NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 1
Carrier File No. AMWB-88-4-12B
Organization File No. S-P-392

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to perform road crossing repair and maintenance work (remove and repave highway crossings) at various locations near Albany, Oregon on November 2, 3, 4, 9, 10, 12, 20, 25 and December 4, 7 and 8, 1987 (System File S-P-392/AMWB 88-4-12B).

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work as required in the Note to Rule 55.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above,

. . . Section Foreman F. K. Gibson be allowed 88.3 hours pay at his straight time rate and 1.3 hours at his time and one half rate of pay. Truck drivers T. L. Napier and J. W. Watts each be allowed 88.3 hours at their straight time rate and 1.3 hours at their respective time and one half rate of pay. Claimants Sectionmen E.E. Holmes, W.M. Clayton and M.G. Koker each be allowed 88.3 hours at straight time and 1.3 hours at time and one half rate of pay.

F I N D I N G S

This dispute concerns work performed by an outside contractor in November-December 1987. The work consisted of removal and application of asphalt paving on highway crossings near Albany, Oregon. The Organization contends that members of the Albany Section Gang could have and should have performed this work. The Organization also states that the Carrier failed to give a 15-day notice to the General Chairman, as required by the Note to Rule 55, which reads as follows:

> NOTE to Rule 55: The following is agreed to with respect to the contracting of construction, maintenance or repair work, or dismantling work customarily performed by employees in the Maintenance of Way and Structures Department.
>
> Employes included within the scope of this Agreement - in the Maintenance of Way and Structures Department, including employes in former GN and SP&S Roadway Equipment Repair Shops and welding employes-perform work in connection with the construction and maintenance of repairs of and in connection with the dismantling of tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service, and work performed by employes of named Repair Shops.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractors' force. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed

through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an undestanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employes included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible.

A principal theme of the parties' submissions to the Board concerned the 15-day notice. The Organization argues that the admitted failure of the Carrier to provide the 15-day notice, standing alone, is sufficient to warrant a sustaining award. The Carrier takes the position that no such notice is required since, according to the Carrier, the work is not

"customarily performed" by Maintenance of Way employees. The Carrier takes the argument one step further by contending that "customarily performed" may be read to mean the work is "exclusively" performed by the employees in a particular class or craft.

It is this point of sharp disagreement which must be initially addressed. In the particular circumstances here involved, the Board takes guidance from Awards which distinguish "customarily performed" from "exclusively". Citation of only a few of these will suffice.

Third Division Award No. 26174 (Gold) states:

> Whatever the merits of Carrier's position on its right to subcontract the work in question, its case falters at the outset because of its failure to provide proper notice to the General Chairman of not less than fifteen days prior to its taking action, as required by Rule 52(a). That Rule stipulates that such Notice is required where the work in question is "customarily performed by employes covered under this Agreement." While there may be a valid disagreement as to whether the work at issue was exclusively reserved to those employes, there can be no dispute that it was customarily performed by Claimants.

Third Division Award No. 26212 (Cloney) under a rule closely similar to Note to Rule 55, states:

> We agree with Carrier that the Organization did not establish historic exclusivity in the handling of this Claim. However, without regard

to the issue of whether it would otherwise be necessary to do so, we have repeatedly held such proof is not necessary when the question is one of Notice under the Agreement and the work is within the Scope of the Agreement.

Third Division Award No. 27012 (Marx) states as follows:

> The Board finds that the Carrier's insistence on an exclusivity test is not well founded. Such may be the critical point in other disputes, such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obliged to make notification where work to be contracted out is "within the scope" of the Organization's Agreement. There is no serious contention that brush cutting work is not properly performed by Maintenance of Way employes, even if not at all locations or to the exclusion of other employees. As emphasized by the Organization, the Carrier failed to make any notification to <u>any</u> Organization.

