NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 46
Carrier File No. GMWA 88-1-13B
Organization File No. C-88-C100-3

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to perform work removing the old roof and installing a new roof on the Old Blacksmith Shop at West Burlington, Iowa beginning on October 19, 1987.

2. As a consequence of the violation referred to in Part (1) above, the eleven (11) senior furloughed Chicago District B&B employes and the senior furloughed Group 1 Machine Operator or the senior promotable machine operator from a lower machine operator class on the Chicago District shall each be allowed pay, at the appropriate rate, for an equal proportionate share of the total straight time hours and overtime man-hours expended by the outside forces performing the above-described work beginning on October 19, 1987.

F I N D I N G S

The Carrier assigned an outside contractor, beginning October 19, 1987, to perform work repairing the roof of the Old Blacksmith Shop at West Burlington, Iowa. Notice of such work had been provided in timely fashion, and conference with the General Chairman ensued, at which the General Chairman opposed the

assignment of the work to outside forces. Some attempts were made to arrange for the work to be performed by Carrier forces, but these were unsuccessful.

The Carrier initially defends its right to have the work performed by a contractor based on previous arbitral findings. Third Division Award No. 14294 (1966) involved a dispute concerning the roofing of the same building under the predecessor railroad (CB&Q). Citing previous cases, that Award stated:

> The foregoing awards have established a definite pattern and precedent on this property. We can find no substantial difference between these previous claims and the claim at bar. Therefore, we hold that the Agreement was not violated.

Likewise, Third Division Award No. 16752 (1968), stated in reference to another instance of roofing involving the same parties as follows:

> The practice of contracting out such work as here in dispute is unchallenged. . . . In prior decisions this Board has held that the long history of contracting out work was a recognition by the parties that such work is outside the Scope of the Agreement and, hence, as in this case, the Agreement was not violated.

The Organization nevertheless argues that the requirements of the Note to Rule 55 place obligations on the Carrier beyond those considered in the above-cited Awards from 1966-68. The Board finds that the Carrier met the commitment to advise the General Chairman in advance. Efforts were made to have Carrier employees available for the work, although the Organization contends that other arrangements could have been undertaken. The Note to Rule 55, however, refers to "work customarily performed" by Carrier

employees. While there is clear evidence that Carrier forces have performed identical or similar work on occasion, there is no basis for the Board to disregard the conclusions reached in the previous Awards, cited above, as to the long-standing practice to contract such specific work.

A W A R D

Claim denied.

Robert L. Marx

HERBERT L. MARX, Jr, Chairman and Neutral Member

Mark J. Schappaugh - dissenting - written dissent to follow

MARK J. SCHAPPAUGH, Employee Member

D. J. Merrell

D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: April 29, 1994

EMPLOYE MEMBER DISSENT TO AWARD 46
PUBLIC LAW BOARD No. 4768
(Referee H. L. Marx, Jr.)

This claim involved the contracting out of roof repair work (installation of a rubber membrane roof) on the Old Blacksmith Shop at West Burlington, Iowa. The Board's reasoning for denying this claim is plainly wrong and requires dissent.

In denying the claim the Board referred to two (2) prior decisions of the Third Division (Awards 14294 and 16752), both which predated Appendix Y (the December 11, 1981 Letter of Agreement), and held:

> "The Organization nevertheless argues that the requirements of the Note to Rule 55 place obligations on the Carrier beyond those considered in the above-cited Awards from 1966-68. The Board finds that the Carrier met the commitment to advise the General Chairman in advance. Efforts were made to have Carrier employees available for the work, although the Organization contends that other arrangements could have been undertaken. The Note to Rule 55, however, refers to 'work customarily performed' by Carrier employees. While there is clear evidence that Carrier forces have performed identical or similar work on occasion, there is no basis for the Board to disregard the conclusions reached in the previous Awards, cited above, as to the long-standing practice to contract such specific work."

The Board's decision to deny this claim on the basis of the two (2) earlier Third Division awards is faulty because the circumstances surrounding the contracting out of work involved here differed substantially from the circumstances involved in the earlier awards. While the earlier Third Division decisions cited the Carrier's past usage of outside forces as the basis upon which to deny the claims, in this instance the Organization established that the past usage of outside forces to perform roofing work was not, in and of itself, a valid basis upon which to contract out work under the terms of the Note to Rule 55 or the December 11, 1981 Letter of Agreement (Appendix Y).

