

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40777
Docket No. MW-40259
10-3-NRAB-00003-080042**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern 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 (Hulcher and Phelps and Williams) to perform Maintenance of Way and Structures Department work (install track panels and related track repair work) on the Atchinson Branch near Winthrop, Missouri on October 11, 12 and 13, 2005 [System File C-06-C100-60/10-06-0090(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Dyche, T. Smith, R. Albright and T. Brown shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for seven (7) hours 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 December 1, 2005, the Organization filed a claim stating the contractor's forces "fixed a derailment on the Atchinson Branch, near Winthrop, Missouri" in violation of Rules 1, 2, 3, 5, 29, 55, Note to Rule 55 and Appendix Y.

On January 23, 2006, the Carrier denied the claim stating the Organization did not provide evidence in its claim and there were no Rules violated because the derailment was an emergency. "The Carrier has a large ongoing track construction project on the St. Joseph Subdivision and all employees have been utilized" including the fully employed Claimants.

On March 8, 2006, the Organization filed an appeal noting the repair work associated with the derailment is historically and customarily performed by BMW-represented forces. "The reason for [the] large ongoing track construction project is due to the Carriers lack of maintenance in this area[.]"

On April 28, 2006, the Carrier denied the appeal stating that "the Organization recognized that this was a derailment on the main line, it was an emergency. An emergency condition existed with a derailment . . . on single track that is jointly used by the BNSF and UP. It was a UP train that derailed and it was the UP which caused the delay in starting due to unloading the cars for repairs. . . . Because the movement of traffic was obviously affected by this derailment and the unloading of salvageable materials, the dates as shown are correct[.]"

By letter dated May 2, 2007, the Organization confirmed the conference held on March 20, 2007. Aside from the arguments reiterated in the claim and appeal and denials, the Organization stated there was no emergency, because the Carrier did not begin the contract work until October 11, 2005, which was four days after the derailment. "The Carrier had a full three (3) days to arrange for Carrier forces, equipment and operator to be available to perform this work."

Track repair and installation of panels, as well as the operation of equipment and machinery to perform such work, is encompassed within the scope of the Agreement. The claimed work is customarily performed by BMW-represented employees; they have a contractual right to be assigned to and perform that work before the Carrier resorts to employ forces from outside the Agreement.

The Carrier states there was an emergency caused by the derailment that occurred on October 7, 2005. In Third Division Award 24440, "emergency" is defined as a "sudden, unforeseeable and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt." A derailment, per se, does not automatically cause an emergency situation. (See Third Division Awards 20223 and 25449.)

The evidence shows, however, that the contracted work began on October 11, 2005, or after salvaging materials from freight cars had been completed. Although the Carrier may not have had sufficient manpower or equipment in the area at the time the derailment occurred, the four day hiatus between the derailment and commencement of the repair work provided the Carrier with at least 72 hours to consider and/or arrange to deploy its forces from the ongoing track construction project.

There is no indication in this record that the ongoing construction project was of an immediate, urgent or emergency nature so as to preclude consideration of or engaging in efforts to facilitate movement of BMW forces to handle this BMW work in an expeditious manner. In doing so, the Carrier violated the Agreement as set forth in Parts (1) and (2) of the claim.

The Carrier is aware that a decision to contract work, which is customarily performed by Carrier forces, may result in an award of compensation. The Claimants were subjected to a loss of work opportunity due to Rules violations.

Monetary relief preserves and protects the integrity of the Agreement and Appendix Y. Having found a violation of Parts (1) and (2) of the claim, Part (3) is granted.

AWARD

Claim sustained.

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 15th day of December 2010.