In this instance, the Organization does not claim exclusivity as to the work of repairing road surfaces at crossings. It does, however, provide some evidence, through a variety of employee statements, that such work has been performed widely by Maintenance of Way employees. Rules 5 and 55 refer to "roadway" work and to Carrier equipment used in such work. Thus, roadway crossing work is clearly found to be "within the scope" of the Agreement. As stated by the Organization in its submission, "the exclusivity doctrine is not in harmony with the Note to Rule 55 and . . . it does nothing but violence to the Agreement".

On the other hand, the Carrier points to Awards which, in effect, read "customarily performed" as meaning "exclusive" performance. Citing numerous previous Awards, Public Law Board No. 2206, Award No. 8 (Eischen) involving the same parties as here, held as follows:

> An additional element distinguishes the present case from Award 21844, however, and that is the Organization's additional and alternative theory that Carrier violated the Note to Rule 55 by contracting this car cleaning work. The critical question presented in that connection is whether the Organization can prevail under the Note by showing a point practice rather than the system-wide exclusivity required under the general Scope Rule. Stated differently, does the concept of system-wide exclusivity also apply to the rights protected under the Note to Rule 55 or may a practice at a particular point establish an exclusive right to work under that Note? There is a split of authority on this issue and each of the parties has cited awards favoring its view. . . . The Scope Rule of the parties' Agreement, like that of the NP, is a general Scope Rule. In such circumstances the Organization, to prevail under the Note to Rule 55, must show reservation of the disputed work to Maintenance of Way Employees by exclusive system-wide.

However, other Awards cited by the Carrier are not directly applicable here. One example is Third Division Award No. 19224 (Hayes), which states:

> Carrier contends, that in applying a general Scope Rule to an Organization's claim to exclusive right to certain work, the Organization has the burden of proving that the work involved has been performed, historically and customarily system-wide, by employes covered by the Agreement. In this connection Carrier points out that janitor work on its

> entire system is performed by both Clerks and Maintenance of Way employes and is not assigned to only one craft.
>
> Upon examination we find that most awards on the question do hold in effect that, to demonstrate exclusive rights to particular work on the basis of past practices, the Organization must prove the existence of a practice of exclusive assignment of such work to employes under the agreement, system-wide, and not simply at an isolated situs.
>
> Since in this particular case janitor's work is done throughout the system by more than one craft and in view of the fact that the Board finds the contentions upon which the Organization relies to be without merit, all parts of the claim are denied.

What must be noted here is that the dispute concerned which class or craft of employees should do the work, rather than whether such work could properly be performed by outside forces.

The Carrier contends that the type of grade crossing work involved here has been frequently given to outside contractors in the past. While it did not provide a compendium of such instances, the Carrier claims that it could have done so. What is not known, however, is whether the Organization was given a 15-day notice, and/or whether or not the Organization was aware of the instances. In any event, this does not prohibit the Organization from raising the issue in this instance.

This is in line with the often quoted Letter of December 11, 1981, which reads in pertinent part as follows:

> The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.
>
> The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith disucssions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons therefor.

The Board concludes, therefore, that the Carrier should have provided the 15-day notice to the General Chairman. Whether such notice with ensuing conference would have led to an arrangement for the participation of Carrier forces is speculative, but this does not require resolution here.

Based on the failure to advise the General Chairman of the forthcoming work, the Board determines that the claim must be sustained. In such event, the Carrier argues that no monetary remedy is appropriate because the Claimants were fully employed at the time. The Board does not agree and here follows the reasoning in Third Division Award No. 19924 (Lieberman), which states as follows:

Carrier argues that Claimant has suffered no monetary loss and no rule of the Agreement requires or provides for a penalty payment. We have examined with care the cases cited by both parties on the subject of punitive damages and recognize the divergent philosophies expressed in those Awards. In the case before us Carrier has offered no proof that the work in question could not have been performed on overtime (in fact the work was performed partially on one of Claimant's rest days) or that it could not have been performed during regularly scheduled hours of work. We agree with those cases which hold that Claimant lost his rightful opportunity to perform the work and is entitled to a monetary claim. See Awards 12671, 17059, 18365, 16430, 19441, and 19840.

