

PUBLIC LAW BOARD NO. 4402

PARTIES)
TO)
DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way material rehabilitation work i.e., wooden tie rehabilitation work, within the Denver Region beginning October 5, 1987 (System File C-88-C100-7/DMWA 88-1-28A).
2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intention to contract out said work as stipulated in the Note to Rule 55.
3. As a consequence of the aforesaid violations, the fifteen (15) senior furloughed Track subdepartment employees holding seniority within the McCook Seniority District shall each be allowed pay at the applicable rate for an equal proportionate share of the total man-hours consumed by the outside forces in performing the afore-described work beginning October 5, 1987 and continuing until the violation ceases. In addition:

“... the claimants have and will suffer a loss of benefits by not being allowed to perform this tie rehabilitating work. Therefore, please make the claimants whole for their lost benefits including but not limited to loss of holiday pay, vacation and insurance coverage.”

OPINION OF BOARD

This dispute raises issues similar to those addressed in Award 28 of this Board. Award 28 dealt with the Carrier's contracting out "in-track" tie treatment. This dispute addresses the Carrier's contracting out "out-of-track" tie rehabilitation.

By letter dated September 11, 1986 the Carrier, through Chief Engineer J. G. Wood, notified the Organization's General Chairman E. L. Torske as follows:

Denver Region plans to contract rehabilitation of wood ties that are recovered as a result of the 1986 concrete tie program. As a matter of information, following is an outline of our plans.

Denver Region's 1986 concrete tie program is as follows

<u>Location</u>	<u>Concrete Ties</u>	<u>Wood Ties</u>
1. Guernsey, WY	108,500	133,600
2. Crawford, NE	20,000	24,600

Installation of concrete ties on the Denver Region began August 18, 1986 near Ft. Laramie, Wyoming.

The total process is as follows:

1. Unload concrete ties using car mover (contractor) augmented by work train to feed new loads and remove empties. (Started July 10, 1986).
2. Install concrete ties by BN Forces.
 - a. Use auto sled with tie extractors to remove wood ties.
 - b. Insert concrete ties.
 - c. Attach fasteners.
 - d. Unload ballast and surface track.
3. Pick up reclaimable ties with spikes, plates and anchors.
4. Transport material to Denver Region reclaim site.
5. Unload by contractor at reclaim site.
6. Rehabilitation to be performed by contractor at Denver region reclaim site:
 - a. Remove spikes from tie.
 - b. Sort spikes, tie plates, ties, anchors.
 - c. Reload spikes, ties plates, and anchors for reuse.
 - d. Grade wood ties.
 1. BN retained ties.
 2. BN rejected ties.
 - e. Apply liquid tie plugger.
 - f. Adz ties and treat adzed with ADZ-Life.
 - g. Apply stainless steel bands to both ends of split ties.
 - h. Bundle, band and load reclaimed ties.

Should there be any questions about the information given above, Mr. Lutzenberger or I will be happy to discuss.

By similar letter dated February 25, 1987 the Carrier, through System Chief Engineer W. E. Glavin, notified four General Chairmen that:

This is to inform you of the Burlington Northern's intent to have

secondhand ties rehabilitated at Spokane and Denver by different independent contractors for the next six years starting at Spokane in late March, 1987.

The Burlington Northern ties scheduled for rehabilitation will be generated as a result of concrete tie projects undertaken during the 1987 - 1992 work seasons. Each rehabilitation location will process the following approximate quantities of wood cross ties and associated materials:

1987	206,000
1988 - 1991	412,000 per annum
1992	206,000

These materials will be shipped into the rehabilitation facilities between March and November annually (the eight month work season).

The contractors will assume responsibility for the complete rehabilitation process including handling of all material at the work site and disposal of all waste material and scrapped ties. The rehabilitation process begins with the removal of all attached metal materials and sorting of the various grades of reusable ties from the scrap ties and those suitable for sale as landscape timbers. It continues with the plugging, adzing, treatment of the adzed areas and end plating of selected ties on a production line basis. In this process the contractor will utilize the following special equipment, not necessarily in the order listed, built into computer controlled integrated assembly line:

- 1) A system that utilizes a weigh scale to aid in sorting and grading.
- 2) Optical scanning equipment to adjust the depth of adzing cut.
- 3) Optical scanning equipment to determine tie plate size.
- 4) Metal detection equipment to aid in orienting the tie for initial removal of the spike.
- 5) Optical readers and scanners to sort various grades of ties after processing.
- 6) Magnetic jig that would lift and feed 22 ties onto the starting conveyor.
- 7) Liquid plugging equipment.
- 8) Adz life tie treatment equipment.