Regarding the Note to Rule 55, the Carrier complied with its obligation to provide the General Chairman with advance written notice of its plans to contract out the roof repair work. In its notice and during the contracting conference the Carrier asserted that the contracting was necessary (1) because of a lack of expertise and equipment, (2) an alleged warranty, (3) an urgency purportedly created by the leaking roof and (4) the purported lack of manpower for the job. Each alleged reason was discredited by the Organization during the handling on the property and the Board did not deny the claim based on any of the reasons cited by the Carrier. Instead, the Board denied the claim because of its determination that there was "no basis for the Board to disregard

the conclusions reached in the previous awards, cited above, as to the long-standing practice to contract such specific work." There are several problems with such a finding. First, it places improper emphasis on past practice as justification for contracting out work under this Agreement. The Note to Rule 55 sets forth the specific circumstances under which the Carrier may contract out scope covered work, i.e., when special skills, special equipment or special materials are required, or when the Carrier is not adequately equipped to handle the work or in an emergency. The Note does not specify "past practice" as a valid basis upon which to justify the contracting out of work. Furthermore, it must be noted that the Note to Rule 55 does not contain any "prior rights" language similar to that found in Article IV of the May 17, 1968 National Agreement. Article IV stipulates that:

> "Nothing in this Article IV shall affect the existing rights of either party in connection with contracting out. Its purpose is to require the carrier to give advance notice and, if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

Some arbitral awards have interpreted the above language to mean that a carrier can contract out work merely if it can show that it has done so in the past, regardless of whether the Carrier has shown justification to do so in a particular instance. The Organization vigorously disputes the validity of such an interpretation. Nonetheless, we submit that such an interpretation, if it had any validity in the first place, has no validity now in light of the language contained in the December 11, 1981 Letter of Agreement (Appendix Y). In the December 11, 1981 Letter of Agreement the carriers promised to exercise good-faith in contracting and to increase the usage of its employees to perform work which may have been contracted before. In this connection, it should be noted that the December 11, 1981 Letter of Agreement was the result of intense discussions at the National level relative to the carriers inordinate use of outside forces to perform Maintenance of Way work. The result of those discussions was the December 11, 1981 Letter of Agreement. Paragraph seven thereof reads:

> "The carriers assure you that they will assert good-faith efforts to <u>reduce</u> the incidence of subcontracting and <u>increase</u> the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." (emphasis added)

The above-quoted paragraph placed on the Carrier the burden of exercising managerial foresight for the purpose of reducing the incidence of subcontracting and increasing the use of its Maintenance of Way forces before resorting to the use of outside forces. To this end, the Carrier was charged with the responsibility of asserting a GOOD-FAITH effort to reduce subcontracting and utilize its forces to the extend practicable. Obviously an arbitral finding that this Carrier may contract out work solely on the basis of a past practice is diametrically opposed to the parties negotiated agreement of December 11, 1981. With respect to the December 11, 1981 Letter of Agreement Third Division Award 29121 held:

> "It has been discussed in scores of our Awards involving this and other carriers. It is not 'simply a dead letter' which can be ignored. The letter, inter alia, stressed good faith efforts to reduce the incidence of subcontracting and increase the use of maintenance of way forces. While it is correct that it was a quid pro quo (the situation in most if not all labor - management accords) being a quid pro quo does not dilute its viability and in the circumstances present here Carrier is not entitled to enjoy the fruits of the bargain without adhering to the assurances of its Chief Negotiator, as memorialized within a formal document attached to and made a part of the 1981 National Agreement."

Clearly, the Board's determination in this instance that the Carrier was free to assign the roofing work to outsiders based on past practice alone was faulty. The record was filled with evidence (32 written statements from longtime employes) establishing that MW forces have historically performed roof repair work, including the installation of rubber membrane roofing material. Moreover, each of the Carrier's alleged reasons for contracting out the work was shown to be without merit. This Board's determination totally disregards the language of the December 11, 1981 Letter of Agreement regarding the Carrier's promises to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces. Such a finding requires our vigorous dissent.

Respectfully submitted,

Mark J. Schappaugh
Employe Member - PLB 4768