

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40792
Docket No. MW-40566
10-3-NRAB-00003-080396**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Atchison, Topeka,
(and Santa Fe Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Messer Co.) to perform Maintenance of Way work (operate loaders and dump truck) in the clean-up of a prior derailment at the South Yard in Amarillo, Texas, on December 26, 2006 [System File F-07-01-C/13-07-0006(MW) ATS].**
- (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 as required by Appendix No. 8.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Collins, D. Hancock, R. Lewis, M. Sperry, P. Place and E. Graham shall now each be compensated for eight (8) hours at their respective straight time rates of pay and for two (2) hours’ pay 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.

At about 8:45 A.M. on Christmas morning, December 25, 2006, a derailment occurred on Track 101 in the Amarillo, Texas, yard. Four loaded cars from train M-KCKBEL-1-24 derailed; two cars were on their sides and leaking ethyl alcohol onto the track. Depending on whose perspective one looks at, this was either a relatively small derailment that was quickly cleaned up (the Organization) or a much more serious incident that had consequences beyond the immediate restoration of track services (the Carrier). According to the Organization, the two cars initially leaked small amounts of ethyl alcohol from relief valves as they lay on their sides, and response crews were prompt in stopping the leaks, which posed no threat to human or animal life and simply evaporated. The derailment occurred in an isolated area of the South Yard, where there was also a triple track main line. As a result, main line train traffic was not stopped and the derailed cars were re-railed within hours. The entire area was open to rail traffic by 10:30 P.M. that same evening. The Carrier describes the incident in more serious terms: emergency action was required to restore the line for track movement, contain the leaks, repair the track, and clean up the debris. Gathering of the necessary material for the repairs began in the morning and continued into the late night hours on December 25. Initially, BMW forces, other Carrier forces, and outside contractors worked together to open the track at a very restricted speed limit, and then they proceeded to begin the derailment clean-up.

However one characterizes the incident and the events of December 25, on the next day, December 26, 2006, the Carrier continued to use the outside contractor as

part of the clean-up effort, which included hauling rock, hauling track to the derailment site, and cleaning up the leak and derailment area. The contractor utilized four front-end loaders and two dump trucks, all with operators, working a total of ten hours on December 26. There is no evidence indicating that the contractor worked at the site any time after December 25 and 26.

By letter dated February 6, 2007, the Organization filed this claim under Appendix No. 8 (Article IV of the May 17, 1968 National Agreement, challenging the Carrier's use of an outside contractor to perform M of W work and its failure to provide proper notice of the proposed contracting out of work normally performed by M of W employees. According to the Organization, the clean-up work performed by the contractor has historically and customarily been done by M of W forces and is reserved for them by the Agreement. As stated by the Organization, "with a modicum of managerial foresight, the Carrier could have scheduled the work to be assigned to the Claimants to enable them to perform the work during the period involved and claimed herein. Moreover, the Carrier could have scheduled the work to be performed prior to the period in question, preceding or following the regular work day and/or on rest days on an overtime basis."

The record includes evidence that M of W forces were not the only Carrier forces who participated in the derailment response work. Collective bargaining provisions for both the Carmen (Brotherhood of Railway Carmen) and the Machinists (International Association of Machinists and Aerospace Workers) anticipate and provide for those forces to assist in case of wrecks and derailments. (See Rule 83 - Classification of Work, and Rule 86 - Wrecking Crews in the Carmen's Agreement, as well as Rule 54 - Work at Wrecks in the Machinists' Agreement.) Carrier forces from these bargaining units were also called out to deal with the December 25, 2006, derailment, without complaint from the Organization.

Appendix No. 8 - Contracting Out, provides, in relevant part:

"In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

* * *

LETTER OF UNDERSTANDING DATED SEPTEMBER 28, 1956

In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employes of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes, landslides and similar disasters.”

