

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 27

Carrier File No. 4MWB 89-02-14B

Organization File No. T-M-639

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned or otherwise allowed outside forces to perform track construction work, i.e., subgrading, bank widening and excavation work, near Milepost 15.2 and Mile Post 15.6 at Fridley, Minnesota beginning on August 29 through September 23, 1988.

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out the aforementioned work, as required by the Note to Rule 55 and Appendix Y.

3. As a consequence of Parts (1) and/or (2) above, Group 2 Machine Operators, C. L. Rathbun, J. A. Lawrence, J. R. Prescott, R. D. Gerner and M. P. Jorland shall each be allowed pay at their respective rates for an equal proportionate share of the one hundred sixty (160) straight time hours and twenty (20) overtime hours expended by the outside forces performing said work. Truck Drivers M. E. Hjulberg, J. A. Kuta and R. R. Stein shall each be allowed pay at their respective rates for an equal proportionate share of the one hundred sixty (160) straight time hours and twenty (20) overtime hours expended by the outside forces performing said work.

F I N D I N G S

The Carrier and the State of Minnesota Department of Transportation entered into an agreement in 1987 allowing the State to construct a replacement bridge carrying the Carrier's tracks over an interstate highway. Carrier forces were engaged to some degree through construction of trackage on the bridge and performance of related track work. At issue here is not the bridge itself but certain work in connection therewith of which the Organization claims it should have been notified and which it should have performed. This work involved, according to the Organization, "subgrading, bank widening and excavation work on both sides of the new railroad bridge".

The Carrier points out that it did not contract for such work and that the work, as with the rest of the project, was undertaken by the State and was let by the State to contractors (who in turn engaged subcontractors).

The question here is not whether the work could have been performed by Maintenance of Way forces or whether they do so on a customary basis. This question only becomes pertinent "[i]n the event the Company plans to contract out work . . .", as stated in Appendix Y interpreting the Note to Rule 55. Such did not occur here.

Supportive of this view is this Board's Award No. 12, which states in part as follows:

Third Division Award No. 26212 (Cloney) was a sustaining Award involving the Organization and another

Carrier under Agreement language closely similar to that applicable here. Award No. 26212 was the subject of vigorous dissent by the Carrier therein and equally strong concurrence by the Organization. The Award, however, reviewed numerous previous Awards and arrived at a summary which stated as follows:

Thus it appears this Board has defined several categories of cases in which the Agreement will not be violated by use of outside forces. These, at a minimum include situations:

(1) Where the work, while perhaps within the control of Carrier, is totally unrelated to railroad operations.

(2) Where the work is for the ultimate benefit of others, is made necessary by the impact of the operations of others on Carrier's property and is undertaken at the sole expense of that other party.

(3) Where Carrier has no control over the work for reasons unrelated to having itself contracted out the work.

After full review of the facts involved herein, the Board concludes that the circumstances here fit the second situation described above ("Where the work is for the ultimate benefit of others, etc.")

A W A R D

Claim denied.

Herbert Marx Jr

HERBERT L. MARX, Jr, Chairman and Neutral Member

Mark J. Schappaugh

MARK J. SCHAPPAUGH, Employee Member

D.J. Merrell

D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED:

April 6, 1992