

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILROAD COMPANY

AWARD NO. 28

Carrier File No. 3MWB-88-12-06

Organization File No. T-D-406

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier assigned outside forces (Loram Maintenance of Way, Inc.) to perform shoulder ballast cleaning work between Dilworth, Minnesota and Bismarck, North Dakota from July 5 through August 7, 1988 (System File T-D-406/3MWB 88-12-06).

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

3. Because of the violation referred to in Part (1) above, Section Foremen D. L. Karch and J. E. Hanson and Group 2 Machine Operators R. E. Lammer, J. A. Vacha, R. L. Mammenga and M. E. Nogowski shall each be allowed pay at their respective rates for an equal proportionate share of the one thousand one hundred fifty-two (1,152) straight time hours and five hundred eighty-eight (588) overtime hours expended by the outside forces from July 5 through August 7, 1988.

F I N D I N G S

This dispute is similar to that reviewed in Award No. 21, involving the contracting of work to the Loram Company, except

that the equipment used here is for shoulder ballast cleaning and undercutting, rather than for ditching work. The same procedure of notification and conference was undertaken here as related in Award No. 21.

Without reference to other arguments raised by the parties, the Board concludes that this dispute centers, as does Award No. 21, on that portion of the Note to Rule 55 which sanctions contracting in instances requiring "special equipment not owned by the Company". The record indicates that the Loram equipment represents technological capacities not available through the use of equipment available to Carrier employees. While the particular functions of shoulder cleaning and undercutting and the replacement of ballast are performed by Carrier employees, this does not require the Carrier to deny itself the opportunity to have these functions performed in a more technologically advanced manner. The Board is persuaded that the use of the Loram equipment comes within the purview of the Note to Rule 55 exceptions.

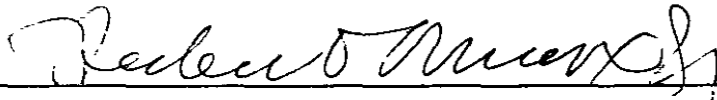
In support of this conclusion is Public Law Board No. 4402, Award No. 20 (Benn), which reads in pertinent part as follows:

Considering the above evidence regarding the type of machinery at issue and its function, we find that the Plasser Undercutter is not owned by the Carrier; is not the precise type of machinery that is ordinarily operated by the Machine Operators; performs more complex functions in the cleaning of ballast than the machinery owned by the Carrier and operated by the employees-particularly the cleaning and replacement of the ballast as opposed to

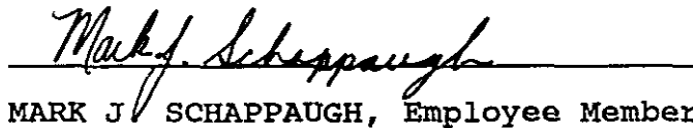
the mere removal of the ballast; and such machinery is not available for lease without use of contractor forces. Under the facts of this case, we therefore find the Plasser Undercutter to fall under the "special equipment not owned by the Company" factor set forth in the Note to Rule 55. We further find that by using an outside contractor in these circumstances where the machines were unavailable for leasing without the contractor's forces, the Carrier did not violate the terms of the December 11, 1981 letter which requires "the use of . . . maintenance of way forces to the extent practicable, including the procurement of rental equipment and operations thereby by carrier employees".

A W A R D

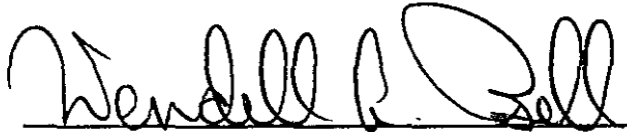
Claim denied.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



WENDELL A. BELL, Carrier Member

NEW YORK, NY

DATED: 11-21-91