

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26708
Docket Number MW-26238

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned machine operator's work, in connection with a washout, to outside forces beginning September 28, 1983 (System File 210-A8-8316/11-1940-20-187).

(2) The Carrier also violated Appendix No. 8 (Article IV of the May 17, 1968 National Agreement) when it did not give the General Chairman advance written notice of its intention to contract said work.

(3) As a consequence of the aforesaid violation, Group 5 Machine Operators R. Gray, T. Ferguson, V. Hart, S. Moser and M. LaFaye shall each be allowed pay at their respective rates for an equal proportionate share of the total number of man-hours expended by outside forces in performing the work referred to in Part (1) hereof."

OPINION OF BOARD: On September 25, 1983, heavy rainstorms caused extensive damage to approximately thirty miles of roadbed, banks, dikes, channels and bridges on the Carrier's right-of-way in the Fourth District of its Albuquerque Division. The Carrier's operations were interrupted and it immediately engaged in emergency reconstruction work. To assist the Carrier's forces in this attempt to return its operations to normal, the Carrier contracted with an outside contractor. The Carrier did so in accordance with its Letter of Understanding with the Organization which is dated September 28, 1956. This Letter states the following:

"In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employees of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes, landslides and, similar disasters."

On September 27, 1983, the trackage in this District of the Albuquerque Division was returned to service. The Carrier continued to use the outside contractor after that date. The record shows that from September 27, 1983, through November 18, 1983, contractor's operators performed approximately "...861 man-hours of service" with two bulldozers and a front-end loader which belonged to that Company.

On October 19, 1983 the General Chairman of the Organization filed a Claim on behalf of the Coast Line Group 5 Machine Operators named in the Statement of Claim. This Claim alleged that the Carrier was in violation of various Rules of the current Agreement and requested as relief payment "...for equal and proportionate shares of all hours worked by Herschkowitz Construction Company since September 28, 1983 continuing forward." In its various responses to this Claim the Carrier stated that it had used all Group 5 equipment and operators "...that could possibly (have been) spared to perform the work involved" after September 27, 1983, and that "...the Claimants and their machines were used on the Fourth District until the work was completed." Although the parties appear, in their exchange on property, to want to resolve this case as one which falls under the correct interpretation of the Agreement's Scope Rule, the focus of the Claim centers, in fact, on whether an "...emergency existed" after September 27, 1983. If it did, the Carrier was correct in continuing to apply the Letter of Understanding of September 28, 1956 (Appendix 8 of the Agreement). If an emergency did not continue to exist after September 27, 1983, the Claim has merit.

The position of the Organization is as follows. It states that "...Group 5 employees have been force reduced each of the last two winters, therefore, these contractor's forces (after September 27, 1983) are causing a loss of work opportunity for Group 5 Coast Line Employees." Even though the Claimants continued to work throughout the reconstruction this argument points to future potential loss of work because of the presence of the contractor. The most specific argument proposed by the Organization is that after the tracks were opened up on September 27, 1983, the "...emergency ceased to exist." According to the Organization the restoring of "...dikes, roadbeds, banks, channels and bridges" was "...routine work" and it should have been reserved for the members of its craft. Further, the existence of "...slow orders" after September 27, 1983, were also not sufficient proof, according to the Organization, to substantiate that an emergency existed.

What exactly was the factual situation on the some thirty miles of right-of-way after September 27, 1983? There were slow orders issued although the parties disagree, in the record, on exactly how many. At least the following were issued on September 27, 1983, restricting the speed limit on the affected territories:

"Speed limit 10 MPH over bridge at Post 84.4
between Kirkland and Skull Valley, Fourth
District.

Speed limit 10 MPH over bridge between Mile
Posts 43.3 and 43.5 between Tucker and Kayfour,
Fourth Division.

*Speed restriction removed October 10, 1984.

Speed limit 10 MPH between Mile Posts 51.3 and 51.9 over shoo-fly between Skull Valley and Tucker, Fourth District.

Speed limit 10 MPH over bridge between Mile Posts 54 and 54.1 between Skull Valley and Tucker, Fourth District.

*Speed limit increased to 30 MPH October 14, 1984.

*Speed restriction removed December 5, 1983.

Speed limit 10 MPH over bridge between Mile Posts 54.8 and 55 between Skull Valley and Tucker, Fourth District.

*Speed restriction removed October 10, 1983.

Speed limit 20 MPH over bridge between Mile Posts 80.2 and 63.3 between Skull Valley and Tucker, Fourth District.

Speed limit 10 MPH over bridge between Mile Posts 85.4 and 85.8 between Kirkland and Skull Valley, Fourth District.

*Speed restriction removed October 18, 1983.

Speed limit 10 MPH over bridge between Mile Posts 86 and 86.2 between Kirkland and Skull Valley, Fourth District.

Speed limit 20 MPH over bridge between Mile Posts 89 and 89.1 between Kirkland and Grand View, Fourth District.

*20 MPH speed limit over bridge between Mile Posts 89 and 89.1 was reduced to 10 MPH, effective October 2, 1983."

