NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 15
Carrier File No. MWA 88-12-02B
Organization File No. C-88-C100-87

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned and/or otherwise permitted outside forces to perform work constructing and relocating trackage on the right of way in the "C" Yards in Murray Yard, in North Kansas City, Missouri beginning on July 5, 1988 (System File C-88-C100-87/MWA 88-12-2B).

2. 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 Part (1) hereof, as required in the Note to Rule 55 and the December 11, 1981 Letter of Agreement (Appendix Y).

3. As a consequence of the violations referred to in Parts (1), and/or (2) above, the senior seasonal foreman and three (3) seasonal sectionmen on Seniority District #4 shall each be allowed compensation:

> ". . . for 44 days or 352 hours straight time at their respective rate of pay. I also request that this claim continues until the violation no longer exists, and that these

days be counted towards their vacation days requirement and all their insurance that they would have been entitled to if they were working be paid."

F I N D I N G S

The Carrier maintains a railroad yard, Murray Yard, in North Kansas City, Missouri in Seniority District #4. There, prior to April 6, 1988, the Carrier operated a locomotive maintenance and repair facility and employed Carrier Maintenance of Way forces for construction, maintenance and repair work on the trackage servicing the facility. Effective April 6, 1988, the Carrier entered into a lease agreement with General Motors Corporation for the facility, land and certain trackage within an area formerly identified as "C" Yard. Subsequently, the repair facility was operated by Oakway, Inc., a GM subsidiary. According to the Carrier, the business arrangement between the Carrier and GM was to lease, rather than purchase, diesel locomotives from GM, with GM, through its subsidiary Oakway, retaining ownership of the locomotives and being responsible for their maintenance and repair.

According to the Organization, the Carrier "assigned or otherwise permitted an outside concern to perform track construction, repair and maintenance work on tracks servicing the locomotive repair facility".

As in numerous other disputes between the parties, with particular reference to that reviewed in Award No. 12, the Organization claims that this is contracting of 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. This is among other arguments set forth by the Carrier. The Board finds, however, that the central issue is the nature of the lease and the actual control of the work involved.

Award No. 12 of this Board refers at length to Third Division Award No. 26212 (Cloney), which defines "several categories of cases in which the Agreement will not be violated by use of outside forces". This discussion is incorporated here by reference.

As in Award No. 12, the Board does not find support for the Organization's view. It is true that forces directed by Oakway performed track work which formerly was performed by Carrier forces when the trackage was under Carrier control.

However, it is clear that the leasee here has taken control of the facility and its trackage for its own business purposes, which is to lease and service locomotives for the Carrier and for other carriers. As argued by the Organization, the lease arrangement does give the Carrier certain rights as to "knowledge and control" of the work performed on the leased trackage. The business arrangement is not without indirect benefit to the Carrier. Nevertheless, Oakway operates as a separate entity, and the facility is no longer part of the Carrier's operation.

In its submission, the Organization cites sustaining Third Division Award No. 28312 (Marx) as being on "all fours" with the dispute here under review. The Board does not agree and finds a distinction can readily be made. In Award No. 28312 the arrangement was for "preparation of the tracks for use by the Carrier to the loading facility to be operated by" an outside firm. Here, the lease encompasses trackage and operations to be utilized as determined by Oakway. The Board reaches the same conclusion as in Award No. 12, namely, that "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: 3/11/91