

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42196
Docket No. MW-42015
15-3-NRAB-00003-120363**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 (Razorback Rail Services) to perform Maintenance of Way work (cut down trees, remove debris and related work to clear right of way for siding extension/new track construction) between Mile Posts 50 and 53 on the Trenton Subdivision beginning on March 7, 2011 and continuing through April 14, 2011 (System File G-1152U-62/1554228).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance notice of its intent to contract out the aforesaid work and failed to make a good-faith attempt to reach an understanding and 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 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants T. Ogle, J. McGinness, G. Chaney, B. Swank, E. Taff, D. Rinehart and A. Blair shall now each be compensated for two hundred eight (208) hours at their respective straight time rates of pay and for forty-eight (48) 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 February 24, 2011, the Carrier provided notice to the Organization of its intent to contract "all labor, supervision, materials and equipment necessary for grading, fencing and incidental work for new construction of Beech siding" at "Beech, Iowa Trenton Subdivision Mile Posts 50 to 53." The Organization requested a conference, which took place on March 1, 2011. The Parties were unable to resolve their differences.

Beginning on March 7, 2011, Razorback Rail Services began the work of cutting trees and clearing debris from the area to be graded. The Organization filed this claim alleging that the notice was inadequate and that the Carrier had not established any right to contract the work under Rule 52. Specifically, the Organization pointed out that the work commenced less than 15 days after notice was given, and that the work of cutting trees and clearing debris was not mentioned in the notice. The Carrier argues that the notice was properly given and conferenced, and that it has an historic right to contract out grading work.

There is considerable Board precedent recognizing the existence of a long-standing mixed practice with respect to grading, under which the Carrier has used both its own forces and outside contractors. This recognized mixed practice makes it permissible for the Carrier to contract out grading work.

The Organization, however, contends that the notice was defective, in that it did not specify tree cutting and debris clearing as part of the work to be contracted. In this regard, the Board finds the Carrier's argument persuasive: tree cutting and debris clearing are incidental to grading, and indeed are the first step in the process.

The notice specified “grading, fencing and incidental work” (emphasis added), and the work performed by Razorback Rail Services falls within the category of incidental work.

The Organization also argues that the notice was inadequate because the work commenced less than 15 days after notice was given. Regarding notice, Rule 52 states:

“In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases.”

There is no dispute that the work started “less than fifteen (15) days prior thereto,” so on the face of it, the notice appears to have been defective. However, there is an exception for “emergency time requirements” cases. The record includes a statement from Manager of Track Maintenance Bass explaining what happened. The Parties met in conference on March 1, 2011. At the meeting was the Carrier’s Director of Civil Construction, Russ Lloyd, who attended for the specific purpose of discussing with the Organization the need to move much more quickly than originally anticipated. According to Bass’ statement, Lloyd was there:

“... in order to discuss the urgent request made by the Design Group, to have the existing tree line cleared throughout the limits of the Beech Siding Construction Project; this request was to comply with the recommendation and instructions made by the Consultant that was in charge of furnishing the notice of proper dates, for the mandatory Bird Nesting and Migration in the area; which due to this study resulted in the requirement of having the existing trees removed before that date expired, and thus allowing the process, in order to construct the Beech Siding, to continue moving forward.”

Although the document is not in the record before the Board, Bass’ statement referenced an attached note that was “broadcast out” explaining the need to move forward immediately so that the work could be completed before the migratory bird nesting regulations went into effect, prohibiting any tree cutting until after the nesting

season ended. The Organization did not refute Bass' statement or explanation for moving ahead sooner than 15 days.

One of the exceptions to the 15-day Rule regarding notice is "emergency time requirements." While not on the level of a derailment or other disaster, mandatory bird nesting and migration regulations (which require that trees be left in place until after the nesting season ends) nonetheless fit the definition of an "emergency" as "an unforeseen combination of circumstances requiring immediate action." Bass' statement was clear: if the trees were not cleared before a certain date (unspecified but apparently imminent), they would not be able to be cut down until after the bird nesting season – which could have put the Beech Siding Construction Project months behind schedule. Moreover, the matter was raised and addressed at the Parties' conference regarding the notice, so the Organization was put on notice of the emergency situation, with an explanation, very early on. The fact that the written notice did not include information about the bird nesting requirements is not fatal to the adequacy of the notice: it is not clear from the record that when the Carrier provided the original written notice to the Organization, it knew about the problem or that it intended to start the work as soon as it did in response to the migratory bird regulations. Under the unique environmental circumstances posed in this case, the Carrier's failure to wait 15 days after the written notice before beginning the disputed work is excused.

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 28th day of October 2015.