

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40865
Docket No. MW-40620
11-3-NRAB-00003-080477**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 (dig drainage ditches, build roads, clear trees and brush and other work) on the St. Joe Subdivision between the East Siding Switch Old Salem and Salem, Nebraska on October 30 through November 8, 2006 [System File C-07-C100-54/10-07-0088 (MW) BNR].**
- (2) The Agreement was violated when the Carrier assigned outside forces (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (build roads, clear trees and brush and other work) on the St. Joe Subdivision between the East Siding Switch Old Salem and Salem, Nebraska on November 9 through November 17, 2006 [System File C-07-C100-53/10-07-0087 (MW)].**
- (3) The Agreement was violated when the Carrier assigned outside forces (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (dig drainage ditches, build roads, clear trees and brush and other work) on the St. Joe Subdivision**

between the East Siding Switch Old Salem and Salem, Nebraska on November 20 through November 22, 2006 [System File C-07-C100-55/10-07-0089 (MW)].

- (4) The Agreement was violated when the Carrier assigned outside forces (Pavers, Inc.) to perform Maintenance of Way and Structures Department work (dig drainage ditches, build roads, clear trees and brush and other work) on the St. Joe Subdivision between the East Siding Switch Old Salem and Salem, Nebraska on November 27, 28, 29, December 4, 5, 6, 7, 8, 11 and 12, 2006 [System File C-07-C100-56/10-07-0090 (MW)].
- (5) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract out the aforesaid 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.
- (6) As a consequence of the violations referred to in Parts (1) and/or (5) above, Claimants V. Pella, M. Jakoubek, J. Lempka, J. Constantine, R. Waggoner, J. Jackson, L. Fountain and D. Biggs shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay.
- (7) As a consequence of the violations referred to in Parts (2) and/or (5) above, Claimants V. Pella, M. Jakoubek, J. Lempka, and L. Fountain shall now each be compensated for fifty-six (56) hours at their respective straight time rates of pay.
- (8) As a consequence of the violations referred to in Parts (3) and/or (5) above, Claimants V. Pella, J. Lempka, R. Waggoner, L. Fountain and D. Biggs shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay.

- (9) As a consequence of the violations referred to in Parts (4) and/or (5) above, Claimants R. Waggoner and L. Fountain shall now each be compensated for eighty (80) hours at their respective straight 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.

This case was originally filed as four separate claims. However, because they involve the same facts and issues, only at different time periods, the parties agreed to consolidate them for presentation before the Board.

On October 27, 2006, a derailment involving 21 cars occurred near Salem, Nebraska, that caused extensive damage to some 1.3 miles of track, from MP 126.2 to MP 124.9. Repairs were complicated by the isolated location of the derailment as well as the topography of the area and the fact that the only access was at a private crossing. Once the Carrier made arrangements to use the landowner's crossing, the existing road had to be improved so that it could be used by Carrier forces and equipment. Another road had to be constructed along the right-of-way in order to access the derailed cars and damaged track. Beginning on October 30 and continuing intermittently until December 12, 2006, the Carrier used an outside contractor to perform this work. The Organization filed a claim dated December 18, 2006, alleging that the Carrier had improperly contracted out bargaining unit work and that it had failed to provide timely notice of its intent to contract out the work. The thrust of the Organization's argument to the Board is that the work was routine track maintenance

work covered by the Note to Rule 55 and that any “emergency” could not have lasted the entire duration of time that the contractor was working.

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 February 14, 2007, response to the claim, the Carrier noted:

“A derailment near Salem, NE, on October 27, 2006, caused extensive damage to over 1.3 miles of track. In emergency situations the Carrier may use all resources to restore the track as quickly as possible. The claimed dirt work was necessary as the derailment area had many drainage ditches on each side of the track, and involved a private crossing. A road had to be constructed to allow access to the track structure for the entire length of the damage and for access to the derailed cars. Carrier employees have been compensated for over nineteen thousand (>19,000) hours at the derailment site, and clearly have not lost a work opportunity. When available, the Claimants worked and were already compensated for straight time and considerable overtime on the claim dates, and most were already working at the claim location.”

