

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42417
Docket No. MW-42218
16-3-NRAB-00003-130175**

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 of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Fane Trucking Company) to perform Maintenance of Way work [transport Maintenance of Way work equipment (front end loader)] from Kenwood Yard in Albany, New York to Richmondville, New York and then back to Kenwood Yard on January 26 and 27, 2011 (Carrier’s File 8-00820 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 any 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 J. Miller shall now be compensated for a total of fourteen (14) hours at his respective straight time 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.

On January 29, 2011, the Organization filed a claim alleging the Carrier violated Rule 1 and Appendix H, among others, when it used Fane Trucking Company on January 26 and 27, 2011 to move the Carrier's front-end loader instead of assigning this scope-covered work to Claimant, a tractor trailer driver (Senior Equipment Operator Specialist A). There was no emergency and the Carrier did not issue notice and conference prior to outsourcing.

On March 28, 2011, the Carrier denied the claim: "this was an emergent response to snow conditions on Richmondville Hill, MP 522 Freight Subdivision." Claimant was unavailable as he was in first-aid training at Cobleskill, NY. "The emergency condition required the loader to be moved into place to allow the Carrier to access the right of way to manage stalled train issues. This required train crew walking the right of way and access for management to investigate and resolve the stalled train issue related to grade, rail lubricators and traction effort."

On April 15, 2011, the Organization filed an appeal. If an emergency existed, the Carrier could have reassigned Claimant for this emergency as first-aid training is not required. Also, the Carrier provided no dates for Claimant's first-aid training which is only one day. At most Claimant was in training either January 26 or January 27 and, thus, available on the other day the contractor performed scope-covered work.

On September 30, 2011, the Carrier denied the appeal stating:

"... experiencing train stalls at MP 522 on the single track. Due to the heavy snow conditions train crew could not walk safely in order to inspect their train. On this particular day a southbound train crew experienced a train stall, that severely delayed them to their final terminal, once this crew was debriefed by the Road Foreman said crew submitted a safety card, and correction action was required."

The Carrier asserts these emergency conditions are confirmed by emails from the Superintendent and Trainmaster.

Addressing Claimant's unavailability, on January 27 Claimant was in first aid training and on January 26 Claimant reported to Oneonta, NY and moved equipment to Mechanicville, NY.

"The Carrier could not wait for the Claimant to be redirected to Albany, NY unload equipment and/or material that was planned for Mechanicville offload the front end loader then report to MP 522."

Given the unpredictable weather in the Northeast, the Carrier decided to return the front end loader from MP 522 to Albany to protect the Albany area. Historically the Carrier deploys contractors to transport equipment when the Carrier's equipment is not available.

The Organization and the Carrier remain deadlocked over this claim. This matter is now before the Board for a final decision.

Having reviewed the record established by the parties in on-property exchanges as well as their submissions in support of their positions, the Board finds that the claimed work is within Rule 1. The Carrier did not contest the Organization's assertion that the force customarily and historically performs the work assigned to the tractor trailer driver position. In this regard, Claimant occupies the position SEO Specialist A and transports the Carrier's equipment. The Organization's un rebutted assertion, under on-property Third Division Award 41443, is a "material fact . . . for purposes of evidentiary analysis."

The Carrier asserts an emergency existed on January 26 and 27, 2011 which, under Rule 1, obviates notice and conference prior to contracting out this scope-covered work.

Third Division Award 24440 states that an "emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt." In accordance with on-property Third Division Awards 36861 and 37187, to name a few, the responsibility to establish the emergency - an affirmative defense - resides with the Carrier. The Carrier's claim denial identifies heavy snowfall caused a train to stall and the snowfall precluded access to the right of way for walking that area to investigate stalled-train issues related to grade, rail lubricators and tractive effort. Emails from the Trainmaster and Road Foreman confirm these emergency conditions interrupting and halting train operations. The Board finds an emergency existed.

Notwithstanding the Board's finding that an emergency existed, the Organization notes that on-property Third Division Awards 36089 and 37287 show the Carrier "is still required to attempt to follow the Agreement" and "justify its reasons for not assigning a Maintenance of Way employee to the subject work."

In assessing the Organization's argument, the Board relies on the Carrier's un rebutted assertion that it contacted Claimant's supervisor and Claimant on January 26 and discovered he was moving equipment from Oneonta to Mechanicville and the next day (January 27) Claimant was in first-aid training in Cobleskill. The Board finds that the emergency required immediate action on January 26 and continuing January 27. In this situation, on-property Third Division Award 13858 is instructive - "Many awards of this Board have established that Carrier may assign such employees as good judgment dictates and must be allowed great latitude when an emergency situation exists." The Board will apply this on-property precedent of "great latitude" in this emergency situation.

Given the circumstances established in the record of this proceeding, the Board concludes that an emergency existed and, in responding to the emergency, the Carrier did not violate Rule 1 and Appendix H. Therefore, the claim will 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 31st day of October 2016.