

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 38

Carrier File No. 6MWA 90-9-28D

Organization File No. C-90-C100-42

STATEMENT OF CLAIM

1. The Carrier violated the September 16, 1987 TLM Memorandum of Agreement when it assigned outside forces (Herzog Contractors) to distribute and apply concrete insulator and tie clips in conjunction with the operation with the P-811 concrete tie machine beginning on Jun 1, 1990.

2. The Carrier violated the September 1, 1982 Schedule Agreement when it assigned outside forces (Herzog Contractors) to distribute and apply concrete insulator and tie clips in conjunction with the operation with the P-811 concrete tie machine beginning on June 1, 1990.

3. As a consequence of the violations of Parts (1) and/or (2) above, Group Machine Operators T. L. Jackson, P. L. Walton, R. M. Pokorney and Group 5 Machine Operators W. J. Kreitman and K. A. antholz shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by the outside forces performing the above described work, beginning on June 1, 1990 and continuing.

F I N D I N G S

This dispute arises from the Carrier's action commencing June 1, 1990 to hire an outside firm, Herzog Corporation, to operate with its own employees equipment to distribute and apply insulators and clips to concrete ties. Because the Organization believed the work was reserved to Maintenance of Way forces, this led to a strike enjoined by court action. In addition, a dispute was initiated by the Carrier with the Third Division of the National Railroad Adjustment Board to seek to establish its right to this action. The Third Division claim was withdrawn in favor of resolution by this Board.

The use of this equipment, known informally as a "Clip Car", was preceded by the Carrier's program, beginning in 1987, for the installation of concrete ties in various locations. This work was to be performed by equipment known as the P-811S Track Laying Machine. This in turn led to an agreement between the Carrier and the Organization as to the operation of the Track Laying Machine (TLM), which included the following:

E. Other Personnel: BN personnel necessary to work ahead of and behind the TLM for the preparation, installation, welding, ballasting, clipping, and other work incidental to concrete tie installation projects, shall be bulletined and operated as a Regional, division, or district gang, as determined to be appropriate by the Carrier. . . .

G. Application Of This Agreement.

. . .

(2) Except as provided in this Memorandum of Agreement, the current effective schedule agreements between Burlington Northern Railroad Company and its employees represented by the Brotherhood of Maintenance of Way Employees shall apply to the TLM operation.

Except as modified by the use of the Clip Car, work of applying insulators and clips to rails and ties was and is performed by Maintenance of Way forces. By the use of outside forces operating the Clip Car, the Organization perceives a violation of the undertaking in Section E of the P811S Agreement, as well as its Scope Rule (Rule 1), seniority rights, and the Note to Rule 55 covering the contracting of work.

The parties' submissions include full discussion of the Scope Rule and the Note to Rule 55. While the Board takes these views into consideration, discussion thereof is not required, since these arguments have been set before the Board and reviewed in numerous other disputes.

Prior to use of the Clip Car, installation of insulators and clips was performed by Carrier forces manually and with a clip application machine. Seeking a better way to perform this work, the Carrier initially contracted with an outside firm (Temco) to develop equipment for the Carrier's use. In 1989-90, this equipment was tested and, according to the Carrier, was "not operable". As a result, the Carrier terminated its relationship with Temco and decided not to purchase the equipment.

At this point, the Carrier sought an alternative solution. Herzog was engaged to take over the Temco project and develop an effective Clip Car. This equipment became operable in June 1990, although, according to the Carrier, not in a fully effective manner. The difference was that Herzog maintained ownership of the equipment, using its own forces to operate the Clip Car.

Clearly, neither to P811S agreement nor other schedule rules prohibits the Carrier from the use of more effective track laying methods. Equally clear is the possibility that the Carrier might have obtained such equipment for use by its own forces. The question therefore becomes whether there is a prohibition on the Carrier to make use of a contractor's equipment (and its forces) to accomplish this end.

The Board must conclude that Section E of the P811S Agreement is not an unlimited guarantee in all circumstances that the work specified therein must be reserved to Carrier forces. That Section does provide that "BN personnel necessary" for work in connection with the Track Laying Machine should be "bulletined" and then operated in a specific type of gang. This cannot be read to prohibit the introduction of new equipment, nor does it require that such equipment be owned and/or operated by the Carrier.

The Note to Rule 55, fully reviewed in many other Awards, includes the following:

. . . [W]ork . . . which is customarily performed by employees describe herein, may be let to contractors and be performed by contractors' force. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company . . . are required;

Given the opportunity to view the Clip Car operation on video tape, the Board does note that the manual duty of workers accompanying the Clip Car hardly requires the "special skills" included in the Note to Rule 55.

The Organization also argues, however, that the Clip Car is not such special equipment, but the Board cannot agree. The development of Carrier-operated equipment was attempted and apparently failed. The Clip Car developed by Herzog is sufficiently "special" to permit application and insulators and clips in a manner not previously undertaken. Neither the P811S Agreement nor other rules require the Carrier to continue such work in the manner previously performed, nor is there any rule requirement that the Carrier must purchase the equipment for its own forces.

Ideally, the way will be found to use Carrier forces in the operation of the Clip Car, in whole or in part, either by changes in the lease arrangements with the contractor or conceivably by purchase of the equipment. This, however, is not within the ambit of the Board's authority. The Carrier's failure or inability to make such arrangements does not represent violation of the P811S Agreement nor of schedule agreement rules -- and it is to these two areas that the Board's jurisdiction is confined.

A W A R D

Claim denied.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED: February 26, 1993