

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 25

Carrier File No. 4WWB 89-02-17

Organization File No. T-M-640

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces (Century Fence Company) to construct four strand barb wire right of way fence on each side of the right of way from Mile post 12.3 to Mile Post 19.3 near Boyleston, Wisconsin on the Wisconsin 1st Subdivision beginning on September 28, 1988 and continuing.

2. As a consequence of the aforestated violation, Messrs. D. J. Phaller, J. A. Sigfrids, D. C. Anderson, B. V. Paulson, E. E. Rolson, R. E. Lorimor, M. J. Amecki, D. R. Grubba, D. H. Ostman, R. E. McConnell, Jr., S. M. Nelson, M. S. Johnson, J. L. Thompson, J. D. Schrader, M. A. Lees, E. R. Schrader, J. L. Parker, K.M. Kvale, R. A. Jarvi, R. R. Watten and P. A. Hellerud shall each be allowed an equal and proportionate share of the total amount of hours worked by the contractor's forces, payable at their current applicable straight-time and time and one-half rate of pay, beginning on September 28, 1988 and continuing until the contractor is removed from the property.

FINDINGS

This dispute concerns a single portion of the work involved in a project to relocate and change a line of trackage near Boyleston,

Wisconsin. The contracting of a major portion of this work was reviewed in Award No. 14, which is incorporated herein by reference. In Award No. 14, the Board reviewed the applicability of the Note to Rule 55 and supported the Carrier in its position that the overall project could properly be undertaken by outside forces.

In this claim, the Organization concerns itself solely with one portion of the work -- that of construction of 14 miles or right-of-way fence in connection with the overall project.

Award No. 14, and other Awards of this Board, discuss the Note to Rule 55 in general and specifically the argument concerning "customary" or "exclusive" performance of specified work, and such need not be repeated here. The dispute may be best addressed by accepting the Carrier's four questions as the "Issues To Be Resolved", which are stated as follows:

1. Is the claim barred from further handling because of untimely filing?
2. Is the Carrier required to "piecemeal" a project in order to ensure Maintenance of Way involvement?
3. Is the work of construction of right-of-way fence within the Scope of the Agreement?
4. Damages

The Carrier notes that the claim was initiated on November 15, 1988 and referred to initiation of fence work "[b]eginning on August 29, 1988". The Carrier thus finds the claim untimely as to the 60-day limit of Rule 42. In later stages of the claim handling procedure, the Organization contends that the date was in error and

reference should have been made to September 28, 1988. Since there is no question as to the nature and timing of the fence work itself, the Board finds no material substance to the Carrier's position.

Other Awards, and specifically Award No. 14, conclude that a carrier need not "piecemeal" a contracted project where such would be impractical and/or inefficient. Here, however, the project was divided between outside forces and Carrier forces, as indicated in Award No. 14. Thus, the question here is not whether division of the work is required but simply whether one more aspect of the work (fencing) should have been assigned to Carrier forces.

The Organization demonstrated on the property that the work of fencing is performed by Maintenance of Way forces, not "exclusively" but certainly with sufficient frequency to be considered "customary".

Not covered in the Carrier's four questions is the concern of the timing of the work, which the Carrier contends was required to be completed by November 1, 1988 prior to adverse weather conditions. The Board is persuaded that the fencing work could have been accomplished by Carrier forces if such had been determined in advance. As justification for this conclusion, the Board notes, as pointed out by the Organization, that the fencing work was not in fact completed by November 1 and that it had been assigned by the major contractor to a subcontractor as a separate part of the work.

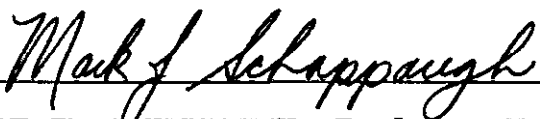
As to damages, the Board does not accept as a defense that Maintenance of Way employees were otherwise assigned during the period in question. However, the claim for a portion of the time at premium rate is excessive, since it cannot be assumed that the work, if assigned to Carrier forces, would have been performed during overtime hours.

A W A R D

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



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: FEB 29, 1992