The Organization contends that the cleanup work performed by the contractor on December 26, 2006, was merely that, cleanup work, and not an emergency. The emergency - if one ever existed - ended when the track was returned to service on Christmas night. The small derailment occurred within a rail yard and on a triple main line track. Hence, any “emergency” exception to either the Carrier’s obligation to use its own forces to perform the work or its obligation to provide timely notice of contracting out no longer applied. Moreover, the work involved here, cleaning the right-of-way, is routine maintenance-of-way work that was unquestionably encompassed within the scope of the parties’ Agreement and accrued to the Carrier’s forces. It should have been performed by M of W forces, not by a contractor. Finally, once the emergency was over, the Carrier had an obligation under Appendix No. 8 to provide proper notice to the Organization of the proposed contracting, which it did not do.

The Carrier’s position is simple. The derailment constituted an emergency that did not end when track service was restored on Christmas night. Derailment response

work is not exclusive to BMW-represented employees; Agreements with other Organizations give those forces the right and ability to participate in emergencies involving wrecks such as derailments. In addition, Appendix No. 8 gives the Carrier the express right to call in contractors to perform work in emergencies. The claim cannot be sustained.

The Accident/Incident Report appears to establish that, for a derailment, the incident was not as bad as it might have been. Four cars sustained major damage and a fifth, minor damage. The alcohol leaks were described in the Report as “dripping;” one car was estimated to have lost approximately five gallons of liquid and both were plugged right away to minimize spillage. All of the alcohol evaporated. No one was injured or evacuated because of hazardous waste. Nonetheless, the derailment still constituted an emergency. It was an unanticipated adverse event that required an immediate, concentrated response in terms of both personnel and resources to restore operations to normal. The Carrier immediately called out M of W forces, as well as Carmen and Machinists and at least one outside contractor to remediate the situation.

The Organization has no complaint with the Carrier’s immediate response; its grievance is with the continuing clean-up work that carried over to the day after the accident. Its arguments are not convincing, however.

Appendix No. 8 gives the Carrier the express right to call in outside forces in cases of emergency:

“In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment of contractors or others and use other than Maintenance of Way employes of the Carrier in the performance of work in emergencies, such as wrecks. . . .”

The December 25 derailment was such a “wreck,” and the Carrier was entitled to use an outside contractor to assist in the work required to get things back to normal. ¹

¹ Appendix No. 8 pertains regardless of whether the work “belongs” to M of W forces or not. It should be noted here, however, that Carrier forces from different crafts also participate in disaster response and clean-up, per their respective agreements. As a result,

The Organization's position is that once track service is restored, any emergency is over. That is too simplistic a view. As the Board noted in Third Division Award 40787, "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." Wrecks and derailments are accompanied by a great deal of debris and damage, not just to the cars involved, but also to the track and surrounding area. Getting the track back in service is only part of the emergency repair and remediation process. Under the Organization's interpretation of "emergency," once track service was restored, the Carrier would have to stop all emergency response and clean-up work in order to provide the Organization with a 15-day notice of its intent to contract out the work. It would have to leave any accident debris in the yard for more than two weeks in order to pursue notice and consultation - at the end of which, if the parties were unable to agree about how to handle the work (internally or using an outside contractor) the Carrier could use the contractor to perform the work anyway. In the meantime, the remaining debris would pose its own hazard in the yard. Such a result would be nonsensical and is certainly not what the parties intended when they negotiated Appendix No. 8. There is no evidence that the Carrier acted here in bad faith to replace its own forces. It acted to complement its own forces in order to finish the emergency clean-up so that operations could return completely to normal. The clean-up work necessitated by the emergency (and an on-going part of the emergency) continued from December 25 to December 26, 2006. The Carrier was permitted under Appendix No. 8 to utilize outside equipment and Laborers on December 26 as part of the continuing emergency response.

The Carrier did not violate the parties' Agreement when it hired an outside contractor to assist its own forces to complete the emergency clean-up work at the South Yard on December 26, 2006. Accordingly, this claim must be denied.

it would appear that at best there is a mixed practice regarding performance of emergency work.

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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.