

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39301
Docket No. MW-37334
NRAB-00003-020289
(02-3-289)

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned outside forces (WRT Construction and Hamms Construction) to perform Maintenance of Way work (cleaning right of way coal and debris) in the area of prior derailment in the vicinity of Mile Posts 50 and 67.38 on the Kansas Subdivision on November 18 and 19, 2000 instead of Eastern District Roadway Equipment Operator A. E. Emperley, Kansas Division Group 15 Truck Drivers T. W. Bremmett, L. B. Brumbaugh, R. A. Gosser, R. D. Creek and V. E. O'Toole (System File W-0152-151/1262259).
2. The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).
3. As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants A. E. Emperley, Kansas Division Group 15 Truck Drivers T. W. Bremmett, L. B. Brumbaugh, R. A. Gosser, R. D. Creek and V. E. O'Toole shall now each receive ‘. . . an equal proportionate share of the man hours consumed by the employees of the outside Contracting forces in cleaning

[sic] the right of way of derailment debris at the referred to locations. This compensation must be allowed at their respective Group 19 and 15 overtime rates of pay.’”

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.

The circumstances giving rise to the instant matter are not in dispute.

As a direct result of a derailment at or about Milepost 50 and again at Milepost 67.38 on the Kansas Subdivision, coal was spilled onto the track as well as the surrounding areas. Maintenance of Way personnel and track forces represented by the Organization were utilized to restore the track and remove damaged track components such as ties, rail, scrap steel, etc. BMW forces also restored ballast sections and road bed. Spilled coal was removed from the track and surrounding area at the Topeka derailment by the Carrier’s BMW forces by use of a backhoe tractor and front end loader. The spilled coal was then stockpiled away from the immediate work area in order to provide sufficient room for Carrier forces to restore the track and road bed. At the Milepost 50 location, spilled coal was moved and scattered in the right-of-way ditches in order to clear the main line and facilitate the restoration of damaged track.

On November 18 and 19, 2000, the Carrier contracted outside forces (WRT Construction and Hamms Construction) to remove the piled coal using one front end

loader and five dump trucks on each occasion. The General Chairman described the work performed as follows:

“As is evidenced from the statement of Mr. Aubert, it is obvious that the removal of the coal was a two (2) step process. First, the Coal was cleaned up from the locations at M.P. 50 and M.P. 67.38 on the Right of Way by utilizing Front End Loaders and Dump Trucks and transported to another point on Union Pacific where it could be reclaimed. Second, the Coal was then cleaned and then loaded into Railroad Cars for shipment by a different contractor than the one that performed the initial cleaning of the Right of Way.”

The Aubert statement referred to above stated:

“I am writing in a [sic] answer to your questions about what happened to the coal that was cleaned from the right of way at about M.P. 50 and M.P. 67.38 on the Kansas Division.

The coal was cleaned from the right of way and hauled to Topeka, Kansas by WRT construction and hamms construction. In Topeka the coal was cleaned by a filter or screen some way by a different contractor who was from Illinois and then was loaded on to railroad cars and shipped to a location which I am not sure of but I think it was in Chicago.”

It is the Organization’s position that the aforesaid work of unloading, loading, transporting and cleaning of the right-of-way is work customarily assigned to and performed by employees of the Roadway Equipment Operators and Track Subdepartments. Whereas the Claimants hold seniority within Groups 19 and 15 of the Eastern District Roadway Equipment Operators and Kansas Division Track Subdepartments, employees of outside contractors should not have been given preference over the Claimants. Moreover, because Rule 52 requires written notice to the General Chairman prior to the subcontracting of any work regularly and customarily performed by Carrier forces, the lack of such notice violated Rule 52.

It is the Carrier’s position that once the Carrier’s forces removed the coal and stockpiled it, it became “lading,” or consumer goods that were in the process of being

transported by the Carrier prior to the derailment. The Carrier asserts that the Organization has no contractual right to handle lading. Accordingly, the Carrier asserts that it "[w]as under no obligation to serve notice as the cleaning up of the shipper's lading at a derailment site is not, and never has been, within the scope of work of the BMW - shippers, clerical employees and even Carmen handle lading depending on the circumstances involved. Thus, Rule 52(d) of the parties Agreement governs and no notice would have been due even in a non-emergency situation." The Carrier also defended its action by asserting that it "[d]oes not have the equipment nor the trained employees to properly and safely undertake this type of cleanup." Accordingly, whereas the Organization described the instant claim as "cleaning right of way coal and debris," its claim must be denied.

The essence of the Carrier's position lies in its contention that BMW forces have no contractual right to handle "lading." Lading is defined as property or goods belonging to another, in this case, not the Carrier. In the instant matter, the lading at issue consisted of coal that was strewn around the track area as a result of a derailment. To the extent that outside forces were used to pickup and deliver "lading" to an off-property site for the benefit of a customer, there is ample case authority holding that such work is not the type generally and regularly performed by BMW forces. (See e.g. Third Division Award 28817.) However, to the extent that outside forces (WRT Construction and/or Hamms Construction) were used to perform cleanup work in and around the track and surrounding area, such work is properly deemed work regularly performed by BMW forces. In this regard, one need look no further than the fact that the Carrier used BMW forces who used a backhoe and front end loader to remove spilled coal from the track itself at the Topeka derailment as proof of the Carrier's recognition of the fact that work of this nature is properly performed by BMW forces. Accordingly, the answer to the issue posed for resolution lies in determining when the spilled coal turned into "lading." It is apparent that the coal became "lading" at that point in time when the Carrier relinquished total control over the product. This conclusion is analogous to those situations where the Carrier sells some of its property to a purchaser "as is." Such "as is" property becomes the possession of the purchaser at the time the Carrier relinquishes total control over the property by placing it in the hands of the purchaser. In such case, BMW forces would no longer have a claim to the handling of the "as is" property once the Carrier relinquishes total control of its property through a legitimate purchase agreement.

In the instant matter, Rule 9 is clear on its face, rendering to the Organization those duties involving, among other listed tasks, the cleaning of right-of-way and loading, unloading and handling of track material. Contrary to those arguments made by the Carrier during the on-property handling of this case, it is not necessary for the Organization to demonstrate that it has historically performed this covered work “exclusively.” Thus, to the extent that the Carrier used outside forces to clean up the track and/or right-of-way, Rule 9 was violated. However, once the coal was cleared from the track and right-of-way areas and put in piles for further disposition, there is nothing in the record that establishes whether or not the Carrier relinquished control over the coal in order for it to be transported to another location and cleaned. Whereas the Organization carries the burden of proof in non-disciplinary cases of this nature, the lack of such detail renders it impossible for the Board to determine when, if at all, the coal at issue turned into “lading.”

Given the foregoing, the Organization’s remedy in this case is limited to the extent that Rule 9 was violated through the Carrier’s use of outside forces to clean the track and right-of-way areas.

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 29th day of September 2008.