

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41169
Docket No. MW-40980
11-3-NRAB-00003-090273**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud 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 (KRW Contracting) to perform Maintenance of Way and Structures Department work (remove and install ties) in the vicinity of Mile Post 68 in Schuyler, Nebraska on December 11, 12, 13 and 14, 2007 (System File D-0752U-230/1495223).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Beavers, J. Mumm and B. Sock shall now each be compensated for thirty-eight (38) hours at their respective and applicable 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 determination of this claim turns on the Carrier's ability to meet its burden to establish its affirmative defense of the existence of an emergency that justified its actions. Although the Carrier also contends it provided notice of the contracting out well before the events at issue and before the events occurred, it is the affirmative defense of "emergency" that the Board reviews first. After careful review of the statements presented on the property, the Board finds the following underlie the events that are subject to the claim. The contractor (KRW) came and remained on the scene after the track was cleared and the slow order remained in effect. The contractor used three of its employees to operate its backhoes – equipment within the Carrier's inventory. The contractor remained on site for eight hours on December 11 and ten hours on December 12, 13 and 14. Each of the contractor's employees worked 38 hours.

The Organization argues that the Carrier did not carry its burden to establish that an "emergency" existed because of the derailment. The Board's findings are based on the employee's statement included in the on-property record. There was a derailment that blocked both mainline tracks. Such blockage constitutes an "emergency." (See Third Division Award 32097.)

The Carrier deployed personnel from at least three gangs located in the area to clear the track. All employees, including the Claimants, were fully employed. After the blockage was removed from one track, a slow order was placed on traffic on the other track.

The Carrier brought the contractor on site after one track was cleared. In Third Division Award 29965, the Board recognized that the work to restore mainline track to full operation cannot wait. Initially, after a derailment no notice is required. (See Third Division Award 38953.)

The Organization notes that the track was in service. However, it was under a slow order. Because this was an emergency, Rule 52 recognizes that the Carrier has the latitude to deploy its own or contractor forces necessary to address the emergency.

The emergency continues when traffic must travel under a slow order. (See Third Division Award 32273.) In Award 32273, due to flooding there was a washout. The Board concluded that the Carrier could use contractor forces to address the emergency, where traffic had to operate under a slow order.

In this case, the Carrier committed a large number of its forces (that presumably were working on other projects prior to the emergency) to the derailment. Initially, the derailment created an emergency situation. It continued under the slow order. It is well established that the Carrier may deploy contractor forces to address an emergency. (See Third Division Awards 31676 and 38953.)

In view of our finding that an emergency existed, the Board does not reach the remaining subcontracting and notice issues pressed by the Organization during the handling of this dispute on the property and at the Referee Hearing. The Carrier did not violate the Agreement, when it contracted with KRW to supplement the Carrier's forces to fully restore track operation at Mile Post 68 in Schuyler, Nebraska.

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**

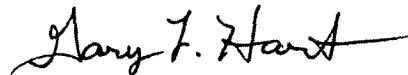
Dated at Chicago, Illinois, this 21st day of November 2011.

LABOR MEMBER'S
CONCURRENCE AND DISSENT
TO
AWARD 41169, DOCKET MW- 40980
(Referee Malamud)

In Award 41169, the majority found that the Carrier's failure to provide advance written notice of the intended contracting transaction did not violate the Agreement because it had proven its affirmative defense that an emergency existed, allowing it to contract out emergency work without advance notice. While we cannot disagree that Rule 52(c) does provide an exception to the advance notice requirement when a bona fide emergency occurs, the Board erred in finding that the Carrier had met its burden of proof in this case that the work performed by the outside contractor was connected to any actual emergency.

The Carrier's emergency argument hinged on its contention that the remaining slow order was proof of a continuing emergency. However, this Division has, in the past, found not only that a slow order is not proof of an emergency, but in Award 27783, we found that an emergency ended after one (1) of two (2) main tracks was open to traffic while the adjacent main track was still blocked. The Majority erred when it failed to follow the established precedent of this Division when evaluating the Carrier's unfounded contention of a continuing emergency.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gary L. Hart", with a stylized flourish at the end.

Gary L. Hart
Labor Member