Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42261
Docket No. MW-41563
16-3-NRAB-00003-110181

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

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(CP Rail System (former Delaware and Hudson Railway Company)

STATEMENT OF CLAIM:

"Claim on behalf of the System Committee of the Brotherhood:

(1) The Agreement was violated when the Carrier assigned outside forces (Ed Garrow & Sons) to perform Maintenance of Way work (operate excavator to break up beaver dams) between Mile Posts 81 and 85 on the Canadian Main Line on December 5, 6 and 8, 2008 (Carrier's File 8-00666 DHR).

(2) The Agreement was further violated when the Carrier failed to provide an advance notice of its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant L. Terrill shall now be compensated for a total of eight (8) hours at his respective straight time rate of pay and for ten (10) hours at his respective overtime rate 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.

This claim of December 19, 2008, arises from the Carrier's decision to use an outside force on December 5, 6 and 8, 2008 to assist B&B forces clearing culverts. The outside force used an excavator with extended boom to break up beaver dams on the Carrier's Canadian Main Line near Clemens, New York. The Organization asserts that the claim involves scope-covered work subject to Rule 1 and Appendix H, whereas the Carrier asserts that an "emergency" with "flooding caused by a beaver dam" blocking the culvert "required an immediate response."

The Organization asserts – and the Carrier does not dispute – that the claimed work is scope-covered and has been customarily and historically performed by BMWE-represented employees in the classifications listed under Rule 28. The Board finds the claimed work is covered by Rule 1.1 of the Agreement. For scope-covered work to be contracted out, there must be notice and conference as stipulated in Rules 1.3 and 1.4 and Appendix H. The Carrier asserts that the "emergency" excused it from complying with Rules 1.3, 1.4 and Appendix H. By raising the "emergency" defense as the reason for contracting out scope-covered work without notice and conference, the Carrier accepts the responsibility to establish it.

Initially, the Board notes that this is not a new or esoteric issue for the Organization and the Carrier. For example, on-property Award 45 of Public Law Board No. 6493 involved this situation where the Carrier used a contractor to clear a culvert during an "emergency" as a means to protect the right-of-way from flooding. On-property Third Division Awards 36851 and 37287 also addressed the "emergency" defense where the Carrier proceeded to contract out without notice, conference and Appendix H considerations. In these three on-property Awards the presiding Board was not persuaded that an "emergency" situation existed. As explained below, the Board finds no "emergency" in the circumstances of this claim.

Flooding is identified in Rule 1.3 as an "emergency" excusing non-compliance with notice and conference. Award 36851 observed that the characteristics of an "emergency" are "suddenness that allows for little, if any, time for preparation to deal with" the situation and the situation contributing or causing the "emergency" which is not subject to "detect[ion] through due-diligence inspections." Complementary to this on-property Award is Third Division Award 24440 which states that an "emergency" is the "sudden, unforeseeable and uncontrollable nature of the event that interrupts operations and bring them to an immediate halt."

The Carrier has known since 2005 with the issuance of Award 45 of PLB 6493 that flooding occurs when culverts are blocked and this poses a risk to its operations. In this claim, however, there is no evidence that the Carrier's operations were diminished, impaired, deterred or halted by the flooding. The dimension and scope of this "flooding" is not well-established in this record other than the water condition is labeled as a flood. There is "flooding" where the pressure of water is of such turbulence and force rendering control measures of little effect with inevitable structural damage to track. The Carrier projects structural damage to the track without a response to this flood, but the response leads the Board to conclude that this "flooding" was not of such force and turbulence so as to alter the Carrier's operations.

The nature of an "emergency" dictates immediacy of response to restore the environment to its status quo or homeostatic condition. A half-day "emergency" began on Friday, December 5 as the contractor worked four hours. The "emergency" resumed on Saturday, December 6 and consumed ten hours. There was no "emergency" on Sunday, December 7, but on Monday, December 8 it resumed for another half day (four hours). Intermittent hours and discontinuous response are not indicative of an "emergency" posing a threat to rail operations.

The Carrier relies on FRA 213.33, Drainage, as requiring it to clear a culvert "as soon as possible." The regulation states that "[e]ach drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned." This regulation references scope-covered work and is of no value in determining whether an "emergency" presented itself.

As for the Carrier's assertions that it did not own an excavator with an extended boom and could not obtain the use of one on short notice without renting

such equipment with an operator, these are matters for conference and not foundational to "emergency" determinations.

Aside from equipment as a consideration for asserting there was an emergency, the Carrier asserts that industry practice is not to recall an employee on furlough (such as the Claimant) for a short-term assignment. Also, Rule 28, Return to Service, provides the Claimant up to ten days to report as well as being subject to drug and alcohol screening before returned to service, which rendered his availability impractical. With respect to industry practice and Rule 28, they do not prohibit the Carrier from recalling the Claimant for the claimed work. These matters are for discussion in conference.

Whether an employee on furlough is returned to service for a short, brief period of time was addressed in on-property Third Division Award 26784 where the Board sustained the claim and directed the Carrier to compensate the employee on furlough (a senior equipment operator, which is the Claimant's job in the instant claim) at the furloughed employee's established rate of pay for the hours worked by the contractor. In view of this on-property Award, the Board directs the Carrier to compensate the Claimant at his established rate of pay for the hours worked by the contractor on December 5, 6 and 8, 2008.

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 21st day of April 2016.