

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40767
Docket No. MW-40148
10-3-NRAB-00003-070393
(07-3-393)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(BNSF Railway Company (former Burlington
(Northern 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 (Hulcher) to perform Maintenance of Way and Structures work (remove/install track panels and related work) at locations between Mile Posts 82.3 and 125.5 on the Orin Subdivision on May 17, 18, 19, 20, 22, 23, and 24, 2005 [System File C-05-C100-99/10-05-0241(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract out said work as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants P. Bratt, Jr. and L. Garniss shall now each be compensated for fifty-six (56) hours at their respective straight time rates of pay and for twenty-eight (28) hours at their respective time and one-half 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 Claimants are assigned as Group 2 Machine Operators (track hoe excavator) on Seniority District 82. They perform routine maintenance such as removing and installing track panels. The panels are 39 foot sections of track composed of rail, ties, and anchors.

According to the Organization, Group 2 Machine Operators use front end loaders to remove track panels from existing track. After removing panels, the front end loaders clean the ballast from the roadbed and prepare the area for installation of new panels. Beginning May 17, 2005, the Carrier used a contractor's machine operators and equipment (two crawler track hoes) to assist Carrier forces with the installation of new track panels at various locations between MP 82.3 and MP 125.5 on the Orin Subdivision.

The Organization filed a claim on June 27, 2005, contending the contractor's operators performed work customarily handled by the Claimants. Routine maintenance work (Group 1 Machines and Group 2 Machines for track panels and switches) is within the scope of the Agreement. There was leased equipment on the property available for this work too.

Because the work is within the scope of the Agreement, BMWWE-represented employees have a contractual right to be assigned to and perform the work before the Carrier resorts to employ forces from outside the Agreement. Before contracting the Carrier is contractually obligated to notify the General Chairman

“in writing, as far in advance of the contemplated transaction as is practicable and, in any event, not less than fifteen (15) days prior thereto except in emergency time requirements[.]”

On August 30, 2005, the Carrier denied the claim asserting that extreme moisture (snow plus rain on May 11, 2005) and coal dust combined to reduce the ballast’s ability to drain water from the track and created slippery conditions making the track less stable under the stress of passing trains. The moisture and coal dust at two derailments (May 14 and 15, 2005) impeded the movement of coal between coal facilities and electrical plants. Consequently, the Carrier acted quickly in this emergency to ensure continued service.

There was no way to give a 15-day notice because the derailments occurred on May 14 and 15, the contractor commenced work on May 17, and the Carrier cannot move every employee and every piece of equipment to work on an emergency and, at the same time, continue to maintain all of its trackage.

This emergency called for extra equipment and operators to assist Carrier forces with dirt work and switch installation; all Carrier-owned crawlers were engaged with this emergency. The contractor used large crawler track hoes, side booms (not owned by the Carrier) loaders, and large graders to lift and move material. Carrier forces performed the majority of the work, but the issue was the emergency, special equipment, full employment, volume of work and availability of equipment and employees.

An emergency is an unforeseen combination of circumstances that calls for immediate action. (See Third Division Award 37459.) Given the wording in the Note to Rule 55 with its notice and conference requisites, the burden is on the Carrier to provide probative evidence that emergency time requirements existed which justified not issuing a 15-day advance written notice. When an emergency exists, the Carrier is afforded latitude in its actions and decisions. (See Public Law Board No. 2206, Award 46.)

The derailments at MP 62 and MP 77 occurred two and three days prior to the Carrier letting this disputed work to contract. Rain and snow (May 11, 2005) layered on top of the thawing rail bed mixed with the accumulated coal dust to prevent water from draining away from the track. The moist coal dust seeped into

the track structure to create a muddy substance, i.e., “coal dust gumbo.” It was present between track ties at the two derailments (May 14 and 15, 2005).

This condition is not an unforeseen circumstance given the fact that snow and rain occur in spring-time in Wyoming when the ground is thawing and coal and its dust are transported on this high density line. The derailments, per se, may be an unforeseen circumstance, but in the circumstances herein, they occurred on a different main line track from the contracted work and, standing alone, did not cause the surface problems at certain locations between MP 82.3 and MP 125.5 where “coal dust gumbo” was present.

Rail expansion in the Powder River Basin is ongoing; simultaneous with the expansion is routine maintenance. Coal dust is ever-present in this environment. There was normal precipitation in the counties and localities between MP 82.3 and MP 125.5 and in the area where the derailments occurred. Following the derailments on May 14 and 15, transport resumed on May 18, 2005, with slow orders. Tracks remained passable at the locations between MP 82.3 and MP 125.5 with the moisture and coal dust.

The Carrier states that Award 46 of Public Law Board No. 2206 involved a situation wherein an emergency existed as in this claim. The circumstances in Award 46 and the circumstances in this claim are not similar. The Carrier did assert an “emergency” in Award 46 and it issued a notice with conference occurring ten days later; there was no notice in this claim and a conference occurred in November 2006, more than one year after the incident. The flooding in Award 46 was part of damages caused by double the normal amount of rainfall leading the governor to declare a state of emergency; in this claim the precipitation (snow and rain) was normal for the area. In Award 46 there were stranded trains, washed out bridges, impassable tracks and rerouted service; all of that is missing in this claim where tracks remained passable between MP 82.3 and MP 125.5 and, after the second derailment on May 15, transit resumed by May 18, 2005, with slow orders.

Whatever the merits of the Carrier’s case, the question in this claim is one of notice under the Agreement because this work is within the scope of the Agreement. (See Third Division Award 26212.) Weather contributed to and complicated this situation, but emergency conditions did not exist based on the circumstances and findings set forth above. Whether a notice would have resulted in a resolution

through conference for use of Carrier forces is speculative, but that need not be addressed here.

The Carrier is aware that a decision to contract out work, which is customarily performed by Carrier forces, may result in an award of compensation. The Claimants were subjected to a loss of work opportunity due to a Rule violation. Full employment or vacation during the claim period does not relieve the Carrier from compliance with the Agreement. Monetary relief is appropriate to preserve and protect the integrity of the Agreement and Appendix Y. The Claimants shall be made whole for the actual number of hours of contractor-performed work at the Claimants' respective rates of pay. (See Third Division Awards 30661, 31521, 36093 and 37470.)

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 15th day of December 2010.