Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40862
Docket No. MW-41343
11-3-NRAB-00003-100120

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

(Brotherhood of Maintenance of Way Employes 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 Carrier violated the Agreement when it called and assigned outside forces (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (track restoration and related repair work) at Mile Post .02 in the vicinity of Grand Junction, Colorado on August 18 and 19, 2008 (System File D-08-28C/1512625).

(2) The Carrier violated the Agreement when it called and assigned outside forces (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (install switches and related work) at Mile Post .02 in the vicinity of Grand Junction, Colorado on August 20, 21 and 22, 2008 (System File D-08-29C/1512918).

(3) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract the aforesaid work or 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, 1981 Letter of Understanding.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimants O. Ratliff, F. Ward, B. Murray, C. Dagnan, J. Jensen, J. Cordova, J. L. Cordova, M. Lara and T. Foley shall '. . . now be compensated an equal and proportionate share of all and any straight time, overtime, and double time hours, at their respective rates of pay, worked by outside contractor's forces in the performance of the claimed work commencing on August 18, 2008 and continuing through August 19, 2008.'

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants O. Ratliff, F. Ward, B. Murray, C. Dagnan, J. Jensen, J. Cordova, J. L. Cordova, M. Lara and T. Foley shall '. . . now be compensated an equal and proportionate share of all and any straight time, overtime hours, at their respective rates of pay, worked by outside contractor's forces in the performance of the claimed work commencing on August 20, 2008 and continuing through August 22, 2008. A total of thirty (30) hours.'"

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.

In these combined claims, the Organization protests the Carrier's use of a contractor's forces for track restoration and related repair work on August 18 and

19, 2008, and for installing switches and related work on August 20, 21 and 22, 2008, due to a derailment.

According to the Carrier in its December 4, 2008 letter, the Carrier utilized contractor's forces to perform the disputed work because ". . . a broken rail caused the derailment which caused five (5) cars and a unit to derail . . . [which] caused substantial track structure damage in the area." Further, according to the Carrier in the same letter, ". . . Carrier records indicate that the Claimants remained fully compensated and worked all of their assigned hours and performed overtime services for the dates listed in the claim." In the Carrier's April 7, 2009, letter the Carrier also asserts "[i]f the Claimants listed wanted to perform the derailment repairs as you allege, then they should have availed themselves when calls were placed to acquire employees for this derailment."

Rules 52(a) and (c) specifically exempt the Carrier from its obligations under Rule 52 for emergencies and allows the Carrier latitude in the use of contractors to perform scope-covered work:

"RULE 52 - CONTRACTING

(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' forces . . . when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.

* * *

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster."

See also, Third Division Award 20527 (". . . it 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.").

Not all derailments can be considered "emergencies." Award 20527, supra, held: "[w]e have heretofore defined an emergency as '. . . an unforeseen combination of circumstances which calls for immediate action' (Award 10965)." And it has been found that conditions from a derailment which may start as emergencies permitting the Carrier's use of contractors can change as the repairs go on so that emergency circumstances no longer exist and the failure to thereafter use scope-covered employees becomes a violation of the Agreement. See Public Law Board No. 7096, Award 14 between the parties:

> "The Carrier's obligations under Rule 52(a) are excused '. . . when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.' So the question here is whether the evidence shows that '. . . emergency time requirements exist[ed] . . .'?
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> In Third Division Award 38349, the parties faced the same issue involving the same contractor with an emergency asserted by the Carrier caused by another yard derailment. The Third Division sustained the claim and held:
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> > A review of Third Division Awards reveal that the existence of an 'emergency' in a derailment situation requires a case by case analysis. (See, e.g., Third Division Award 37644 where the Board stated '(d]erailments are not 'one-shoe-fits-all,'; See also Award 31036 where the Board determined that the specific facts of that case supported the conclusion that the emergency ceased where the contractor's work forces began to fluctuate 'thereby suggesting that the emergency

> condition did not exist for the entire period in which the work was performed.' Further review of Third Division Awards support the conclusion that any claimed emergency must be bona fide where time is of the essence thereby rendering the Carrier's obligation to supply a Rule 52 notice impractical given the exigencies that then exist. (See, e.g. Third Division Award 30868 where the Board stated 'the Organization has failed to prove that the 15 day advance notice provision has ever been applied to derailment situations where immediacy of action is required and advance notice is not practical.')
>
> The facts gathered during the on-property discussion of the instant claim demonstrate that the track at issue was impaired for approximately three hours following a derailment followed by what essentially amounted to clean up work that continued for more than four days. Given these undisputed facts, the Board finds that once the track was unimpaired and thereby useable, the emergency ceased to exist. Accordingly, the clean up work performed by Bannock Paving Company did not meet the time is of the essence criterion for the existence of a bona fide emergency."

See also, Third Division Award 40077:

> "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."

Finally, with respect to the burden, see Third Division Award 40077, supra ("[a]nd, as discussed in Third Division Award 32862, ". . . [t]he burden rests with the Carrier to demonstrate the existence of the emergency.").

Clearly, the Carrier met its burden to show that, at the outset, the conditions in this case constituted an "emergency" (". . . a broken rail caused the derailment which caused five (5) cars and a unit to derail . . . [which] caused substantial track structure damage in the area."). We recognize that the events involved in this case extended over a period of five days - August 18 and 19, 2008, for the track restoration and repair work and August 20 through 22, 2008 for installing switches and related work - which might cause a question concerning why the "emergency" lasted as long as it did? See Third Division Award 38142 (". . . any emergency caused by the snow storm in the Cascade Mountains in January 2000, would not have lasted 13 days by any reasonable standard."). However, there is nothing in this record to refute the Carrier's assertion that the "emergency" lasted as long as it did. When the Carrier showed that the incident started as an emergency, the burden shifted to the Organization to show that at some point during the period covered by the claims, the "emergency" ended. The Organization has not sufficiently, through facts, refuted the Carrier's showing that the emergency existed for the five days in dispute. The claims must therefore be denied.

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 7th day of February 2011.