The above described process must be performed by contract for the following reasons:

- 1) The process requires utilization of special handling and processing equipment not owned by the Railroad. No such equipment is available to the Railroad which could perform the work with the efficiency necessary to make it practicable.
- 2) Without the utilization of a highly efficient production facility, the rehabilitation of the wood ties recovered from the concrete tie program would not be practicable, because the handling costs per tie must not exceed the economic value of the remaining life of the secondhand wood ties.
- 3) In the absence of an economically feasible method of reusing these ties, they would create a monumental disposal problem which the Railroad is not equipped to handle. Used railroad ties in large volumes cannot be left on the right-of-way, cannot be burned in the open and cannot be chipped and disposed of because of local, state and federal environmental laws and regulations.
- 4) The rehabilitation process itself involves hazardous material handling requirement and waste disposal problems which the Railroad is not equipped to handle and for which it has no employees trained and licensed to handle. The "adz life" tie treatment material requires a certified handler.

If ties are adzed in the track the disposal of the adzing material (approximately one pound per tie) does not constitute a disposal problem. In a rehabilitation location this pound of shavings constitutes a ton per day and therefore becomes hazardous to dispose, store, and handle. The contractor is assuming this risk and also disposing of scrap ties that would be a liability to Burlington Northern.

On November 5, 1987 the Organization filed the instant claim concerning the performance of the above-described tie treatment by Judd Brother's Company at Denver, Colorado.

The rules governing the analysis of this dispute are detailed in Awards 20 and 21 of this Board. As set forth in those awards, in a dispute concerning the contracting out of work, under the Note to Rule 55 it is not necessary for the Organization to demonstrate that

the employees exclusively performed the work at issue, but the Organization need only demonstrate that the employees "customarily performed" that work. For the sake of discussion, we shall assume that the Organization can make that demonstration in this case. Nevertheless, we must deny the claim.¹

Initially, we find that the Carrier met its notification obligations. The correspondence from the Carrier set forth above clearly meets the requirements under the Note to Rule 55.

We also find that the exceptions set forth in the the Note to Rule 55 apply thereby permitting the Carrier to contract out the disputed work. Putting the nature of the disputed work into perspective, due to the installation of concrete ties for the first time, the work involved has not been previously performed and involves the rehabilitation of ties on a large scale through the use of a sophisticated assembly line process, which process, in turn, requires the use of another procedure utilizing Adz-Life and its attendant requirements for certified operators (of which at the time, the Carrier had none). Thus, and for reasons fully explained in Award 28 of this Board concerning the use of Adz-Life, we must find that the exceptions in the Note to Rule 55 concerning special skills, special equipment, and special material available only when applied and installed through the supplier must govern.²

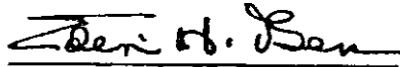
¹ There is a serious question concerning the validity of the Organization's showing that the affected employees "customarily performed" the work in dispute. While the Organization points to standard language found in the scope rule and the rosters in the Track Sub-Department which generally address the kind of work at issue and further while there is reference in the record to the fact that employees have performed some kinds of out-of-track tie rehabilitation (*see e.g.*, the Organization's letter of November 5, 1987 at p. 4), the Carrier has pointed out that this process is quite unique; there has been an extensive history of contracting out similar work; and that employees represented by another organization (TCU) perform related work now claimed by the Organization. However, for the purpose of this discussion, we shall give the Organization the benefit of the doubt and assume that it has made the "customarily performed" showing required by the Note to Rule 55.

² That fact that the contractor allegedly employed day labor to perform some of the duties does not change the result. Similarly, the fact that covered employees use claw bars, tie plugs and an Adz is not dispositive. The *entire* process and not just small parts of the work must be examined and we are satisfied that examination brings the exceptions specified in the Note to Rule 55 into play.

We shall therefore deny this claim.

AWARD

Claim denied.



Edwin H. Benn
Neutral Member



E.J. Kallinen
Carrier Member

Denver, Colorado
April 26, 1991



P. S. Swanson
Organization Member

*Dissenting, written dissent
to follow.*