Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40373
Docket No. MW-40724
10-3-NRAB-00003-080586

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (KRW and Hulcher) to perform Maintenance of Way and Structures Department work (move mudslides and related work) at Mile Post 340.25 on the Omaha Subdivision on May 6, 2007 instead of Messrs. W. Peterson, R. Winter, P. Gibson, D. Overly, R. Jensen, J. Richardson, R. Haner, D. Zulkoski and J. Mumm (System File R-0752U-302/1478624).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intention to contract out the aforesaid work and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 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 W. Peterson, R. Winter, P. Gibson, D. Overly, R. Jensen, J. Richardson, R. Haner, D. Zulkoski and J. Mumm shall now each be compensated for twenty-four (24) hours at their respective and applicable 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.

Due to storms, the Carrier utilized contractors on Sunday, May 6 and Monday, May 7, 2007 to clean up mudslides over its mainline tracks near M.P. 340.25 on the Omaha Subdivision. The mudslides were approximately four feet deep and 2,000 feet long. According to Manager M. G. Blackley's statement, "[w]e mobilized contractors along with our available [equipment] to this location to remove the mud and trees so we could restore service."

Several of the Carrier's employees were called out to work clearing the tracks. According to employee J. M. Sewell:

> "We worked on the Omaha sub between M.P. 328 & M.P. 349 all during the hours of 04:00 on the 6th to around 08:00 on the 7th. Working with me was P. A. Gibson, D. L. Cunard, & D. J. Meyer. . . . At around 17:00 hours on the 6th Mr. Cunard and Mr. Gibson were sent home. . . . I asked . . . if we should keep these operators here if needed . . . [and t]he reply was no K.R.W. people would stay. I worked during the night running the form B. [T]he K.R.W. people stayed all night. . . ."

Cunard and Gibson confirm in their statements that they were sent home at 5:00 P.M. on May 6, 2007.

According to the record, the track was opened for some traffic around 5:00 P.M. on May 6, 2007 (which is also shown by employee Sewell's statement - "I worked during the night running the form B").

Rule 52 (Contracting) provides:

> "(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than Maintenance of Way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disasters."

Clearly, the washout and mudslides on May 6, 2007 constituted an emergency as contemplated by Rule 52(c). The mudslides were approximately four feet deep and 2,000 feet long and train service ceased. The Carrier therefore had the latitude to use contractors to meet those emergency conditions - both under Rule 52(c) and under established authority (see Third Division Award 32273 - ". . . heavy rains and flooding that had washed out track at various locations" which resulted in slow orders considered to be an emergency).

In its September 7, 2007 letter, the Organization concedes, as it must, that given the conditions of the mudslides as they first existed on May 6, 2007, ". . . an emergency existed for a while. . . ." According to the Organization in its December 11, 2007 letter, however, "[s]ome Claimants not called while the contractor's employees were called to work and were allowed to remain and perform the work."

Three factors lead the Board to conclude that the claim has merit.

First, contrary the Carrier's position, ". . . exclusivity is not a necessary element to be demonstrated by the Organization in contacting claims." Third Division Award 32862 and Awards cited therein.

Second, the lack of evidence concerning the Carrier's attempts to contact its employees to work the emergency is problematic. Even though an emergency existed when the mudslides occurred, which gave the Carrier much greater latitude with respect to its Rules, 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") 32419 ("[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"). There is no evidence in this record to show the extent of such attempts by the Carrier, if any.

Third, the lack of an explanation in this record why - at least as of 5:00 P.M. on May 6, 2007 when the mudslides were cleared to the extent that trains were able to again move through the area - the contractors' forces were kept working and some of the Carrier's employees were sent home and, yet again, other Carrier employees were not contacted to come in and work. See Third Division Award 38349 (". . . once the track was unimpaired and thereby useable, the emergency ceased to exist").

The adversely impacted employees lost work opportunities and therefore should be made whole. The claim shall therefore be sustained, but the remedy shall be limited to the named Claimants not contacted to work the emergency, as well as those employees released from the jobsite. Those employees shall only be compensated for the period after 5:00 P.M. on May 6, 2007 when it appears that the emergency was over.

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 25th day of March 2010.