While the claim is sustained, the Carrier remains at liberty to demonstrate to the Organization that the requested number of hours' pay does not entirely conform to the amount of work performed by the outside contractor, and payment should be modified. Failing to do so, the claim is fully sustained.

A W A R D

Claim sustained to the extent provided in the Findings. The Carrier is directed to put this Award into effect within thirty (30) days of the date of this Award.

Herbert L. Marx Jr.

HERBERT L. MARX, JR., Chairman and Neutral Member

Wendell A. Bell, concurrence attached.

WENDELL A. BELL, Carrier Member

Mark J. Schappaugh

MARK J. SCHAPPAUGH, Employee Member

NEW YORK, NY

DATED: 10/23/90

CONCURRENCE TO AWARD 1 OF PUBLIC LAW BOARD 4768

Looking at this Award, it becomes obvious that we did not sufficiently explain the distinctive origin of the subcontracting provision in the BN agreement and did not sufficiently show how those distinctive origins had led to a unique body of interpretative Awards.

We are, of course, aware of the language of Article IV of the May 17, 1968 National Agreement and its notice requirement. We are also aware that it has been subject to varying interpretations: some arbitrators have held that notice is commonly required even if the organization is unable to show that they have exclusively performed the work in question, while others have looked for a compelling showing of work reservation before requiring that a notice be issued.

The unique aspect of this case is that our subcontracting provision, the Note to Rule 55, is neither a copy of, nor derived from Article IV of the May 17, 1968 National Agreement, like so many other subcontracting provisions on so many other railroads. Instead, it is exactly the same as a Letter Agreement, dated January 31, 1952, between the BMWE General Chairman and the Northern Pacific's Vice President, Labor Relations. When the 1968 National Agreement was reached, it was the Organization, not the Carrier, which opted to preserve what it had, and which refused to adopt, on the NP, the National Agreement Article. Then, in 1970, after BN was formed by the merger of four railroads, and when BMWE and BN negotiated a single, consolidated Agreement, it was, again, the BMWE which insisted upon the continuation of the NP Letter Agreement, rather than adoption of the National Agreement article. Yet again, when the Agreement was updated in 1982, there was an agreed-upon continuation of this separate and distinct subcontracting rule.

Not only is the language of the BN-BMWE Note somewhat different than the National Agreement Article's terms, but it has had quite a different interpretative history. Since 1964, when Third Division 12952 was issued, it has been interpreted to find a subcontracting violation **only** when the work was that "which the Organization could claim by operation of the Rules and history and tradition." There has been an unbroken string of Awards, including 3-16640 on the former NP, the various Awards of Public Law Board 2206 (Eischen) on BN, as well as those from Public Law Board 3460 and 4431, all standing for the proposition that, on this Carrier, and under this language in this distinctive subcontracting provision, "...the Organization, to prevail under the Note to Rule 55, must show reservation of the disputed work to Maintenance of Way Employees by exclusive system-wide practice (PL 2206, A8)."

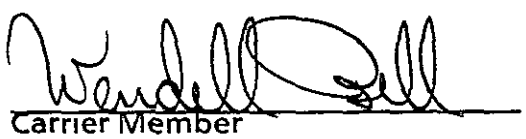
We realize that it is not an enviable interpretative task to attempt to square this distinctive Note (and its distinctive interpretative history) with the generic language of the Letter of December 11, 1981--language which was written to comport with and amplify upon the 1968 National Agreement Article. That is a subject which we will have to address in greater detail in future submissions, because this Award does not appear to reach or resolve it.

It seems to be recognized, in this Award, that this work had not been exclusively reserved to BMWE-represented employees. In that situation, in the past, we had not issued notices, since the work was, therefore, not that which the Organization forces

had "customarily performed," as the Awards had interpreted that language. In good faith belief that the standards for interpretation of this distinctive Note were well-established, and acting in reliance on those prior Awards, no notice was given of the carrier's intent to contract the work involved here. Nevertheless, punitive damages were imposed by this Award, even though that was not a necessary action in this circumstance. Compare 3-21646 (Ables), 3-22194 (Wallace) and 3-28311 (Marx).

