

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 16

Carrier File No. 4MWA 89-03-21

Organization File No. C-89-C100-15

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned and/or otherwise permitted outside forces to perform work constructing an under track unloading pit on the "Coal Hole" track at LaCrosse, Wisconsin from November 14 through 25, 1988 (System File C-89-C100-15/4MWA 89-03-21).

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, Foreman A. M. Steenberg, Carpenter G. F. Searle and Helper G. A. Anderson shall each be allowed, at their respective rates, an equal proportionate share of the total number of manhours consumed by the outside forces performing the work referred to in Part (1) hereof from November 14 through November 25, 1988.

F I N D I N G S

This dispute concerns the construction of storage hopper or unloading pit under the Carrier's track at LaCrosse, Wisconsin. On January 20, 1987, the Carrier issued a permit to one of its shipper/consignees, Dundee Cement Company, to construct such hopper, specifying that such construction would meet requirements insuring continued safe and efficient operation on the Carrier's track. Dundee in turn engaged a construction company to build the hopper, and this work was performed in November 1988.

In its claim, the Organization contends this is work "customarily, historically and traditionally" performed by the Carrier's B&B Subdepartment forces and is "contractually reserved" to them. The Organization finds fault in the Carrier's failure to notify the General Chairman in advance and to discuss the feasibility of having such work performed by Carrier forces, as provided in the Note to Rule 55 and Appendix Y (the December 11, 1981 Letter of Agreement).

In this instance, the Board finds the Organization's position without support. The hopper in question was for the sole use of Dundee. It was Dundee, not the Carrier, who engaged the construction firm. While it is clearly the case that the hopper was constructed under the Carrier's right of way, it was not for the Carrier's use. Whether or not the

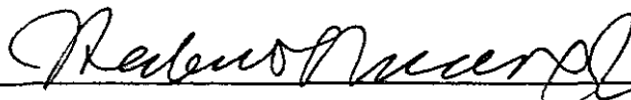
hopper was to be constructed was entirely in the control of Dundee.

The Carrier contends that "hundreds, or perhaps thousands, of other under-track unloading hoppers in place on the Carrier's property . . . were built by Shippers and were also completed without notice, conference, or objection by employees". The Organization's contention as to its "customary" construction work on such projects is largely undocumented, other than reference in a letter to the removal of such a facility and general reference to "the building of concrete forms and pouring concrete".

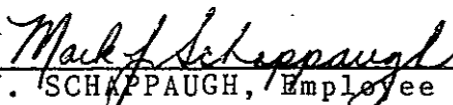
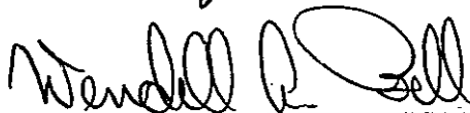
The Organization has failed to provide evidence to defeat the Carrier's contention that it did not undertake the construction itself; that the work was not for the Carrier's benefit; or that such work is not "customarily" performed by Carrier forces through the Carrier's system. Thus, the absence of notice or failure to provide the work to Carrier forces is without rule support.

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