Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37574
Docket No. MW-36536
05-3-01-3-29

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 (Domino Construction) to perform Maintenance of Way truck driver work (transport track panels) from Laramie, Wyoming to Clay, Colorado on August 15, 1999, instead of Group 15 Truck Drivers K. Williams, W. Schaffer and M. A. Matthie (System File W-9952-160/1213773).

(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 and failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 52 and the December 11, 1982 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant K. Williams shall now be compensated for eleven and one-half (11.5) hours' pay at his respective time and one-half rate of pay and Claimants W. Schaffer and M. A. Matthie shall each be compensated for eight and one-half (8.5) hours' pay at their respective time and one-half 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.

On Sunday, August 15, 1999, the Carrier engaged the services of Domino Construction to transport track panels from the Carrier's facility at Laramie, Wyoming, to a derailment site at Clay Colorado. According to the Organization, the work of hauling track panels to the site was specifically reserved to the Claimants under Rule 9 and the Scope Rule. It also argues that the Claimants were Truck Drivers who were available to transport the panels in the Carrier's vehicles; however, despite their availability, the Carrier nonetheless opted to utilize a contractor in their place, in violation of Rules 1, 2, 3, 4, 5, 9, 15 and 16 of the Agreement, the Organization further asserts.

During the parties' on-property claims conference of October 17, 2000, the Organization furnished a statement from Claimant Matthie which, in its view, established the availability of all three Claimants and confirmed their entitlement to the overtime work, given their assigned headquarters of the Laramie Track Panel Plant. The Organization also asserted that the Carrier did not serve any 15-day notice of its intent to subcontract the disputed work, a violation of Rule 52(a), it submits. Moreover, in response to the Carrier's allegation that the derailment was "an emergency which required Carrier's use of contractors," the Organization stressed that the Carrier "presented no evidence whatsoever that the derailment created an emergency" and thus improperly subcontracted the work in circumvention of the Rule 52(a) notice requirement.

The Carrier admitted during the on-property handling of this matter that it did not notify the Organization of its intent to subcontract. It argued however that

(1) the work was of an emergency nature; (2) such work has been contracted out in the past, hence no advance notice was required; and (3) the Claimants were as a matter of fact unavailable for the work. The Carrier thus urged the Board to deny the claim for the above reasons, but also especially in light of Third Division Awards 29965, 27969 and 27700. According to the Carrier, the above on-property Awards support its position that, when work must be undertaken on an emergency basis, it may assign the work to outside forces without any ensuing violation of the Agreement, especially when the Carrier's employees are unavailable to perform the necessary work, as it maintains was the case here, as noted above.

The Board carefully reviewed the record in this case, as well as the parties' arguments and the prior Awards cited in support of their respective positions. The Board finds that the crux of this case centers on whether the subcontracting was actually undertaken to address an emergency situation, as the Carrier alleges. If so, a second significant issue is whether the Carrier was required to ascertain the availability of its own qualified employees to perform the arguably scope-covered work, at overtime, before calling a contractor to perform the disputed work. These two issues are the nub of this case, we rule.

We carefully considered the Organization's assertion that the Carrier failed to establish, by probative evidence, its "emergency defense" as regards the work of transporting track panels from the plant to the derailment site. We note that the Board in Third Division Award 13738, cited by the Organization, essentially found that derailments do not necessarily always give rise to emergencies and the record in each case must contain "factual evidence" of the emergency in order for the Carrier to sustain its affirmative defense on that point.

The Board is, however, also aware of the Board's holdings in on-property Third Division Award 29965, referenced above. In that Award, the Board held that "work in connection with a derailment is reasonably interpreted to be emergency work," and consequently found that the Carrier's use of outside forces in response to an emergency condition (derailment) was done "without loss of work to Carrier forces at the time the work had to be done." Hence, the Board in that same instance concluded that no violation of Rule 52 or the Scope Rule occurred on the facts of that case, where the track repair was not undertaken until "some days after the derailment."

From the above, there is arguably no unanimity of arbitral opinion as to whether a derailment, per se, is tantamount to an emergency, which would thereby allow the Carrier to contract out the necessary work without notice and/or without first determining the availability of its own qualified employees.

However, from our review of the record before us, it is not necessary for the Board to reconcile the Board's holdings in the two above Awards, which we also note span nearly 30 years. This is so because we recognize that what the Carrier did here was to attempt to ascertain which of its employees were in fact available for the work in this case. Once it undertook that process, we reason, it had to proceed to obtain the complement of needed employees fairly, we find. Said another way, there may be situations where an emergency dictates getting the track cleared, etc., by any and all means, including the use of contractors. Where there is an attempt to ascertain availability of its employees, however, the process must be fair and consistent with the Carrier's Rules and practices, we hold.

