

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 12

Carrier File Nos. C-88-C100-73

C-88-C100-74

C-44-C100-77

Organization File Nos. MWA 88-10-26B

MWA 88-10-26A

MWA-88-10-26

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned and/or otherwise permitted outside forces to perform work constructing a berm for an industrial track and approaches for a grade crossing on the south side of the main track between Mile Post 512.10 and Mile Post 512.20 in the vicinity of Hudson, Colorado, on the Colorado Division, Second Subdivision on May 25, 26, 27, 31 and June 1, 9, 15 and 16, 1988 (System File C-88-C100-73/MWA 88-10-26B).

2. The Carrier violated the Agreement when it assigned and/or otherwise permitted outside forces to perform work constructing a berm on the south side of the main track at Mile Post 511.75, in the vicinity of Hudson, Colorado, on the Colorado Division, Second Subdivision on July 28 and 29, 1988 (C-88-100-74/MWA 88-10-26A).

3. The Carrier violated the Agreement when it assigned and/or otherwise permitted outside forces

to perform work constructing two-hundred fifty feet (250') of industrial track at the east switch of the railroad car repair facility located at Mile Post 511.75 in the vicinity of Hudson, Colorado, on the Colorado Division, Second Subdivision on August 10 and 11, 1988 (C-44-C100-77/MWA 88-10-26).

4. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out or otherwise permit the performance of the work referred to in Parts (1), (2) and (3) hereof, as required in the Note to Rule 55.

5. As a consequence of the violations referred to in Parts (1) and/or (4) above, Group 2 Machine Operators M. D. Baker, Q. L. Roskilly, J. R. Hutson and J. S. Volker shall each be allowed forty-eight (48) hours' pay at the appropriate Group 2 Machine Operator's rate.

6. As a consequence of the violations referred to in Parts (2) and/or (4) above, Group 2 Machine Operators T. S. Wilhelm, G. G. McGowan and M. D. Baker shall each be allowed sixteen (16) hours' pay at the appropriate Group 2 Machine Operator's rate.

7. As a consequence of the violations referred to in Parts (3) and/or (4) above, Foremen E. J. Withrow and D. L. Alexander, Truck Drivers C. Luna, P. Sanchez and J. J. Perez, Section Laborers M. D. Lounsberry, D. K. Stalder, F. Rodriguez and J. Meza and Group 2 Machine Operator T. S. Wilhelm shall each be allowed sixteen (16) hours' pay at their applicable rate.

F I N D I N G S

In three instances jointly reviewed here, the Organization contends that the Carrier "assigned or otherwise permitted an outside concern" to perform work in the vicinity

of Hudson, Colorado. This work consisted of construction of a berm for an industrial track and approaches to a grade crossing between Mile Post 512.10 and 512.20; construction of a berm to support the east switch and a section of track on the south side of the mainline track; and construction of 225 feet of track. According to the Carrier, this work was performed by outside forces at the direction of the Rocky Mountain Rail Car, Inc., an outside company engaged in maintenance and repair of railcars for private industry. The Carrier further maintains that the work was performed on land leased to and under the control of Rocky Mountain.

As in numerous other disputes between the parties, the Organization argues that this is "contracting of construction . . . work . . . customarily performed by employees in the Maintenance of Way and Structures Department" and, as such, the Carrier is required to advise the General Chairman at least 15 days in advance of its intention to undertake such arrangement with an outside contractor.

The Carrier argues that such notice is not applicable, since the Carrier is not involved in contracting work in this instance. Rather, the Carrier points to the lease granted to Rocky Mountain and the fact that Rocky Mountain "own[s], paid for and contracted for" the construction work involved.

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.") There appears to be no contradiction to the fact that Rocky Mountain sought the land lease in order

to construct track in the furtherance of its own business requirements. Clearly, the Carrier imposed certain restrictions on such work, but the trackage was under Rocky Mountain's control. The Carrier did perform with its own forces certain work involved in the approaches to such trackage.

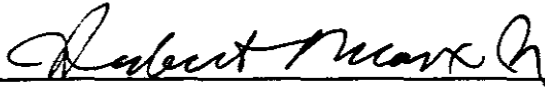
Referring again to Award No. 26212, the Board is further persuaded, as argued by the Carrier, that the lease arrangement therein and the Rocky Mountain arrangement are not identical. In this instance, Rocky Mountain, as stated by the Carrier, is the owner of the track, responsible for its maintenance, with "control over who is to perform the construction and how, subject to certain normal minimal standards; and will bear the expense of the project". Award No. 26212 refers to lease conditions indicating substantially greater Carrier control.

Given this state of facts, there is no evidence of subterfuge by having work performed by others which the Carrier would otherwise have performed itself. Thus, the Organization fails to demonstrate that the Carrier has contracted work to outside forces and consequently fails to

show that the Carrier is required to provide advance notice
to and offer subsequent discussion with the Organization.

A W A R D

Claim denied.



HERBERT L. MARX, JR., Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: 1/14/91