

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31835
Docket No. MW-31461
96-3-93-3-470**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned an outside contractor (M&M Construction Company) to perform Maintenance of Way work (repairing and rebuilding slopes) at Mile Posts 387 and 388 near Jayell and Baird, Texas beginning March 9, 1992 and continuing.

(2) The Agreement was violated when the Carrier assigned an outside contractor (M&M Construction Company) to perform Maintenance of Way work (removing and replacing switch ties) in the West end of Jayell siding, Mile Post 382, on April 27 through 30, 1992.

(3) The Agreement was violated when the Carrier assigned an outside contractor (M&M Construction Company) to perform Maintenance of Way work (clearing the right of way and general clean up of the right of way) at Mile Post 416, Tye, Texas on May 1, 1992.

(4) The Agreement was violated when the Carrier assigned an outside contractor (M&M Construction Company) to perform Maintenance of Way work (distributing and replacing switch ties) at East Jayell, Mile Posts 381.1 and 381.2, on May 4 through 6, 1992.

(5) The Carrier also violated Article IV of the May 17, 1968 National Agreement when it failed to furnish the General Chairman with proper advance written notice of its intention to contract out the work referred to in Parts (1), (2), (3) and (4) above.

(6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Foremen R. J. Little and J. A. Rivera, Machine Operators R. G. Maples and J. L. Stutts and Trackmen M. Moyes, Jr., R. Rodriguez and W. L. Washington shall each be compensated, at their respective rates of pay, for an equal proportionate share of the total number of man-hours expended by the contractor's forces.

(7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Machine Operators J. L. Stutts and R. G. Maples shall each be compensated, at the machine operator's rate of pay, for an equal proportionate share of the total number of man-hours expended by the contractor's forces.

(8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Machine Operators J. L. Stutts and R. G. Maples shall each be compensated, at the machine operator's rate of pay, for an equal proportionate share of the total number of man-hours expended by the contractor's forces.

(9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Machine Operators J. L. Stutts and R. G. Maples shall each be compensated, at the machine operator's rate of pay, for an equal proportionate share of the total number of man-hours expended by the contractor's forces."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

There are two procedural matters that must be addressed at the outset. The Organization made a timely objection to certain information and argument contained in the Carrier's Submission that had not been exchanged or discussed during the handling of the claims on the property. We have, as we must, excluded such information and argument from our considerations. In addition, Carrier initially raised a time limitation defense to Part (1) of the claim. It is noted, however, that Carrier waived this defense at the highest level.

The parts of the claim primarily raise the issues of notice and remedy as a result of the performance of the specified track work by contractor forces. The mixed practice nature of the work and Carrier's related contracting rights were demonstrated via the numerous prior Awards of the Third Division involving these same parties that were cited by the Carrier. See, for example, Awards 30067, 30205, 30267 and 31274. Accordingly, Parts (1) through (4) must be denied.

Given the mixed practice, however, advance notice of the planned contracting of work is ordinarily required. See Award 1 of Public Law Board No. 5567 between these same parties.

The Carrier contends that the existence of emergency circumstances made notice unnecessary. It also noted that the "... Claimants were all fully employed and ... worked tremendous amounts of overtime during the timeframe in question." The Organization did not dispute Carrier's assertions regarding full employment and overtime. Nor did the Organization dispute that heavy rains in late December 1991 caused mud slides that shut down the main line for several days and resulted in 10 mph slow orders for rail traffic in the area for several months.

The Organization's primary contention is that no emergency existed at the time the contracted work was performed. In its view, therefore, Carrier was required to provide the requisite notice called for by Article IV of the Agreement and the December 11, 1981 Hopkins/Berge Letter.

As noted in Third Division Award 12267, there is a point where every emergency ceases and the contract resumes its governing role. It is also well settled that assertions of emergency circumstances are treated as an affirmative defense. As such, the burden of proving the nature, extent and duration of the emergency must be satisfied by the party asserting its existence.

The on-property record for each of the instant claims shows that Carrier's main line was shut down for approximately one week due to the rains. However, the disputed work was not performed by the contractor until well after the period of the heavy rains. Part (1) of the claim places the disputed work more than two months later. Parts (2) through (4) involve work performed even later in 1992.

The December 11, 1981 Hopkins/Berge Letter between the instant parties reads, in pertinent part, as follows:

"The parties jointly reaffirm the intent of Article IV of the May 17, 1968 Agreement that advance notice requirements be strictly adhered to" (underlining supplied)

The Organization disputed Carrier's on-property assertion of continuing emergency circumstances. It contended that any emergency expired after the main line was reopened.

Given the dispute over the duration of the emergency as well as the strict adherence intent underlying the Article IV notice requirement, we find Carrier had to satisfy one of two alternative obligations. It was either incumbent upon the Carrier to provide advance notice to the Organization or, in the alternative, to produce appropriate evidence satisfying its burden of proof to establish that continuing emergency circumstances excused the notice requirement. The Carrier's responses on the property do not provide such evidence.

Carrier also relied on Third Division Award 26708 involving other parties that suffered similar rain-induced problems. In that case, however, the use of contractor forces began immediately, not months later.

On the record before us, therefore, we find that Carrier violated the advance notice requirements of Article IV. However, the remedy question for such a violation, under the circumstances of this claim, is also well settled between these parties. Prior decisions have awarded monetary compensation only to furloughed employees or employees who were working in lower paid classifications and were qualified to perform the higher rated work done by contractor forces. There is no evidence of furloughed employees on this record. In addition, there is no evidence that any of the Claimants are entitled to differential compensation. As a result, no monetary compensation is awarded.

Parts (1) through (4) of the claim are denied.
Part (5) of the claim is sustained.
Parts (6) through (9) of the claim are denied.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of December 1996.