

PUBLIC LAW BOARD NO. 2206

AWARD NO. 58

CASE NO. 60

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Burlington Northern, Inc.

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the effective Agreement September 18 and 19, 1978, when permitting Cy's Excavating firm of St. Cloud, Minnesota to load and haul spilled coal from between Mileposts 109 and 110, and dump the coal in Carrier owned Darling pit, a waste pit. (System File T-M-238C)
- (2) Claimants Richard Breitzkreutz, Ronald Frey, A. D. Ficek, B. L. Junes and J. E. Dombrovski be allowed 16 hours straight time and 2 hours time and one-half each at their respective straight time and time and one-half rates of pay because of the violation in part one (1) of claim.

OPINION OF BOARD:

This claim arose when Carrier's subcontract with an outside excavating company to pick up coal spilled during a derailment between Mileposts 109 and 110, and haul it away to nearby Darling Pit. The contractor's forces performed that work on September 18 and 19, 1978, following which the Local Chairman filed a grievance alleging that Claimants were contractually entitled to perform the work under Rules 1, 5, 55 and Note to Rule 55. The claim was appealed to Carrier's highest levels where it was denied by letter of March 19, 1979, as follows:

Referring to your letter dated January 30, 1979, file T-M-238C, appealing claim on behalf of Richard Breitzkreutz and four others for 16 hours each for work performed by Cy's Excavating Company of St. Cloud, Minnesota, picking up spilled coal from derailment on September 18 and 19, 1978.

Note to Rule 55, cited by you, would have no application as you have furnished no evidence or proof that Maintenance of Way employs have performed this work to the exclusion of all other crafts, including contractors. Furthermore, Note to Rule 55 only makes reference to contracting of "construction, maintenance or repair work, or dismantling work" and makes no reference to picking up spilled material from derailments. The burden is on the Organization to prove this work is normally reserved exclusively to claimants.

You have cited nine rules and "by referral" made them a part of your appeal; however, you have furnished no explanation as to their application in the instant claim. Not one of the rules cited makes any reference to the work claimed.

As stated in Superintendent E. L. Phillips' letter dated December 5, 1978, the Minnesota Pollution Control Agency set time limits for the removal of the spilled material. Even if this work had been reserved exclusively to claimants, which it was not, they were not available to perform the work. In fact, Claimant A. D. Ficek actually worked on this project on September 18 and 19 performing flagging.

Claimants were fully employed and you have furnished no explanation to establish that they were capable of performing two jobs at one time. This claim is simply a demand for a penalty payment to claimants who have not suffered any monetary damage as a result of not being assigned this work and are not entitled to any relief under any rule of the agreement.

The Organization urges that the work at issue is brought under the procedures, prohibitions and conditions of the Note to Rule 55, both by the express language of Rules 5 and 55 N, P and Q; as well as by the general reservation language in Rule 1. On the latter point, the record does not demonstrate clear and convincing evidence of exclusive system-wide performance by BMWE track forces of the work of salvaging or recovering and hauling away

spilled demurrage from Carrier's right of way. Accordingly, the Organization has not made out a case for the violation of Rule 1 (A) or (B) of the present Agreement. Nor does the record show violations of Rules 1 (C) or 69 (C) since the former NP Agreement was also of the type known in the industry as a "general" Scope Rule. If the Organization is to prevail, therefore, it must show such work reservation by the express language of Rule 55. Turning to the language cited by the Organization we find Rule 55 (Q) does not specifically describe the work of retrieving salvage, but rather it is at best vague or ambiguous on the point, i.e., "maintaining roadway and track and other work incident thereto". The same vagueness or open-endedness is found in the last sentence of Rule 55 (P) (Truck Driver), reading as follows: "Truck Driver will perform such other work as may be assigned to him when not driving a truck". Given this ambiguity and the lack of probative evidence of reservation of salvage work by custom, practice or tradition, Rules 55 (Q) and the last sentence of Rule 55 (P) cannot support this claim. Rules 55 (N) and (P) also classify the work of Machine Operator and Truck Driver by reference to specifically described equipment. However, even if this could be construed to reserve all such driving or operation to BMW forces, the record before us is devoid of probative evidence regarding what size, style, type or brand of trucks or machines were used.

Due to the lack of contractual support and insufficient evidence to warrant a finding of violations of Rule 1, 5, 55 or the Note to Rule 55, this claim must be denied.

AWARD

Claim denied.

F. H. Frank
Employee Member

William H. H. H. H.
Carrier Member

Dana E. Eischen, Chairman

Date: August 20, 1912