

Award No. 15597
Docket No. MW-16174

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
LOUISVILLE AND NASHVILLE RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it employed outside forces to perform Track Sub-department work in connection with a derailment which occurred at Bangor, Alabama, on Mile 356, S&NA, on March 17, 1965. (Carrier's File E 201-12 E 201.)

(2) Assistant Foreman Charles Smith, Jr., Machine Operators J. W. Duke, L. J. Cofer, C. J. Hopkins, Tamper Operator E. L. Askew, Laborers Hoyt Stanfield, W. V. Fitts, Lonnie Rupert, William Mosley, Sylvester Davis, Solomon Logan, Joe West, Sanford Powell, William Cornell, Powell Jackson, Bill Burton, Joe M. Pope and Shakespeare Jackson each be allowed pay at their respective rates of pay for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On March 17, 1965, at about 1:30 P. M., Train No. 78 derailed near Mile Post 356. Instead of immediately calling employees who come within the scope of the Agreement and have seniority within the track sub-department to perform the work of clearing the derailment, hauling necessary material and restoring the damaged section of track, the Carrier employed outside forces (employees of the Thomas Construction Company, as well as a Mr. Cannon and four (4) other local people) to perform said work.

The claimants, who were willing, qualified and fully equipped as well as available, were not called until the beginning of their regular work period on the following days.

Claim was timely and properly presented and handled by the Employees at all stages of appeal, up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 1, 1960, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

possible to the very best interest of the Company, and your claim is respectfully declined in its entirety.

Yours truly,

/s/ A. Manson
A. Manson
Division Engineer"

The claim was then appealed in the usual manner, and correspondence exchanged with the employees is attached and identified as Carrier's Exhibits AA, BB, CC and DD.

The claim was discussed in conference on August 31, 1965, when it was again declined, and nothing further was heard about the matter until notice was received from you that employees intended to file an ex parte submission in the dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The essential facts are that Carrier's Freight Train No. 78 derailed at Bangor, Alabama, at approximately 1:55 P.M. on Wednesday, March 17, 1965. Three engines and three box cars were derailed, with a resulting pile-up of fifty-four other cars, forty-eight of which were destroyed. Carrier's main line was completely torn up for several hundred feet, and no trains could operate over the affected section of the railroad.

Carrier engaged an outside contractor to perform certain work at the situs of the accident. Claimants were working at the time of the derailment, but were not called or assigned to perform any of the work arising out of the derailment until their regularly assigned starting time the following day, approximately eighteen (18) hours after the derailment.

Petitioner contends that Carrier violated the Scope Rule of the Agreement when it engaged an outside contractor to perform certain work incident to the train accident instead of assigning said work to its own employees.

Carrier contends that the outside contractor was engaged solely for the purpose of transporting material by highway from the south end of the derailment to the north end with necessary heavy equipment which Carrier did not possess or have readily available for use during the emergency. It is the position of the Carrier that its engagement of the outside contractor was proper under Rule 2 (f) of the Agreement, which provides:

"2 (f) The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

Carrier also maintains that even in the absence of Rule 2 (f), its action in expediting the repair work was justified because of the emergency situation.

Petitioner asserts that Carrier should have used Claimants, who were on duty and available at the time of the accident instead of "shopping" for some outside contractor, and, further, that Carrier possessed the necessary equipment to perform the disputed work. Moreover, Petitioner avers that

men not holding seniority under the effective Agreement assisted in the actual rebuilding of the damaged section of track.

An analysis of the record reveals conflicting assertions by the parties concerning the work actually performed by employees of the independent contractor as well as the adaptability of Carrier's equipment to performance of the disputed work. It is well established that the burden of proof rests with the party seeking the allowance of a claim. Award 6698. Petitioner has failed to establish facts sufficient to require or permit a finding that Carrier possessed the necessary equipment to perform the disputed work and concedes that the Claimants were working. Accordingly, we must find that Carrier properly invoked the provisions of Rule 2 (f) as it apparently did not have adequate equipment laid up and forces laid off, sufficient both in number and skill to perform the disputed work incident to the derailment. Awards 14122, 11085 and others.

Moreover, the derailment did in fact create an emergency situation in the instant case, and this Board has held in many Awards that a Carrier may take any action deemed necessary to cope with an emergency. Awards 5766, 8199 and 13316. Although Carrier might have adopted a different method for transporting needed material from the south end of the derailment to the north end following the accident, there is no evidence before us to support a finding that Carrier was motivated by an intent to circumvent the provisions of the Agreement. Awards 10965, 12777, and others.

In view of the foregoing, we will deny the Claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of May 1967.

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