According to the Carrier's December 8, 1999 response to the Organization's October 14, 1999 claim, the Carrier in fact did attempt to contact the Claimants before calling the contractor, if what is set forth in that response is considered to be true. Moreover, according to the Carrier's October 27, 2000 letter, four employees from Gang 9411 were in fact used to load track panels. According to the Carrier's October 27 letter:

> "Gang 9411 has 33 employees assigned to it and a total of four employees were called to load track panels on August 15, 1999. Each of these four employees was compensated 3 hours at the overtime rate of pay. Clearly there was not a need to call out every employee assigned to Gang 9411 and those that were needed and could prompt (sic) report were called."

Moreover, we also note that the December 8, 1999 letter from the Manager Engineering Resources, specifically stated:

> "As a result of my investigation into the merit of your claim, this work was contracted out due to the emergency situation and the unavailability of the employees. . . ." (Emphasis added.)

Under these circumstances we believe that the Organization's reliance on Third Division Awards 21222 and 21224, which essentially held that the Carrier "must make a reasonable effort to call employees even with the broad latitude permitted Carrier in an emergency situation" is not at odds with the Carrier's initial approach to the situation, as shown by the correspondence excerpts quoted above. In this case, it is clear that, regardless of whether the need to transport the track panels from Laramie to Clay, on a Sunday, was emergency-based, the Carrier did attempt to ascertain the availability of its own employees prior to subcontracting the work, if the Carrier's factual contentions are credible.

As to the question of whether the Claimants in this case were unavailable for the work, as the Carrier contends, then, the Board finds from the record that Claimants Williams and Schaffer were not available. Thus, we find no evidence of any violation of the Agreement as a result of the Carrier's use of two subcontracted drivers in their place. With respect to Claimant Matthie, however, the Board finds from the record that the Carrier did not submit any probative evidence in support of its contention that Matthie was not available for the overtime. Our reasoning for our findings as to whether the record established each Claimant's availability is set forth below.

First, the Board agrees with the Carrier's position as to Claimant Williams' unavailability for the weekend overtime for the two reasons set forth by the Carrier. We concur that the location of the Claimant's residence, some 230 miles away from the Laramie Panel Plant, made him unavailable for the overtime under the circumstances, despite the fact that he was initially, and apparently erroneously, called for the overtime (for which he was paid three hours for the miss-call). The record furthermore makes plain that Williams was, in fact, paid three hours at the overtime rate for "replacing OTM between Mileposts 304 and 316. . . ."

Thus, given the above, the Board rules that Claimant Williams was not available. The Carrier's reliance on Third Division Award 27700 as regards Williams' unavailability was not misplaced, we note.

Second, with respect to Claimant Schaffer, the first level claim response prepared by the Manager Track Maintenance established, without rebuttal by the Organization, that Schaffer could not be reached. According to the Carrier, Schaffer "did not answer his phone or pager." We note that Claimant Schaffer submitted no statement asserting his availability, and there is no request in the

record for the Carrier to document its attempts to reach Schaffer either "by phone or pager." Thus, we similarly rule that Schaffer was not available.

Third, with regard to our findings concerning Claimant Matthie, the Board reviewed Matthie's detailed statement of May 6, 2000. As mentioned above, the Organization tendered the statement to the Carrier during the October 17, 2000 claims conference, with no ensuing rebuttal, we note. According to the statement, Matthie's assigned work location on the date of claim was the Laramie Panel Plant where, during his normal workweek, he was assigned as a Truck Operator, whose duties included transporting materials, including track panels, to various locations, as needed.

The Board further notes that, although the Director Track Maintenance supposedly "did not know (Matthie) and would not have known to call him," we find that Claimant Matthie's assertion that his Foreman had erred by not calling him, and even admitted his error, is persuasive evidence that Matthie was essentially overlooked and not called for the overtime. According to Matthie:

> "When I explained to him that my number was in the phone book and showed him in the phone book in his desk, his story changed. He then told me that he could only get a hold of two drivers (K. Williams and W. Schafer (sic) so the MTM told him to contract it out."

According to the record, Claimant Matthie's above statement was not refuted by the Carrier through any statements or records from the Foreman. The Board finds that the statement is credible and thus affords it weight, in light of the fact that it was not rebutted by the Carrier while the claim remained in on-property handling.

Therefore, from the above, we conclude that, with respect to Part (1) of the claim, the Agreement was violated when the Carrier failed to contact Claimant Matthie regarding the overtime work of transporting track panels from Laramie to Clay. For the reasons stated above, the claims submitted on behalf of Claimants Williams and Schaffer must be denied, given our findings that they were unavailable for the overtime.

With respect to Part (2) of the claim, we hold that the question of advance notice is not material to the resolution of this matter, given the "emergency" and "availability" issues clearly at its core. Therefore, the Board declines to reach any findings on the issue of notice.

Under the circumstances, the Board concludes with respect to Part (3) that Claimant Matthie's claim for eight hours at the time and one-half rate of pay shall be sustained in full, and we so rule. See Third Division Awards 25968 and 28724 which support Claimant Matthie's entitlement to compensation at the overtime rate.

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 24th day of August 2005.