We understand what this Award says about initiation of the notification procedures. Even so, we have to put this Award in context, as just the latest in the series of awards on this subject and not as, alone, dispositive. Because it did not treat the unique aspects presented by the Note's unique language, negotiation history and interpretations, this Award has, it would seem, created an apparent conflict of interpretations without advancing any compelling reason for having done so. This apparent conflict, if subsequently perpetuated, could lead to uncertainty as to just how much vitality all of the earlier NP and BN Awards still have, as to whether the distinctive aspects of this Note will still be recognized, as to whether we will now be treated just like the UP in Award 26174, the SP in Award 26212, and Conrail in Award 27012--all carriers, unlike BN, where, it seems, the BMWE had chosen to adopt the 1968 National Agreement's Article.

We are concurring in this Award because we recognize that the record was, at best, weak with regard to the history of the performance of the work and because we apparently weren't sufficiently clear or emphatic about the contractual and interpretative background. Thus, an Award, favorable to the claimants, could have been justified. We do not, however, believe that this record provides anything resembling adequate support for any wholesale reversal of all of the earlier NP and BN Awards or a complete abandonment of the standards for requiring issuance of notices under this particular Note--and we do not believe that this Award was intended to, or did, reach any such extreme result.



Carrier Member

EMPLOYE MEMBER'S RESPONSE TO CARRIER MEMBER'S CONCURRENCE TO AWARD 1 OF PUBLIC LAW BOARD NO. 4768

At the outset of its "Concurrence", the Carrier Member contends that:

> "Looking at this Award, it becomes obvious that we did not sufficiently explain the distinctive origin of the subcontracting provision in the BN agreement and did not sufficiently show how those distinctive origins had led to a unique body of interpretative Awards."

Contrary to what the Carrier Member would have the reader believe, the Carrier Member articulately presented the Board with extensive written and oral arguments relative to the Carrier's position on the Note to Rule 55. In fact, the balance of the "Concurrence" is nothing more than a restatement of the Carrier's position as it was initially set forth at Pages 7 through 18 of its submission. The inexorable conclusion is not that the Board failed to understand the Carrier's artfully articulated position, but that the Board rejected the Carrier's position because it is in error.

Here, as in its submission and oral presentation, the Carrier attempts to portray the Note to Rule 55 and related awards as being "distinctive" and "unique" as compared to Article IV of the May 17, 1968 National Agreement and the vast body of awards concerning said rule. The Carrier Member's error is apparent on multiple fronts.

First, there is nothing unique about the advance notice and meeting requirements of the BN contracting rule (Note to Rule 55). As a comparison will demonstrate, the advance notice and meeting requirements of the Note are virtually identical to Article IV. The Note to Rule 55, in pertinent part, reads:

"*** In the event that the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith."

Article IV, in pertinent part, reads:

"In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss the matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said

contracting, and the organization may file and progress claims in connection therewith."

The Note to Rule 55 and Article IV are nearly word for word the same. Both rules mandate that the Carrier provide fifteen (15) days' advance written notice of its plans to contract out scope covered work. Moreover, both rules mandate that if the General Chairman requests a meeting, the parties will promptly meet and make a good-faith attempt to reach an understanding concerning said contracting, but that if no understanding is reached, the Carrier may nevertheless proceed with said contracting and the Organization may file and progress claims in connection therewith. Obviously, there is nothing unique about the advance notice and meeting requirements of the Note to Rule 55.

