

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 2

Carrier File No. AMWB 87-08-26E

Organization File No. B-M-166

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned or otherwise allowed outside forces to perform excavating work, i.e., digging holes and related work, in the Great Falls Yard on June 9, 10 and 11, 1987 (System File B-M-167/AMWB 87-08-27B).

2. The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its plans to contract out said work as required in the Note to Rule 55.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants D. Fritchen, M. Letcher and C. Wombold shall each be allowed twenty-four (24) hours' pay at their respective straight time rates.

F I N D I N G S

This dispute arises from an order of the Montana Department of Health and Environmental Sciences which directed the Carrier "to identify and correct potential sources of ground-

water contamination" at the Carrier's Montana fueling facilities. The Carrier arranged to have such hydrogeological testing work under an agreement with the Montana agency. To perform such testing, the Carrier engaged the Ecova Corporation, a resource engineering firm, as outside contractor and project manager "to ensure", in the Carrier's words, "that the operations would be conducted in accordance with all state and federal regulations".

As part of its work, the Ecova Corporation engaged another outside firm, Roe and Sons, to perform excavation work ("digging holes", as characterized by the Organization) at the Carrier's Havre Yard. The Organization states that this work required three Roe and Sons' employees three days each to complete.

It is this portion of the work (the excavation preliminary to soil testing) which the Organization claims should have been assigned to Carrier employees. Further, the Organization points to Carrier's failure to advise the General Chairman in advance concerning the work.

Directly involved here are the parties' obligations under the Note to Rule 55 and the agreement letter of December 11, 1981. The extent of these obligations has been reviewed in numerous previous Awards, including Award No. 1 of this Board.

The Board will not explore these rights and limitations further here, except by reference to the fully established positions of the parties as expressed in other Awards concerning the contracting of work to outside contractors.

The claim herein does not dispute the propriety of assigning the principal portion of the testing work to the Ecova Corporation as part of the Carrier's compliance with state law. The Organization does, however, express its concern in reference to the work subcontracted by Ecova to Roe and Sons.

The Organization presents substantial evidence to show that excavation of the type performed by Roe and Sons parallels work performed by Carrier employees with equipment under the Carrier's control. If such excavation stood by itself, the Organization would have a viable argument as to the impropriety of contracting out such work.

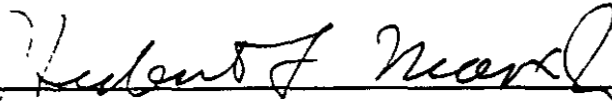
Here, however, the excavation work (or "digging holes") is a component of the responsibility contracted to Ecova and performed by its direction to its specifications. The Carrier did not engage in subterfuge in the performance of this task; rather, Ecova determined to assign the task to another contractor as an integral part of Ecova's independent testing work.

In certain situations, Awards have concluded that advance notice should have been given to the General Chairman, if only

with a view to determining whether a portion of the work proposed to be performed by outside forces could effectively have been piecemealed to permit participation by Carrier forces. In this instance, the Board concludes that it would have been clearly impractical, given Ecova's necessarily independent role in providing test results to meet the requirements of the state agency. Since the overall contractual relationship with Ecova is not in question, it follows that the three days' work involving excavation was not violative of the Note to Rule 55 nor other Rules cited by the Organization.

A W A R D

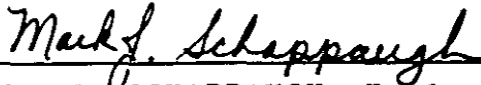
Claim denied.



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



WENDELL A. BELL, Carrier Member



MARK J. SCHAPPAUGH, Employee Member

NEW YORK, NY

DATED: 10/23/90