

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 22

Carrier File No. 4WWB 89-03-01

Organization File No. T-M-641

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces (Bolander and Sons, Inc.) to perform roadbed and subgrade construction work (excavation, removal, hauling, grading and compacting roadway subgrade) at the Midway Hub Facility in St. Paul, Minnesota beginning on September 19, 1988 and continuing.

2. The Agreement was further violated when the Carrier failed to give the General Chairman timely and proper advance written notice of its intention to contract out the work involved here, in accordance with the Note to Rule 55 and Appendix Y.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Machine Operators M. P. Jorland, C. L. Rathbun, V. L. Johnson, J. A. Lawrence, Jr., R. D. Gerner, J. O. Aiton, D. C. Leikvoll, K.P. Knutsen, A. C. Farley, G. L. Korte, E. G. Griffith, J. M. Lawrence, G. E. Kurvers and Truck Drivers T. V. Sura, J. S. Schneider, J. A. Kuta, T. M. Kuta, R. R. Stine, P. B. Kuta, M. E. Hjulberg, J. W. Pinske, T. C. Markwardt and D. J. Newbauer shall each be allowed pay at their respective rates:

. . . for eight (8) hours straight time and four (4) hours time and one-half each for each day, Monday through Friday, and twelve (12) hours time and one-half each for each

Saturday and Sunday beginning on September 19, 1988 and continuing until the contractor is removed.

F I N D I N G S

This dispute concerns a major construction project undertaken by the Carrier at its Midway Hub Center in St. Paul involving excavation, grading removal, hauling, placing and compacting granular borrow/backfill material. It is the Organization's position that, under the Note to Rule 55 and other Agreement Rules, the Carrier should have assigned the work to Maintenance of Way forces. In addition, the Organization contends that the notice given to the Organization concerning the project came too late to offer the opportunity for a good-faith effort to determine if the work could have been performed by Carrier forces.

After reviewing all the circumstances, the Board concludes that this project was of a nature which would have prevented the use of Carrier equipment and forces on any practical basis. While there is no doubt that elements of the work are regularly performed by Carrier forces, this does not therefore determine that such major projects could have been undertaken other than by outside forces. More significantly, however, is that the Organization has failed to demonstrate that such projects are "customarily performed" by Maintenance of Way forces. This is the necessary element for consideration of the application of the Note to Rule 55.

As with other similar major projects, the Carrier has, in addition, convincingly demonstrated that the project involved,

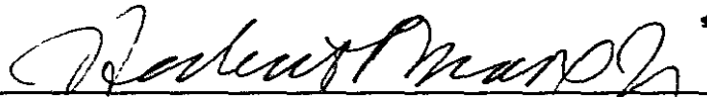
among other elements, the requirement of materials available only from the supplier and the use of disposal sites not available to the Carrier.

It is the fact that notice to the Organization came just a few days prior to actual commencement of work by the contractor. This, however, becomes irrelevant, since such notice did not have to conform to the requirements of the Note to Rule 55 in the absence of the work itself being of a nature "customarily performed" by Carrier forces.

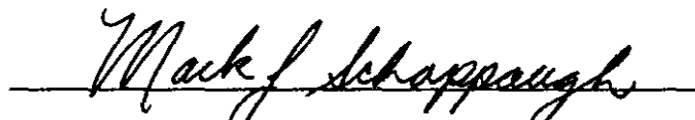
It should be noted that other phases of the St. Paul Midway Hub Center project were assigned to Maintenance of Way forces.

A W A R D

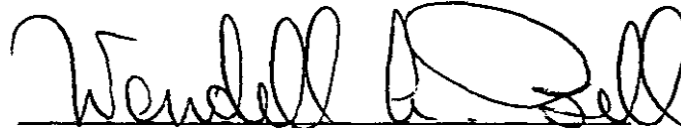
Claim denied.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: FEB 29, 1992