NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 47
Carrier File No. MWA 89-9-12E
Organization File No. C-89-C100-38

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to unload and distribute ties from gondola cars on Nebraska Subdivision #11 between Dedham, Iowa, Mile Post 399.6 and Council Bluffs, Iowa, Mil Post 483.6 beginning on April 26, 1989 through May 8, 1989.

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 stipulated in the Note to Rule 55 and Appendix Y.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Group 2 Machine Operator S. J. Schlotfeld shall be allowed seventy-two (72) hours' pay at his straight time rate and forty-eight (48) hours' pay at his time and one-half rate.

F I N D I N G S

This dispute concerns the Carrier's use of an outside contractor (Herzog) to unload track ties from gondola cars through the use of the contractor's "cartopping" equipment. It also concerns the Carrier's failure to give advance notice of its plan to do so.

The Carrier contends that the dispute concerning virtually identical circumstances as resolved by Public Law Board No. 3460, Award No. 63 (Lieberman), involving the same parties. That Award stated in pertinent part as follows:

> A careful check of the record of the dispute does not support any proposition that the work of unloading ties from gondola cars has been performed exclusively by employees covered by the Agreement in question. In fact it is evident that for at least five years, since 1977, the removal of ties from gondola cars has had a mixed practice using both outside contractors as well as employer's own track forces. Thus Petitioner has not met its burden of showing either exclusivity or even customary performance of the disputed work by its own members. Further, it is evident that the particular tasks specified in the claims are not spelled out with particularity in the Scope Rule. Although it is true that track forces have customarily and historically unloaded ties by hand from various other types of Carrier's cars, that is not the issue before the Board. By its language, the Note to Rule 55 does not preclude the finding that work must be at least customarily, if not exclusively, performed by employees represented by the Petitioner for the Petitioner to succeed. In this instance, the work was neither exclusively performed or customarily performed by track forces nor was the work specified in the language of the scope rule. The Board is constrained to conclude, in view of the fact that Petitioner has failed to demonstrate that the work in question was reserved to it by agreement, custom or practice, that the claims must be dismissed for lack of proof.

The Organization argues that the PLB 3460 Award is not dispositive of the matter, contending that the Award concerned a

situation prior to the addition of Appendix Y on December 11, 1991. In actuality, the incident reviewed by PLB 3460 was contemporaneous with adoption of Appendix Y. In any event, Appendix Y is concerned with work "customarily performed", and PLB 3460 found this not applicable to the method of unloading ties here under review.

In sum, the Board finds the use of the Herzog "cartopper" equipment is simply a continuation of a long-standing practice, adequately disposed of in the findings of PLB 3460.

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 47
PUBLIC LAW BOARD No. 4768
(Referee H. L. Marx, Jr.)

The Board's finding against the Organization in this dispute requires dissent. This dispute involved the use of outside forces to perform tie unloading work. The outside concern utilized a modified backhoe to accomplish the work of unloading ties from gondola cars. The two most important facts established on the record were (1) that Carrier forces have historically and to this date performed tie unloading work throughout the Carrier's property by either manual or mechanical means and (2) the Carrier failed to give advance written notice of its plans to contract out this type of work. Given those two facts the claim should have resulted in a sustaining award. However, the Board cited the previous erroneous findings of Award 63 of Public Law Board No. 3460 (BN/BMWE)(Lieberman), as a basis upon which to deny the claim.

In denying this claim the Board held:

> "The Organization argues that the PLB 3460 Award is not dispositive of the matter, contending that the Award concerned a situation prior to the addition of Appendix Y on December 11, 1981. In actuality, the incident reviewed by PLB 3460 was contemporaneous with adoption of Appendix Y. In any event, Appendix Y is concerned with work 'customarily performed', and PLB 3460 found this not applicable to the method of unloading ties here under review.
>
> In sum, the Board finds the use of the Herzog 'cartopper' equipment is simply a continuation of a long-standing practice, adequately disposed of in the findings of PLB 3460."

This Board's decision to base its denial of this claim on the findings of Award 63 of Public Law Board No. 3460 serves only to perpetuate the error of an earlier palpably erroneous award. The Organization's dissent to Award 63 of PLB 3460 clearly explained that the Board's decision was faulty since it embraced the "exclusivity" test in a contracting out of work dispute and because it improperly determined that a change in the method of performing tie unloading work served to remove such work from the scope of the Agreement. By reference the Organization's dissent to Award 63 of PLB 3460 is hereby made a part of this dissent.

It is perplexing that this Arbitrator would elect to perpetuate the wrongheadedness of the earlier award. Especially since this decision goes against numerous earlier findings he has reached on this Board and at the Third Division NRAB which have rejected the exclusivity test in contracting out of work claims. Moreover, the Board's reference to the Carrier's usage of the outside contractor as "a continuation of a long-standing practice" is faulty since such a determination (which we by no means concede)

suffers from the same deficiencies noted in our dissent to Award 46 of this Board. By reference the Organization's dissent to Award 46 of PLB 4768 is hereby made a part of this dissent.

The bottom line is that the prior award was plainly and simply wrong. For this Board to follow the incorrect reasoning of that award only serves to compound the error. The Organization recognizes and agrees with the principle that prior decisions should be followed when the facts and circumstances warrant. However, it must be made sure that the precedent upon which a decision is based is reasonable and sound. No such finding can be made here with respect to Award 63 of PLB 3460. Hence, reliance on that award was improper. Neither Award 63 of PLB 3460 or this Award have solid, sound basis. Therefore, I respectfully dissent.

Mark J. Schappaugh
Employe Member - PLB 4768