The second error in the Carrier Member's "Concurrence" is its attempt to portray Third Division Award 16440 and various awards of Public Law Boards 2206, 3460 and 4431 as a "unique body of interpretive Awards". While these awards may be called "unique", they are also anomalies or aberrations that deviate without reason or explanation from the vast body of awards on the advance notice and good-faith discussion issue. From the very first award interpreting Article IV until the present, the National Railroad Adjustment Board and other tribunals have universally held that proof of exclusivity is not necessary when the question is one of notice under Article IV or similar rules such as the Note to Rule 55. Typical of the literally hundreds of awards which have held to

such an effect are Third Division Awards 18687 (DRG&W), 18792 (CMP), 18999 (SPW), 19578 (N&W), 19631 (ICRR), 19899 (SLF), 23203 (DRG&W), 23354 (MKS), 23578 (UP), 24137 (DRG&W), 24173 (CMP), 24236 (SLF), 24280 (CMP), 26016 (PPU), 26174 (UP), 26212 (SP), 27012 (CRC), 27185 (CRC), 28044 (N&W) and Award 5 of Public Law Board No. 4306 (BAR).

The third problem with the Carrier Member's "Concurrence" is that the basic reasoning underlying its premise is unsound. In essence, that Carrier's position when reduced to its simplest form is that it must furnish the General Chairman with advance notice only when it intends to contract out work which is exclusively reserved to the Organization. The Catch "22" in the Carrier's position is obvious. If specific work was reserved exclusively to the Organization, that work could never be contracted out. Hence, under the Carrier's interpretation, it would be required to serve notice only when it intended to contract out work which it was absolutely prohibited from contracting out. No reasonable mind could possibly conclude that such was the intent of the parties when they crafted the Note to Rule 55.

The far more reasonable and logical interpretation is that the Carrier must notify the General Chairman in advance when it intends to contract out work customarily performed by BMWE employes. During the requisite good-faith discussions, the parties would then consider whether or not one or more of the exceptions in the Note

to Rule 55 (special skills, special equipment, emergency, etc.) where present. If the exceptions existed, the Carrier could contract out the work, if they did not, the work would be reserved to the Organization's members in accordance with customary practice. If the work fell into a grey area, agreements could be made so that the work could proceed without claims. That is where "good faith" emerges.

The word exclusive does not appear in the Note to Rule 55 or elsewhere in the Agreement. More importantly, the concept of "exclusivity" is at odds with "customarily" and "good-faith" standards that the parties specifically included in the Note to Rule 55 and the amendments thereto articulated in the December 11, 1981 Letter of Agreement (Appendix Y). That is precisely why this Board recognized that, "*** 'the exclusivity doctrine is not in harmony with the Note to Rule 55 and . . . it does nothing but violence to the Agreement'." The awards to the contrary which the Carrier cites are simply not based on sound reasoning. It is axiomatic that awards cited as precedent are no better than the reasoning contained therein.

The fourth problem with the Carrier Member's "Concurrence" is its reference to the "unbroken string of awards" that allegedly support the Carrier's position. Apparently, the Carrier has overlooked Third Division Award 20633 on this property which

clearly rejected the exclusivity standard in a contracting out of work case.

Finally, the Carrier Member insists that the BN should not be "*** treated just like the UP in Award 26174...." based on the contention that the Note to Rule 55 is different than the UP advance notice rule. A review of the UP contracting rule [Rule 52(a)] establishes that it is virtually identical to the Note to Rule 55. Since the language is the same, there is no reason to distinguish the BN and UP with respect to the notice requirement.

In addition to the notice issue which we have addressed above, the Carrier Member also addressed the damages issue and concludes that "punitive damages" were imposed. Apparently, the Carrier Member has not carefully read Award 19924 (quoted at Page 9) upon which the monetary award is based. Said award appears to be based on a lost work opportunity theory and is not punitive in nature. In any event, had the award been punitive, there is ample precedent for monetary awards to enforce the terms of the Agreement. See Third Division Awards 15869 and 23928.

As the Majority indicates, this Board carefully considered the parties' arguments and plainly found the Carrier's position to be in error. What this award does is finally put to rest the debate over what the language of the Note to Rule 55 means. It clearly and correctly recognizes that the term "customary" does not mean

"exclusive". If the parties had intended to use the word "exclusive", they would have put that language into the rule. They did not. Therefore, this award is correct in its interpretation of the Note to Rule 55 and should be considered as controlling precedent.

Mark J Schappaugh
Mark Schappaugh
Employe Member

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