

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 17

Carrier File No. 1MWB 89-05-02B

Organization File No. S-P-411

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces (Hal's Construction) to perform road crossing repair and maintenance work (remove and repave highway crossing) at the Chemawa Street crossing at Salem, Oregon on December 2, 5 and 6, 1988 (System File S-P-41/1MWB 89-05-02B).

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 and the December 11, 1981 Letter of Agreement (Appendix Y).

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Section Foreman F. K. Gibson, Truck Driver T. L. Napier, Group 2 Machine Operator R. R. Kass and Sectionmen M.P. Fordney, M. M. Clayton, M. G. Koker and J. Watts shall each be allowed 13.4 hours' pay at their respective straight time rate.

F I N D I N G S

This dispute concerns the Carrier's assignment to outside

forces of the replacement of asphalt over a road crossing at Chemawa Street in Salem, Oregon. It is the Organization's position that the Carrier improperly failed to give advance notice of the action under the requirements of the Note to Rule 55 and further that the work itself should have been assigned to Carrier forces.

This matter must be considered in the light of Award No. 1, which involved removal and application of asphalt paving on highway crossings near Albany, Oregon. That Award concerned, to substantial degree, the Carrier's argument that the Organization is required to show its "exclusive" performance of such work. In finding that such a showing was not necessary, the Board therein ruled that an advance conference was appropriate.

While the work is somewhat similar, the dispute here takes a different turn. Here, the Carrier describes the work as follows:

The actual cutting of the asphalt was performed by a local contractor. Carrier forces removed the bad sections of asphalt and performed other preparatory work with the ties and rail as necessary. On December 2, 5 and 6, 1988, the same as on hundreds of other occasions in the past, a contractor overlaid the crossing with hot-mix asphalt, and flag protection for the contractor was provided by a Maintenance of Way employee.

The Carrier makes particular reference to the application of "hot-mix asphalt paving compound" performed by outside forces with specialized equipment. In the claim handling procedure

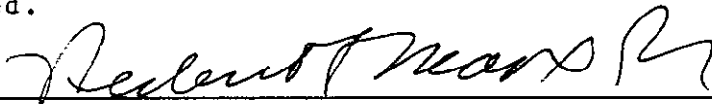
on the property, the Carrier presented evidence of 250 instances in which the Carrier had contracted out various types of asphalt work. This was not effectively contradicted.

The conclusion must be reached that the Organization cannot claim that this particular type of work is "customarily performed" by Carrier forces, a basic prerequisite to the implementation of the Note to Rule 55.

This finding is limited to the facts as present in this claim. It does not suggest, of course, that there is no cross-ing repair work and/or use of asphalt which is "customarily performed" by Carrier forces. The Organization has recounted examples where such is the case, unlike the particular situation here under review. Where such is the case, the Carrier proceeds at its peril when no advance notice is given to the Organization.

A W A R D

Claim denied.



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



MARK J. SCHAPPAUGH, Employee Member



WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: 4/2/91