

PUBLIC LAW BOARD NO. 4402

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

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces to perform ditch cleaning work on the track east of Sheridan, Wyoming, on the Yellowstone Division, on May 19, 20 and 21, 1988 (System File C-88-C100-69/MWA 88-10-18E).
2. The Agreement was violated when the Carrier assigned outside forces to perform ditch cleaning work starting at the tunnels between Guernsey and Casper, Wyoming beginning on May 24, 1988 and continuing (System File C-88-C100-68/MWA 88-10-18F).
3. As a consequence of the violation referred to in Part 1 hereof:
"... the two senior furloughed employees should be allowed a total of 16 hours straight time and 17 hours overtime at the foreman's rate of pay. The next two senior furloughed employees should be paid the same amount of time at the group 3 rate of pay, with the two junior furloughed employees from the top six that were on furlough on May 19, 20, and 21, 1988 to be allowed the same hours of pay at the laborers rate of pay. ***"
4. As a consequence of the violation referred to in Paragraph 2 hereof, Foreman A. J. Stangland and Group 2 Machine Operators T. L. Anderson, R. D. Andrews, J. W. Bates, K. O. Davis and G. L. Witt shall each:
"... be paid at their respective rates of pay for all time lost from May 24, 1988 until this violation no longer exists."

OPINION OF BOARD

This dispute involves the contracting out of certain ditching work.

By letter of December 21, 1987 the Carrier advised various General Chairmen:

As information the Carrier plans to utilize a high production ditching machine across the system starting approximately January 4, 1988 on the Portland Division, Seattle Region. This machine was manufactured by Loram Maintenance of Way, Inc. and is a specialized piece of equipment which is

owned, operated and maintained by Loram. The ditcher will be manned by three Loram personnel, and all flagging, supervision, and other work to support the ditching will be accomplished by BNRR people. BNRR intends to enter into a service contract with Loram for this machine beyond 1988 and into 1991, since multi-year service contracts represent substantial savings in rate structures.

The ditching program is intended to correct drainage problems which currently exist on BNRR right of way. This machine will be passed from Region to Region and utilized at locations as determined by the five individual Regions based on need and requirements.

* * *

By letter of February 12, 1988 the Carrier provided the Organization with a tentative schedule for the ditching work to be performed by Loram.

Conference between the parties did not resolve the Organization's protest over the Carrier's use of the Loram to the satisfaction of the Organization. This claim followed concerning the use of that outside contractor on certain portions of the Yellowstone Division during May 1988.

As found in earlier awards of this Board, the Organization need not demonstrate that the involved employees exclusively performed the disputed work. *See, e.g., Award 20 of this Board.* The threshold question under the Note to Rule 55 is whether the employees "customarily performed" the work at issue. The record demonstrates that ditching work has been customarily performed by the employees.

The question in this case, then, is whether or not this customarily performed work can be contracted out because of "special equipment not owned by the Company" as provided in the Note to Rule 55. The Carrier advised the Organization by letter of August 22, 1988 that:

The machinery required to perform this work is not owned by the Carrier and is not available to the Carrier for operation by Carrier forces. The company providing this service, Loram Maintenance of Way Inc., will not lease this equipment to the carrier without their own operators. They want to operate this very complex high production equipment to maintain standards of performance and protect their investment. At present, there are only two machines of this type in the U. S. that are capable of producing the results that the Loram dumper in question can provide. Rather than just plow away material, the machine actually removes material without fouling the track structure and builds a new ditch. The machine is capable of ditching, profiling, contouring, continuous waste material removal and several other salient features which distinguish it from any other type of equipment that the Carrier currently owns or is available

for rent. The machine establishes a ditch profile with a smooth bottom which provides for the efficient runoff of storm drainage. Much of the work that this machine performs has simply not been done in the past because of the difficulty and expense of using more conventional equipment in these areas. It has the capability of handling air dump cars to deposit material in.

Recently, in PLB 4769, Award 21 that Board had occasion to pass upon the use of Loram as part of the program announced by the Carrier's letter of December 21, 1987 and the above-stated reasons for its actions. That Board held:

The board concludes that this complies with the portion of the Note to Rule 55 concerning "special equipment not owned by the Company". The record indicates that the Carrier attempted to lease the equipment for use by its own employees, without avail. It is clearly the case that Carrier employees do perform ditching work. Here, however, the Carrier has demonstrated that the capability of the Loram equipment is substantially greater than that which can otherwise be achieved. The Note to Rule 55 specifically covers such situation.

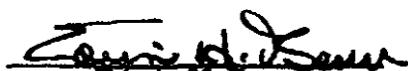
In light of the fact that the dispute in this case arises out of the same basic transaction that was involved in PLB 4768, Award 21, our inquiry at this point is limited to whether or not that decision is palpably erroneous. We find it is not.

This record demonstrates that the Loram Ditcher is a far superior ditching system than any equipment owned by the Carrier and the Loram Ditcher is capable of performing ditching functions that Carrier-owned equipment cannot perform. Given that demonstration and further given that the Carrier has also demonstrated that it was unable to lease that equipment, for purposes of this case, those showings lead us to conclude that PLB 4768, Award 21 is not palpably erroneous and must be followed.

We do note, however, that the Letter of Agreement of December 11, 1981 (Appendix Y) provides that the Carrier agrees to "the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees." The status of this record and the record in PLB 4768, Award 21 shows that the Carrier "attempted to lease the equipment for use by its own employees, without avail." Our award in this matter is therefore confined to the existence of that factual premise that the Carrier could not lease such equipment for operation by its forces.

AWARD

Claim denied.


Edwin H. Benn
Neutral Member

E. J. Kallinen
Carrier Member

P. S. Swanson
Organization Member

Chicago, Illinois

Dated: _____