

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40372
Docket No. MW-40722
10-3-NRAB-00003-080573**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Kelly’s Reload) to perform Maintenance of Way and Structures Department work (repair and install fence and related work) around compound at Mile Post 984.8 at Tucson, Arizona on April 18, 19 and 20, 2007 (Carrier’s File 1477723 SPW).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance written notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces in accordance with the provisions of Rule 59 and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants P. Munoz, F. Cota, B. Brown and H. Mendez shall now each be compensated for twenty-four (24) hours at their respective straight time 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 record shows that on the dates set forth in the claim (April 18, 19 and 20, 2007) the Carrier utilized a contractor to perform what the Carrier deemed to be emergency fence repairs to the Maintenance of Way compound at Tucson, Arizona, after individuals stole a Carrier vehicle and ran it through the gated compound damaging the fence and double gates. The Organization disputes the nature of the claimed emergency arguing that the compound had not been protected from thieves for more than one year prior to the incident and that the fence was in such a state of disrepair that it was easy for thieves to enter the compound and steal the vehicle. The Organization asserts that the contractor repaired all of the fence areas which were neglected for more than one year that should have been repaired by the Carrier's employees.

In these cases, "[t]he Carrier bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees." Third Division Award 32419.

For the sake of discussion, the Board will assume that the circumstances facing the Carrier were, at least at the beginning, sufficient to be considered an "emergency" which would allow the Carrier latitude with respect to its Rules. Nevertheless, in this case, we shall sustain the claim.

First, even though an emergency may have existed at the onset, there was still an obligation on the Carrier to at least attempt to contact its employees to determine if they could work. See e.g., Third Division Awards 21222 ("[i]t has been held

repeatedly that Carrier has the obligation to make a reasonable effort to communicate with employees in [emergency] situations. . . .”) 21224 (“[e]ven with the time pressures of an emergency and the latitude accorded to Carrier it must show that it made an attempt to call its own employees”). There is no evidence that the Carrier attempted to do so.

Second, there is no explanation in this record why the contractors’ forces were kept working for three days. There comes a point where the emergency comes to an end. Third Division Award 38349 (“ . . . once the track was unimpaired and thereby useable, the emergency ceased to exist”). Because the burden of demonstrating the existence of an emergency falls on the Carrier (Third Division Award 32419, *supra*) the Carrier must show why the “emergency” lasted as long as it did. The Carrier has not done so.

The Claimants lost work opportunities as a result of the demonstrated violation. They shall be made whole as requested for time worked by the contractor’s forces.

AWARD

Claim sustained.

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 25th day of March 2010.