

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 40077  
Docket No. MW-40643  
09-3-NRAB-00003-080471

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 and HTI) to perform Maintenance of Way and Structures Department work (load and haul ballast) at a derailment site at Mile Post 147 in the vicinity of Grand Island, Nebraska on March 15 and 16, 2007, instead of Messrs. J. Mumm, D. Rice, R. Winter, K. Gute, R. Mostek and D. Overly (System File R-0752U-301/1473576).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Mumm, D. Rice, R. Winter, K. Gute, R. Mostek and D. Overly shall now each be compensated for twenty-one (21) 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 Organization asserts that during the period beginning at 3:00 P.M. on March 15 and continuing until Noon on March 16, 2007, the Carrier improperly utilized contractors to perform work at a derailment that blocked the main lines near Grand Island, Nebraska.

The record shows that three contractors were called in to assist in clearing the derailment - Hulcher, KRW and HTI. The contractors' forces supplemented the Carrier's forces and the Claimants were fully employed and working overtime during the time worked by the contractors.

The Organization points out that although there were three contractors at the site, the claim only protests the Carrier's use of two of the contractors - KRW and HTI. According to a statement provided by the Organization:

“ . . . Hulcher was the contractor being used to get the wreckage cleared away and the new panels laid. We filed no claim involving Hulcher.

\* \* \*

When the crew I was on was sent home KRW and HTI were doing nothing but watching us work. There were 4 panels left to lay, which our guys were doing with Hulcher doing the heavy lifting. The only thing KRW did for the emergency situation was to dump stockpiled rock on the last 4 panels. We had the REOs and the equipment to do that.”

Third Division Award 20527 sets forth the standard for an “emergency:”

“We have heretofore defined an emergency as ‘an unforeseen combination of circumstances which calls for immediate action’

(Award 10965). . . . [I]t is well established that the Carrier, in an emergency, has broader latitude in assigning work than under normal circumstances; in an emergency Carrier may assign such employees as its judgment indicates are required and it is not compelled to follow normal Agreement procedures.”

And, as discussed in Third Division Award 32862, “. . . [t]he burden rests with the Carrier to demonstrate the existence of the emergency.”

The Carrier has sufficiently shown that the derailment constituted an emergency. The tracks were blocked and they had to be opened. Indeed, the statement provided by the Organization acknowledges that there was an “. . . emergency situation. . . .”

However, as shown by the provided statement, the Organization seeks to parse out work at the end of the emergency, asserting that Carrier forces could have done the work. In this case, that argument is not persuasive.

The Organization is correct that there comes a point when an emergency ends. See e.g., Third Division Award 40080 where the Board found that a snow emergency ended by the second and third days after the major snow event and it was improper to use outside forces on those days. The same cannot be said for this case. The period involved was from March 15, beginning at 3:00 P.M. and continuing until March 16, 2007 at Noon - a period of only 21 hours. Even according to the statement provided by the Organization, when the Carrier’s forces were sent home, “[t]here were 4 panels left to lay, which our guys were doing with Hulcher doing the heavy lifting.” When the Carrier’s forces were sent home, the emergency had not yet come to an end. With respect to one of the contractors, the statement further provides that the contractor’s forces “. . . dump[ed] stockpiled rock on the last 4 panels” thereby showing that the contractor’s forces participated in the last phase of the emergency work. In this case, we cannot find that the emergency ended to the extent that the Carrier’s “. . . broader latitude in assigning work than under normal circumstances . . .” (Third Division Award 20527) had come to an end.

This claim shall therefore be denied.

**Form 1**  
**Page 4**

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**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 19th day of November 2009.**