

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43640
Docket No. MW-42773
19-3-NRAB-00003-140492**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(BNSF 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 (Patrick Construction) to perform Maintenance of Way and Structures Department work (install trench drains and place rip-rap) in connection with right of way bank stabilization work between Mile Posts 105.7 and 105.9 on the Fort Benton Subdivision on the Montana Division beginning April 9, 2013 through May 14, 2013 (System File B-M-2674-E/11-13-0250 BNR).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with 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 its Maintenance of Way forces as required by Rule 55 and Appendix Y.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants H. Giard, D. Garrett, D. La Plaunt and R. Michalski shall now be allowed ‘... two hundred and eight (208) hours of straight time and one hundred, eleven point seventy five (111.75) hours overtime and sixteen (16) hours at double time at the respective 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 concerns the use of outside forces to perform Structures Sub-department work, specifically installing trench drains and place rip rap between Mile Posts 150.7 and 105.9 on the Fort Benton Subdivision. Claimants have established and hold seniority in various classifications in the Maintenance of Way and Structures Departments in the Carrier's service.

The Organization contends that the claim was timely presented by placement in the custody of the United States Postal Service on June 6, 2013. The Organization contends that it has documented that the claim letter was timely placed in the mail 58 days after the occurrence, in accord with Rule 42A.

The Organization contends that the disputed work is reserved to the Carrier's Maintenance of Way forces under Rules 1, 2, 5, 55 and the Note to Rule 55 and should have been assigned to them, rather than to outside contractors. The Organization contends that there should be no dispute that the work has been customarily performed by BMW-represented employees for decades. The Organization further contends that the Carrier failed to notify the General Chairman in advance of its plans to assign outside forces to perform this work.

The Organization contends that the Carrier's defenses should be rejected as without merit. Although the Carrier asserted that the track was sinking two to three feet after each train passed, the Organization presented a statement purporting to refute that assertion. The Organization contends that the event was not unforeseen because

the Carrier had been warned previously that the track needed repair. The Organization contends that the work claimed was not caused by an emergency but by the Carrier's lack of track maintenance. The Organization contends that Claimants are entitled to the claimed remedy.

The Carrier contends that the disputed work was part of its response to an emergency situation and thus, is expressly exempted from the contracting provisions in Rule 55. The Carrier contends that in an emergency situation, it is afforded greater latitude to restore service and need not give notice of its contracting out. The Carrier concedes that the track in the area had prior problems but contends that the problems were aggravated by the addition of two new unit grain facilities, causing the track to sink two to three feet after each train passed.

The Carrier contends that the Organization has failed to produce evidence that the work occurred as claimed, or to show the work was actually performed by a contractor. The Carrier further contends that the Organization has failed to demonstrate that this work was customarily performed by its members. Finally, the Carrier contends that the Claimants are not entitled to any monetary remedy.

Between April 9 and May 14, 2013, the Carrier utilized its forces, including two section gangs and a track inspector to rehabilitate the track between MP 105.7 and 105.9 on the Fort Benton Subdivision, of the Montana Division. In addition, the Carrier utilized contractor Patrick Construction to provide additional forces and equipment.

The Organization filed a claim on June 6, 2013, objecting to the use of contractor forces resulting in a lost work opportunity for Claimants. The Carrier denied the claim on August 6, 2013. The parties were unable to resolve the claim on-property and it is now properly before this Board for final adjudication.

The first issue that must be resolved is whether the Organization's claim was timely filed. In its denial dated August 6, 2013, the Carrier asserted that the claim was untimely because it was received by the Carrier on June 10, 2013, although the alleged occurrence took place on April 9, 2013.

Rule 42A states, in part:

"All claims or grievances must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive

same, within (60) days from the date of the occurrence on which the claim or grievance is based.”

In Third Division Award 40785, this Board wrote that “a claim is ‘presented’ under Rule 42A when it is mailed, but there must be some proof of the mailing.” In this case, the Organization provided proof that the claim was mailed on June 6, 2013. Therefore, the claim was timely presented.

Turning to the merits, the Carrier has asserted that it used outside forces to respond to an emergency situation. This Board has defined an emergency as “an unforeseen combination of circumstances that calls for immediate action.” Third Division Award 20527; Third Division Award 10965. This Board has also suggested that an event which is neither sudden nor unforeseeable, such as a heavy snowstorm, is not an emergency. However, where an emergency exists, this Board has held that a Carrier may take whatever action it deems appropriate to cope with its problems. Third Division Award 26677.

Here, the track in question was sinking two to three feet after each train passed. The Organization acknowledges this fact, but asserts the problem was foreseeable. However, the Carrier responded that the sinking was accelerated due to the addition of two new grain facilities. The destabilization of the track was an emergency and the Carrier had wide latitude to correct the problem.

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 17th day of May 2019.