Thus some nine slow orders were issued on the territory in question with speed limits, in most cases, reduced to 10 MPH. Several of these orders were not lifted prior to the departure of the contractor. The Organization cites Third Division Award 19948 to support its contention that slow orders "...alone do not lead to the ultimate conclusion of emergency." The Board is in agreement with the conclusions of this Award given the circumstances under consideration. In that case a fire had sufficiently damaged a railroad bridge so that the Carrier decided to replace it with a steel structure. B&B forces installed the structure and an outside contractor did the fill work. In the interim, a

slow order of 10 MPH was in effect. It took the contractor some ten days to finish the work although it only worked five of those days. The Board reasoned in that case that the facts "...especially the pace of the work, (did) not reflect a policy of immediate action by the Carrier" and it ruled that no emergency existed and sustained the Claim. Such facts are in considerable contrast to those of this case both because of the large number of slow orders here under consideration and because of the "...pace of the work" required of the contractor by the Carrier. That pace is best underlined by correspondence by the Organization itself to the Carrier wherein it states, in its original October 19, 1983, Claim letter, that "...contractor's forces have worked 10 hours per day, 7 days per week since September 28, 1983...." Such pace does not suggest "...routine work." In view of this, Award 19948 cannot reasonably be considered to have precedential value for this Claim. There is no dispute that parts of the right-of-way along the thirty miles sustained major damage. For example, the Carrier states in its correspondence of June 6, 1984, to the Organization that:

"several bridges between Mile Posts 43 and 89 on the Fourth District did sustain major damage. For instance, at Bridge 51.6, a 200 ton section of the concrete drainage box broke off and washed 35 feet downstream together with most of a 100 yard embankment 50 feet high (see attachment). At this location, it was necessary to construct a shoo-fly on the upstream side of this bridge in order to affect repairs. At Bridge 84.4, some of the supporting timbers were completely destroyed."

The record before the Board in this case paints one of fairly widespread destruction by the rains on September 25, 1983. Such implied the need for slow orders for up to six weeks after that date in some sections of the Carrier's track in the Fourth District of its Albuquerque Division. The Carrier states that it did not have sufficient manpower among its own employees to bring the situation back to normal in several days. The record reasonably supports this contention, both by the number of slow orders issued and by the pace of the work performed by the contractor while it was on property.

In Claims such as this one the burden of proof lies with the Organization as moving party (Second Division Awards 5526, 6054; Third Division Award 15670). A study of the record warrants the reasonable conclusion that such burden has not been met in this case. The Carrier was not in violation of the Agreement when it continued to use the contractor after September 27, 1983, under the provisions of Appendix 8 of the Agreement. The record reasonably establishes that an emergency continued to exist past that date. On merits, the Claim must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and


That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1987.

LABOR MEMBER DISSENT
TO
AWARD 26708 - DOCKET MW-26238
(Referee Suntrup)

The Majority erred when it held that:

"The record before the Board in this case paints one of fairly widespread destruction by the rains on September 25, 1983. Such implied the need for slow orders for up to six weeks after that date in some sections of the Carrier's track in the Fourth District of its Albuquerque Division. The Carrier states that it did not have sufficient manpower among its own employees to bring the situation back to normal in several days. The record reasonably supports this contention, both by the number of slow orders issued and by the pace of the work performed by the contractor while it was on property."

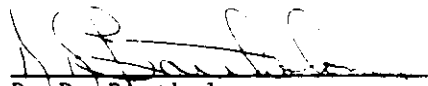
The Majority found that the record in this dispute supports the Carrier's position that an emergency existed during the claim period. However, a review of the entire Award discloses at least two (2) inconsistencies in the reasoning relied upon in arriving at such a finding.

First, the majority points to a picture of fairly widespread destruction caused by the rains of September 25, 1983, on the Carrier's Albuquerque Division. However, this dispute involved only a small portion of the Albuquerque Division. This is important because the slow orders listed by the Majority involved bridges which were located within the claim area, but were not affected by the work performed by the contractor's forces. The fact is that it was undenied by the Carrier that such was the case. This was clearly established in the record of the handling of this dispute on the property and was pointed out to this Board. If the contractor's forces were not performing work which materially affected the slow

orders, then the fact that those slow orders existed should have been of no moment insofar as the disposition of the instant claim was concerned.

Second, the Majority found it significant that the Carrier asserted that it did not have sufficient manpower and in support thereof, pointed to the pace of the work performed by the contractor's forces. However, it was undenied in the record and pointed out to the Majority that the Carrier's forces were not working any overtime hours during the claim period. This is particularly striking when consideration is given to the fact that prior to September 27, 1983, the date on which the Carrier's train traffic was restored in the claim area, the Carrier's forces were performing significant amounts of overtime service. It was pointed out by the Organization that when the Carrier's train traffic was restored, albeit with the aforementioned slow orders, the Carrier instructed its employees that no more overtime would be authorized. In other words, the Carrier's employees were at home while the contractors employees were working in their place. Hence, it could hardly be argued that such a circumstance supported the Carrier's contention that an emergency existed.

We submit that the Majority ignored the Organization's undenied arguments concerning the emergency issue and erred in determining that the Organization had not met its burden of proof. Therefore, I dissent.


D. D. Bartholomay
Labor Member