

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40787
Docket No. MW-40514
10-3-NRAB-00003-080349**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (haul main line ballast) from the stock pile in the Lincoln Terminal at Lincoln, Nebraska to Abbott, Grand Island and Ravenna, all locations on the Ravenna Subdivision, on October 19, 20, 25 and 26, 2006 [System File C-07-C100-13/10-07-0019(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 or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces 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 R. Stoner, M. Lane, R. Hayes, D. Claus, T. Brandt, E. Adam and R. Drew shall now be “. . . paid 19.3 straight time hours each for the 136 hours worked by the**

contractors drivers at their big truck drivers rate of pay as settlement of this claim.”

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.

On October 18, 2006, a derailment involving 31 loaded cars occurred on the main line at Abbott, Nebraska. There was extensive damage to the track and to a bridge on the line. Carrier forces and outside contractors worked together to restore service. Shortly after midnight on October 19, the track was reopened for movement of trains, but at restricted speed. Carrier forces and outside contractors continued to work together on the track and to repair the bridge. Because there was not sufficient ballast already on site, the Carrier contracted with Pavers, Inc., to move ballast from the Lincoln Terminal to the Ravenna area for use in the repairs to both the track and the bridge. According to the claim originally filed by the Organization, the contractor had seven trucks that worked eight straight time hours on October 19; four trucks that worked eight straight time hours on October 20; and three trucks that worked eight straight time hours on both October 25 and 26, 2006.

The Organization filed this claim under the Note to Rule 55, challenging the Carrier's use of Pavers, Inc., instead of its own forces and equipment or leased equipment on October 19, 20, 25 and 26, 2006. According to the Organization, the emergency ended when the main line reopened a few hours after the derailment. Moreover, as pointed out by the Local Chairman “. . . this rock was hauled after the main line was reopened. . . . This rock was hauled from the Lincoln, Nebraska,

Terminal to Grand Island, Nebraska, Ravenna, Nebraska, and Abbott, Nebraska, and stock piled there to be used as and where it was needed.” The Organization also contends that the Carrier failed to provide adequate notice of the proposed subcontracting as required by the Note to Rule 55 and Appendix Y.

The Carrier asserts that its actions were permitted under the Rule 55 emergency exceptions regarding both the use of outside contractors and the failure to provide timely notice. Specifically, in its January 2, 2007, response to the claim, the Carrier noted:

“After the derailment at Abbott, the emergency work did not conclude with the opening of the main line. The track is always put back in service as quickly as possible, but normally the permanent repairs require additional material, equipment and man-hours. Carrier employees worked over fourteen thousand (>14,000) hours on repairs for this derailment, but the Carrier did not have sufficient equipment or additional truck drivers to haul in the necessary ballast.”

Additionally, during the initial investigation, the Roadmaster explained the scope of the work and the need to subcontract some of it in an e-mail dated November 2006:

“... The emergency work did not conclude with the opening of the track, in fact the Bridge 105.76 was rebuilt on 10-21 and additional ballast was needed for the rebuild. The ballast depth for opening the track was insufficient for a BNSF track section, this required additional ballast to be delivered to the derailment site for placement in the track structure. BNSF does not have a large enough dump truck fleet to handle the amount of ballast required in the time frame needed. Dump trucks are not available to be rented without operator on a daily basis and only 3 of the trucks assigned to truck drivers named in this claim are appropriate for hauling ballast rock, the remainder are log style trucks for handling large solid material not rock. All ballast was hauled to the derailment site.”

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

"[S]uch work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

In addition, if the Carrier plans to contract out work on one of these bases, the Note to Rule 55 requires the Carrier to notify the Organization "as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases." The Organization may request a conference to discuss possibilities for avoiding the proposed contracting out, pursuant to the Note to Rule 55 and Appendix Y.

In this case, the parties do not dispute that the work at issue is work "customarily performed" by Carrier forces, and Rule 55 applies. The real issue is whether the emergency exceptions apply.

The burden is on the Carrier to establish the existence of any of the exceptions to Rule 55. It has done that here. A 31-car derailment that closes the main line is clearly an unanticipated event that requires immediate attention to correct. Moreover, the Board accepts the Carrier's explanation that the emergency did not end when the main line was reopened. Train speed on the reopened line was reduced, and Bridge 105.76 still needed to be replaced. It appears that there was a massive mobilization of personnel and resources to repair the damage caused by the derailment. The Carrier estimated that its forces spent more than 14,000 hours on the job. The Roadmaster's explanation of the need to contract out the ballast hauling work was both credible and consistent with the size of the job at hand. According to the Roadmaster, who addressed the issue within a few weeks of when

the claim was filed (and about a month after the incident occurred) all of the ballast was hauled to Ravenna to be used in the repairs. Several months later, the Local Chairman asserted otherwise, but there is nothing in the record to support that allegation. Considering the record as a whole, the Board concludes that the derailment that occurred on October 18 constituted an emergency as that term was meant in Rule 55. Accordingly, under the exception for “emergency time requirements . . . which present undertakings not contemplated by the Agreement and beyond the capacity of the Company’s forces,” the Carrier did not violate the parties’ Agreement when it used outside contractors in addition to the Carrier’s own forces to make emergency repairs in a timely fashion.

The Organization implied that while there may have been an emergency on October 19 and 20, it did not extend to October 25 and 26, when Pavers’ operators and trucks also hauled ballast to the site. The question “how long does an emergency last?” is a legitimate one for the Organization to raise, but it is a question that is not susceptible to a generic answer that will fit all circumstances. Every emergency is different. Some emergencies are capable of being handled in a relatively short time (mere hours) while others require more time to redress. In this case, the derailment shut down the main line. There was considerable track damage and a bridge needed to be rebuilt. The fact that the main line was reopened within a few hours did not end the emergency. The track was repaired only enough to permit traffic to resume at a reduced speed. More permanent track repairs remained to be done and Bridge 105.76 still needed to be rebuilt. In addition, it appears from the record that the repairs required more ballast than originally anticipated, which would explain the need for a second round of hauling. October 25 and 26, while separated by a few days from the original incident, are still close enough in time (seven to eight days) to the original emergency to be considered part of it, given the size of the effort expended to deal with the damage caused by the derailment.

The Organization also grieved the Carrier’s failure to give it proper notice under Rule 55 of the proposed contracting out. In that regard, Rule 55 states that the Carrier will give notice “as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in ‘emergency time requirements’ cases.” (Emphasis added.) This is one of those cases. The derailment occurred on October 18. The subcontracting

occurred immediately thereafter, on October 19, 20, 25 and 26, in response to the emergency nature of the work that needed to be done. The Carrier literally could not have given 15 days' notice - nor was it required to under Rule 55's "emergency time requirements" exception.

The Carrier did not violate the parties' Agreement when it subcontracted the work at issue.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.