

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40807
Docket No. MW-40728
10-3-NRAB-00003-0080614**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 (Rick Franklin Company) to perform Maintenance of Way and Structures Department work (cutting rail, spiking, gauging and related track repair work) at Mile Post 690.5 in Albany, Oregon on May 3 and 4, 2007 (Carrier’s File 1479963 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 work referenced in Part (1) above 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, Article IV of the May 17, 1968 National Agreement and the December 11, 1981 Letter of Understanding.**
- (3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimants P. Henshaw, R. Hamilton, S. Midbust, S. Andrew, J. Saeburn, R. Powers, Sr., T. Doolittle and K. Armstrong shall now each be compensated for seven and one-half (7.5) hours at their respective time and one-half rates of**

pay and for six (6) hours at their respective double 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.

Except for the number of hours spent performing track work, the basic facts of this claim are essentially free of dispute. The Carrier had a derailment on its mainline which needed immediate corrective efforts. The fact that a state of emergency existed is acknowledged by the Organization. The contractor called by the Carrier to assist with the cleanup of the derailment supplied nine employees who worked from 3:30 P.M. on May 3 through the night until 5:00 A.M. on May 4 for a total of 13.5 hours. However, an email statement in the record from the Manager of Track Maintenance stated as follows:

“Contractor did in fact help to clean up the derailment as is customary and expected as that is what he is hired to do. His forces assisted the car dept. re-rail the cars and assisted the track forces to set spikes and apply rail anchors. This was nothing we could not have done ourselves {sic} with the forces on hand. The total time contractor forces assisted track forces was three hours.” (Emphasis added)

During the claim handling process on the property, the Organization made repeated assertions about the availability and desire of the Claimants to assist in the derailment cleanup. According to these assertions, none of the Claimants was called to work. They were left at home within minutes of the derailment site and others

were no more than 40 minutes away. They even called in to express their availability and willingness to participate, but were told that “. . . things were taken care of.” None of these assertions was refuted by the Carrier.

While it is well-settled that emergency circumstances do permit the Carrier broad latitude in the deployment of its forces to contend with an emergency, we do not believe any of the prior Awards of the Board allow the Carrier to totally ignore the rights of its available and qualified employees under the effective Agreement. Under the circumstances, we find that the Carrier’s action did constitute a violation of the Agreement to the extent that contractor forces performed routine track work within the scope of the Agreement that did not require any special skills or equipment. The record establishes that the contractor’s forces were so engaged for only three hours or a total of 27 hours.

In its September 27, 2007 appeal, the Organization cited four prior Awards for the proposition that a loss of work opportunity such as occurred here should be compensated at straight time rates. Accordingly, we find that each of the Claimants should be compensated for a proportionate share of the 27 hours at their respective straight time rates of pay in effect at the time.

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.