

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42995
Docket No. MW-43068
18-3-NRAB-00003-150307**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Delaware 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 Construction) to perform Maintenance of Way work (ditching) between Mile Posts 519 and 523 on the Freight Subdivision between June 14, 2013 through June 21, 2013 (Carrier’s File 8-00933 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 T. St. Dennis shall now be compensated for forty (40) hours at his straight time rate of pay and twenty-nine (29) hours at his time and one-half rate of pay and Claimant J. Miller shall now be compensated for forty (40) hours at his straight time rate of pay and for twenty-four and one-half (24.5) hours at his time and one-half 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.

It is undisputed that the Carrier contracted out ditching work between Mile Posts 519 and 523 on the Freight Subdivision between June 14, 2013 and June 21, 2013. The Organization protested the action as a breach of the parties' Agreement.

The Carrier explains that the Company was dealing with significant heavy rain storm events that caused flashing flooding: track subgrade was scoured and water was over the rail, creating an emergency situation. It notes it has historically rented equipment and outsourced operators to assist its work force in such circumstances. In its view, the situation met the requisites of an 'emergency' within the meaning of the parties' Agreement. It argues the Organization has failed to prove that the work in question has been exclusively and historically performed by BMW representative employees, especially under the emergency circumstances present in the instant dispute.

The Organization maintains the work of concern was scope-covered ditching work, and the Carrier's failure to comply with the advance notice and conference provisions compounded its violation of contracting out the work. In its view, ditching clearly concerns the ongoing maintenance of tracks and roadbed and was therefore basic Maintenance of Way work clearly encompassed within the language of Rule 1.1.

"Rule 1.3 clearly and expressly carves out an exception for the notification and conferencing requirement when the Carrier is dealing with an emergency

situation. The Board does not disagree with the Organization's assertion that the nature of the work, ditching, is properly considered scope covered work, the situation of an emergency constitutes an exception to the requirements that would otherwise apply.

The record in this case establishes that heavy rain storms caused flash flooding with damage to the track subgrade and with water over the rail. In the opinion of the Board, these conditions did indeed constitute an emergency within the meaning of Rule 1.3.

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 29th day of March 2018.