

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40934
Docket No. MW-41118
11-3-NRAB-00003-090489**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific 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 (Hamm's Quarry) to perform Maintenance of Way work (distribute rip rap and related work in conjunction with bank stabilization) at various locations on the Kansas Subdivision on June 9, 10, 11, 16, 17, 18, 19, 20, 30, July 1 and 2, 2008 (System File D-0852U-210/1507489).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman an advance written notice of its intent to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the national December 11, 1981 Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Brumbaugh, C. Lux, M. Magnet, P. Lees, M. Taphorn and T. Brummett shall now each be compensated for one hundred and two and one-half (102.5) 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.

The facts are that in June 2008, the Carrier was affected by heavy rain erosion on the Kansas Subdivision. At Mile Post 17.10 and Mile Post 87.50, the rain caused the embankments to slip away resulting in unstable grade conditions and the removal of a main line from service. The Carrier arranged for the purchase and delivery of 1500 cubic yards of heavy rip rap material for stabilization. The outside contractor was assigned duties of loading, transporting, and placing rip rap material to stabilize embankments at the aforementioned locations.

It is the Organization's position that the Carrier failed to serve notice in accordance with Rule 52 and the December 11, 1981 Letter of Understanding and the work performed by the outside contractor was covered work customarily and historically done by its members. It further argued that Rule 52 contains exceptions which must be present before the Carrier can be allowed to contract work, and in this instance, no exception existed including the Carrier's assertion that it was an emergency situation. It argued that the conditions may have been urgent, but it was not an emergency. It concluded by requesting that the claim be sustained as presented.

The Carrier submitted that emergency conditions existed account of heavy rainfalls that necessitated immediate action to stabilize embankments. It asserted there is no dispute that rains and flooding shut down the main line as stated by its Supervisors without effective rebuttal. It argued that in accordance with Rule 52 it

met one of the conditions that allowed it to use an outside contractor without serving a 15-day advance notice, that being, that it was an emergency situation. Additionally, it argued that it did not own or have access to the heavy duty trucks needed to haul the rip rap, which it stated was not disputed by the Organization. It closed by asking that the claim remain denied.

Rule 52 - CONTRACTING, Paragraph (a) which was relied upon by both parties, states the following:

“By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such 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 Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization in writing 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. If the General Chairman, or his representative, requests a meeting to discuss matters relating to said contracting transaction, the designated representative of the Company will promptly meet with him for that purpose. Said Company and Organization representatives shall make a good faith attempt to reach an understanding concerning said contracting but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.”

During the handling of the claim on the property the Carrier offered two statements from its Supervisors. One Supervisor stated the conditions involving the incident were as follows:

“It was an emergency situation. The main line was out of service because of heavy rains in the areas and the embankment slipped away causing a unstable sub grade condition. . . .”

The Director of Track Maintenance (DTM) described the conditions, in pertinent part, as follows:

“. . . this was an emergency situation whereby heavy rains and runoff and high waters on the Kansas River, eroded the embankment and toe of the high fill along our Main Line at MP 17 on the Kansas Sub. Main Line #2 was removed from service for approximately 12 hours while temporary emergency repairs were made. . . .”

The DTM also stated that the heavy duty rock trucks were utilized to access the bottom of the creek bed. He asserted that the Carrier did not own or have access to this type of equipment; nor did it have the expertise to undertake an endeavor of this magnitude. He further asserted that BMW forces do not operate this type of machinery. That secondary argument made by the DTM might have met one of the other exceptions for the usage of outside contractors under Rule 52 on the basis that the Carrier did not have the necessary specialized equipment needed and/or skill to operate that machinery. However, that argument will not be considered in this instance for two reasons. First, if that was one of the reasons for the use of an outside contractor, Rule 52 would have required at least a 15-day advance notice and discussion, if requested. Secondly, and more importantly, in this instance the Carrier’s sole basis for using the contractor was that emergency conditions existed and on that basis alone the claim will be resolved.

The Organization challenged the existence of an emergency arguing slow orders were in place prior to the heavy rains, and according to it, that showed there might be an urgent situation, but not an emergency. Review of the record indicates that the statements presented by the Supervisor and the DTM were not effectively

rebutted. The track was taken out of service for approximately 12 hours for emergency repairs because the embankment was rapidly dissolving, after which permanent repairs followed. It is noted that the Carrier served an informational notice to apprise the Organization of its use of contractors after the emergency work had begun. That action does not detract from the Supervisors' statements attesting to an emergency caused by excessive rainfall that created unstable grade conditions and embankments slipping away on the Kansas Subdivision. No on-property statements were offered to counter those assertions. The Board finds and holds that there was no requirement for the Carrier to serve an advance notice before it could use contractors for the period in question because emergency conditions existed. Therefore, the claim must be denied.

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 24th day of March 2011.