

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 41772  
Docket No. MW-41177  
13-3-NRAB-00003-100011

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Division -  
( IBT Rail Conference  
(  
(Soo Line Railroad Company (former Chicago, Milwaukee,  
( St. Paul & 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 (Harry Viner, Inc.) to perform Maintenance of Way work (ditching and associated clean-up work) in the vicinity of the LaCrescent Yard in LaCrescent, Minnesota on September 11, 12, 13, 17, 18 and 19, 2007 (System File C-09-07-C080-04/8-00228-148 CMP).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract said work as required by Rule 1 and failed to enter good-faith discussions to reduce the use of contractors and increase the use of Maintenance of Way forces as set forth in Appendix I.
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant K. Kruser shall now be compensated for a total of fifty (50) hours at his respective and applicable rate 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 record evidence reflects that on Saturday, August 18 and Sunday, August 19, 2007, a large swath of heavy rain fell across most of southern Minnesota, with the highest total of 24-hour rainfall of 18.17 inches falling in and around the City of LaCrescent causing flash flooding in the vicinity of the Carrier's LaCrescent Yard, burying the yard in mud. The Carrier appropriately determined the situation to constitute an "emergency" as that term has been defined in previous Board Awards as, "an unforeseen combination of circumstances that calls for immediate action" and, accordingly, arranged to bring in contractor forces to address the damage caused by the flood. Even though under the circumstances of an emergency the Carrier was not contractually obligated to notify the Organization that it was contracting out the work necessary to address the damage caused by the flash flooding of the yard, nevertheless the record evidence reflects that the Carrier verbally notified General Chairman M. S. Wimmer of same.

According to the Carrier, when all the damage caused by the flash flooding was assessed, it notified General Chairman Wimmer in writing of its intention to contract out further emergency work necessary to address damage that had occurred along the river. Prior to its written notification to the Organization dated September 21, 2007, the Carrier had utilized the services of the outside contractor (Harry Viner, Inc.) to perform ditching and associated clean-up work on the six claim dates in question. The Carrier argues that because the work performed on the six claim dates in question was an extension of the emergency, it was not contractually obligated to notify the Organization that it was utilizing the services of an outside contractor even though it made such notification. The Organization submits that the disputed work involved was scope-covered work belonging to BMW-employees and asserted that because the work in dispute was no longer performed in light of an "emergency" situation, the Carrier was contractually obligated to give it proper notice of contracting out the subject work; proper notice being notice given prior to the performance of work - not of work performed after-the-fact. Additionally, the Organization asserts that because the disputed work was scope-covered work belonging to its members as provided under the Controlling Agreement, the Carrier was obligated to assign the disputed work to the Claimant, as opposed to utilizing the services of an outside contractor.

The crux of this case rests on a determination as to whether the disputed work was performed under emergency conditions as the term "emergency" has come to be defined

in cases such as this where a carrier has utilized the services of an outside contractor to perform work contractually reserved and customarily, historically and traditionally performed by BMW-employees. By the fact that the disputed work was performed three weeks after flash flooding had occurred and the Carrier's own characterization of this timeframe as an "extension" of the emergency, the Board finds the following: (1) at the time the disputed work was performed, there was no extant emergency as that term has been defined and accepted in a multitude of past cases as referenced elsewhere above; (2) the disputed work is scope-covered work under the Controlling Agreement belonging to BMW-employees; and (3) under all prevailing circumstances, the Carrier improperly assigned the disputed work to be performed by an outside contractor. As the named Claimant was on vacation at the time the disputed work was performed, a properly identified Claimant shall be the employee compensated for the asserted violation committed by the Carrier. Moreover, because the number of hours worked by the outside contractor on the claim dates cited are in question, the Board remands to the Parties the issue of calculating the specific number of hours to be paid by the Carrier at the appropriate rate of pay.

**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 25th day of November 2013.