According to the Carrier, outside forces were assigned to perform the road work so that Carrier forces could concentrate on repairing the damaged track and right-of-way. In an e-mail sent on February 6, 2007, during the initial investigation, the Roadmaster explained the scope of the work and the need to subcontract some of it:

“Concerning the derailment repairs due derailment of MINTUL 1 26 near New Salem NE. Unlike many derailments this derailment spanned from MP 126.2 to MP 124.9. There were many topographic difficulties encountered in the initial return track to service as well as traditional derailment cleanup.

This derailment spread over 1.3 miles, throughout this area there are substantial drainage ditches on each side of the track, the only access

to this area is at a private crossing. An agreement with the landowner adjacent to the track access required improvement to the road in excess of ½ mile. From that location it required construction of a ROW road to access the derailed cars and to facilitate the repairs to the track structure for the entire length of the damage. The repairs to the track structure were not completed when the first train traversed the site in fact this work is nearing completion now.

Pavers [the contractor] provided the BNSF with the means to gain access to the track to complete the repairs due to this derailment. . . .”

The Carrier contends that the emergency was on-going until the track was finally brought back into full service in early 2007. The movement of traffic continued to be affected until repairs were completed. Although the track at the derailment site was opened for traffic relatively quickly after the accident, there is no dispute that trains were subject to a go-slow order for an extended time. One of the Claimants submitted a statement about the work done by the contractor in which he stated: “Trains were operating on the track under a 25 mph slow order.” He described the work done by the contractor as various types of ditch work, reshaping the right-of-way, making a road, and hauling dirt, trees and ballast.

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 on 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. The Note to Rule 55 adds further language concerning the performance of work during an emergency:

“Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when additional force or equipment is required to clear up such emergency condition in the shortest time possible.”

In this case, the Carrier contends that the work performed by the contractor to make the existing road accessible to Carrier forces and equipment and to construct a new access road to the site of the derailment is not work “customarily performed” by Carrier forces, and Rule 55 does not apply, in terms of either providing notice or limiting the Carrier’s right to contract the work. If the work is subject to Rule 55, the emergency exceptions apply. In either instance, the claim should be denied.

The Board finds the Carrier’s position persuasive.

The burden is on the Organization to establish that the work at issue is work customarily performed by Carrier forces. The work performed by the contractor here was hardly routine MofW work. It was necessary to construct an entirely new road in order to provide access to the site of the derailment for Carrier forces, who performed the track repairs. Carrier forces are certainly capable of doing such work, but the Note to Rule 55 applies only to routine bargaining unit work, which the work at issue was not. The Organization has not successfully established that the disputed work falls with the parameters of Rule 55.

Even if Rule 55 did apply, the disputed work falls within the emergency exceptions. The burden is on the Carrier to establish the existence of any of the exceptions to Rule 55. It has done that here: a 21-car derailment that closes the main line and damages 1.3 miles of track is clearly an unanticipated event that requires immediate attention to correct. The Board has previously articulated its opinion that an emergency is not necessarily over simply because the main line reopens. Trains were subject to a half-speed slow order for months. There was a massive mobilization of personnel to repair the damage caused by the derailment: the Carrier estimated that its forces spent more than 19,000 hours on the job. The Roadmaster's explanation of the need to contract out the access road work so that Carrier forces remained free to concentrate on the main track repairs was credible and consistent with the size of the job at hand. The derailment near New Salem that occurred on October 27 constituted an emergency as that term was meant in Rule 55. Rule 55 permits the use of outside forces "when additional force or equipment is required to clear up such emergency condition in the shortest time possible." The Carrier's use of outside forces was limited to only what was necessary to complete access: even after the contractor had completed its work, repairs on the track continued for approximately two more months before they were finished. 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. Additionally, once the Carrier had contracted the access road work, it did not make sense, nor was it required by contract, to fire the contractor mid-job to turn it over to Carrier forces, which remained fully occupied with the basic track repairs.

The Organization also grieved the Carrier's failure to give it proper notice under Rule 55 of the proposed contracting out. Rule 55 states that the Carrier will give notice "as far in advance of the date on 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 27. The subcontracting started almost immediately thereafter, on October 30. The Carrier literally could not have given 15 days' notice - nor was it required to under Rule 55's "emergency time requirements" exception.

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The Carrier did not violate the parties' Agreement when it contracted 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 7th day of February 2011.