

PUBLIC LAW BOARD NO. 6538

**Carrier File No. MWA93-12-17W
Organization File No. C-93-C100-87**

BROTHERHOOD OF MAINTENANCE)	
OF WAY EMPLOYES)	
And)	AWARD NO. 4
)	CASE NO. 4
BURLINGTON NORTHERN)	
SANTA FE RAILWAY)	

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Osmose Incorporated) to perform ordinary concrete repair work on Bridge 443.06 at Red Oak, Iowa beginning August 5 through 24, 1993.**
- (2) As a consequence of the aforesaid violation, District 4 B & B Subdepartment employes M. C. Scott, E. L. Wolfe, J. L. Coy, C. O. Hudson and D. R. Courtney shall each be allowed compensation at their appropriate rates of pay for an equal proportionate share of the total number of man-hours expended by the outside forces performing the above-mentioned work beginning August 5 through 24, 1993."**

FINDINGS:

Public Law Board No. 6538, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employes within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.

On April 15, 1993, and again on July 9, 1993, Carrier provided notice to the Organization advising of its intent to repair several bridges utilizing an epoxy injection repair technique. A conference was held on the matter, during which the parties were unable to agree to the contracting of the work. Thereafter, the Carrier proceeded to contract with Osmose Incorporated to perform the work at issue.

The claim in this case involves the repair of one of the bridges identified in the Carrier's notice, Bridge No. 442.06 at Red Oak, Iowa. The Organization contends that much of the work did not involve epoxy injection but instead was

ordinary bridge maintenance. The Organization argues that such work has customarily and historically been performed by the Carrier's B & B forces and is contractually reserved to the Claimants in accordance with the Scope Rule, seniority provisions and classification of work rules. In addition, the Organization relies upon the Note to Rule 55, which provides:

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:

Employees included within the scope of this Agreement – in the Maintenance of Way and Structures Department, including employees in the former GN and SP&S Roadway Equipment Repair Shops and welding employees – perform work in connection with the construction and maintenance or 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 employees 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 employees described herein, may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, 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...

The Organization asserts that the evidence submitted during the on-property handling of this case firmly established that ordinary concrete bridge repair work comprised the vast majority of the work performed by the outside contractor's forces. Carrier forces were plainly capable of performing such work, thereby indicating to the Organization that Carrier had no intention of engaging in a good faith effort to reduce contracting and increase the use of BMW forces to the extent practicable, in accordance with the Note to Rule 55 and December 11, 1981 Letter of Agreement, set forth in Appendix Y.

Carrier submits that the repair work involved here is the same as has been done on almost 400 other Carrier bridges over the past twenty years. The contractor performing the bridge repairs uses a specialized technique known as epoxy injection to repair damaged concrete. Carrier argues that while BMW forces certainly perform general bridge repair, they have not performed the type of specialized process at issue in this case. Further, Carrier asserts that the evidence submitted on the property demonstrates that this process cannot be piecemealed in an effective manner as it is integrated with various methods, all of which are used to accomplish the epoxy repairs to the bridge.

Based on the Board's review of the voluminous record, we concur with Carrier's position in this case. There is no dispute that BMW forces perform ordinary concrete repair work. Considerable evidence attests to that fact. On this record, however, we are persuaded that the work performed was in conjunction with the epoxy repairs to the bridge structure and did not constitute ordinary concrete repair as claimed by the Organization. Nor are we persuaded that the evidence supports the theory that work could have been assigned efficiently or effectively on a piecemeal basis between Carrier forces and those of the contractor.

Our findings in this regard are bolstered by three previous awards on this property. In Award No. 10 of Public Law Board 4768, as here, the Carrier had engaged the service of Osmose Company to perform epoxy repair work identical to the repair work performed in the instant case. In denying the claim, the Board stated:

In this instance, it is the Carrier's position that the particular bridge work herein required epoxy structural repair, a technique which has not been employed by Carrier employees as part of their customary duty and which, more significantly, has been performed by the Osmose Company on the Carrier's property since 1976. While the Organization offered evidence that Carrier employees have performed similar work and/or that the work is not as complex as the Carrier would describe it, the fact remains that the Organization has not demonstrated that the type of work involved here has been 'customarily performed' by Carrier employees.

In the second case, the Carrier engaged the same contractor, Osmose Company, to perform the same kind of work that was performed at Red Oak, Iowa. In Award No. 29 of Public Law Board 4768, the Board concluded:

The Carrier established information that for more than ten years the Osmose firm had been employed by the Carrier 'to perform the internal structural cement bridge repair using advanced epoxy methods and technology' and that the process for 'repair [of] internal cracks in concrete structures had never been performed by B & B forces. In the light of these facts, the Board has no basis to determine a violation of Rule 99, which states in its concluding section that 'Nothing herein shall effect the existing rights of either party in connection with contracting out.'

The third case, Award No. 36 of Public Law Board 4402, was presented with essentially the same factual predicate. The Board again denied the claim, stating:

The conclusion reached in PLB 4768 is not palpably erroneous and is equally applicable to the similar dispute in this case.... Indeed, the record satisfactorily establishes that prior to the raising of this dispute and the

dispute resolved by Award 10, the Carrier has contract out this type of work for a number of years on its various divisions without objection.

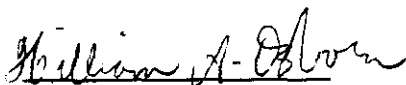
Under the Note to Rule 55, the 'customarily performed' requirement is a threshold showing and, because this is a contract claim, that showing must be made by the Organization.

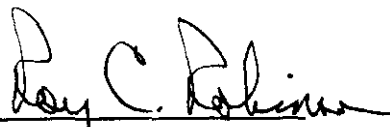
In light of all the foregoing, we conclude that, as in the prior awards on this subject, the Organization has not met its threshold burden of establishing that this was work customarily performed by its forces. On the contrary, Carrier has shown that there were specialized skills required for this project which were not possessed by Carrier employees. The claim must therefore be denied.

AWARD

Claim denied.


ANN S. KENIS, Neutral Member


Carrier Member
William A. Osborn


Organization Member
Roy C. Robinson

Dated April 10, 2003.