

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42412
Docket No. MW-41796
16-3-NRAB-00003-120022**

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 Employees Division -
(IBT Rail Conference
(CP Rail System (former Delaware and Hudson
(Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (ING Civil Inc./New Century Construction) to perform Maintenance of Way work (build road, cut trees and related work) to access a culvert at Mile Post 503.7 on November 1, 2, 3, 4, 5, 6, 9 and 10, 2009 (Carrier’s File 8-00734 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, Claimants A. Melville, T. Delamater, K. Chilson and C. Layman shall now be compensated at their respective and applicable rates of pay for all straight time and overtime hours expended by the outside forces in the performance of the aforesaid work on November 1, 2, 3, 4, 5, 6, 9 and 10, 2009.”**

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 November 28, 2009, the Organization filed a claim over time expended in early November 2009 by an outside force building a road, cutting trees and repairing a culvert near MP 503.7 in the vicinity of Esperance, NY. The Organization states an emergency did not exist, therefore, the Carrier was required to issue notice prior to outsourcing this scope-covered work.

“The Organization recognizes that if this had been an actual emergency the Carrier would need to bring a contractor in to get the track structure repaired as soon as possible. However, that does not excuse the Carrier from notifying the Organization of the situation.

The Organization’s investigation of this incident failed to prove an actual emergency situation had occurred.”

On November 30, 2009, the Carrier denied the claim stating an emergency existed because “[a] large sinkhole was discovered on October 30, 2009” near MP 503.7:

“The culvert was excavated and temporarily patched and reconstructed the fill.

The intent was to bore a new pipe alongside the old.

Some of the equipment required included two 6-wheel drive and dumps, 325 Excavator, 12” chipper, vibratory roller, and 950 Loader. Additional equipment was utilized as the emergency work progressed.

This was a major excavation requiring an experienced excavation contractor with major resources in that field. The Carrier has historically contracted this type of work.”

On December 18, 2009, the Organization filed an appeal. The force has skilled and qualified employees to perform this scope-covered work and the Carrier owns 950 Loaders as well as excavators and other equipment could be rented. This was not an emergency as the Tabular General Bulletin Order (TGBO) does not show the location of the claimed work subject to a slow order or track out of service. In other words, the Carrier did not document an emergency.

On August 4, 2010, the Carrier denied the appeal. The Carrier states that pictures of the sinkhole support its emergency declaration as they show the embankment and culvert failing under the track structure and erosion at the right of way. The contractor possessed all the equipment to accomplish the work in a short response time; any delay would have caused a line outage and/or derailment. “The Carrier did not have time to send out the required fifteen (15) notice to the General chairman, per rule 1.3”

When the sinkhole was discovered on October 30 the Carrier placed a slow order for trains because heavy rain was predicted in the area. Until the work could be completed, the B&B Manager protected the site. The TGBO is continuously updated and a slow order is not always documented on it; the slow order was communicated by radio transmission to train crews.

Conference convened on September 20 and 27, 2010 but an understanding was not attained. This deadlocked dispute is now before the Board for a final decision.

Having reviewed the record, the Board finds there is no dispute that (1) the claimed work is scope covered as the force historically and customarily builds roads and cuts trees and (2) the Carrier did not issue a notice to the Organization prior to contracting out the claimed work. According to the Carrier, an emergency existed which, under Rule 1.3, accords it flexibility such as not issuing the 15-day notice to the Organization. A declaration of emergency is an affirmative defense that must be proven by the Carrier.

Each party submits arbitral precedent defining and giving context to what constitutes an emergency. The Organization relies on, for example, Third Division

Award 24440 (“emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt”) and on-property Award 45 of Public Law Board 6493 (“there is not an iota of evidence to show that the blockage of the culvert was a sudden or unpredictable occurrence and no showing of any urgency or immanence of the asserted potential flood ‘emergency’”).

The Carrier relies on, among other awards, Third Division Award 39723 (“a leaning bridge requiring a slow order certainly suggests immediate action”), Third Division Award 38953 (time of the essence to rebuild a bridge) and on-property Third Division Award 37619 (“well-established that in emergency situations the Carrier has latitude to use its discretion in the assignment of forces”).

The Carrier’s claim denial states its view of this situation as an emergency - “[a] large sinkhole was discovered on October 30, 2009” near MP 503.7:

“The culvert was excavated and temporarily patched and reconstructed the fill.

The intent was to bore a new pipe alongside the old.

Some of the equipment required included two (2) 6-wheel drive and dumps, 325 Excavator, 12” chipper, vibratory roller, and 950 Loader. Additional equipment was utilized as the emergency work progressed.

This was a major excavation requiring an experienced excavation contractor with major resources in that field. The Carrier has historically contracted this type of work.”

According to the Carrier, the 950 Loaders in its inventory were not at the “emergency” location and the slow order was communicated by radio transmission to train crews and not documented in the TGBO. According to the Organization, the TGBO documents track out of service and speed restrictions (slow orders). This was not rebutted by the Carrier.

The Carrier discovered the sinkhole on October 30, 2009 but the TGBO dated November 2, 2009 does not reflect this environmental condition nor does the TGBO show track in the vicinity of the claimed work (MP 503.7) as subject to a

slow order or out of service. The TGBO contains reports of tripping hazards, poor walking conditions, hole in right-of-way and over 30 slow orders on sections of track; however, the pertinent TGBO in this claim does not contain a reported or recorded slow order or track out of service for an emergency situation notwithstanding the Carrier's statement that the TGBO is continuously updated.

This Board finds that the TGBO is a document maintained in the normal course of operations by the Carrier and continuously updated as it is relied upon by the force and train crews to alert them to track conditions. In this record the TGBO documented many items (some large, some small) in the area of this track where the claimed work occurred but there was no reference to the conditions that the Carrier asserts constitutes an emergency. The record is void of any curtailed, halted or rerouted train movement during the period of the asserted emergency (November 1-10, 2009). The disparity between the documented record and the Carrier's assertion of verbal communication (radio transmission) to train crews throughout the period of November 1-10, 2009 informing them that an emergency situation exists is not construed favorably for the Carrier when considering its burden of proof to establish its affirmative defense.

There is insufficient evidence for the Carrier's affirmative defense of an emergency. In this situation, the Carrier was required to issue notice to the Organization before contracting out scope-covered work. The Carrier's concerns about lack of equipment, force availability and the existence of a past practice and the Organization's assertion that the Carrier possessed most of the equipment for this work and there is no past practice are appropriate topics for discussion at conference.

Since the Carrier failed to establish its affirmative defense and did not issue notice prior to outsourcing scope-covered work, the claim is sustained. The requested remedy is granted as it is consistent with precedent in on-property Third Division Awards 36851, 40453, 40454, 40456 and 40457.

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 31st day of October 2016.