

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43661
Docket No. MW-42852
19-3-NRAB-00003-150052**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 (Lewis Holding) to perform Maintenance of Way and Structures Department work (remove a concrete crossing) at First Street in Sheridan, Wyoming on August 5, 2013 (System File C-13-C100-377/10-13-0667 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, Claimant W. Truax shall be compensated for eight (8) hours at his applicable 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.

This dispute involves the Carrier's alleged assignment of contractor Lewis Holding to remove a concrete crossing for the mobile maintenance crew to replace a broken rail at First Street in Sheridan, Wyoming at Mile Post 698.300 on August 5, 2013.

The Organization argues that the work at issue is contractually reserved to, and has customarily, historically, and traditionally been performed by, Maintenance of Way employees. Further, the Organization argues that the Carrier failed to comply with the advance notice and meeting requirements of the Note to Rule 55 and Appendix Y. Based on these arguments, the Organization submits that the Claimants are entitled to the remedy requested in Paragraph (3) above.

The Carrier argues that it was not required to comply with the advance notice and meeting requirements of the Note to Rule 55 because an emergency existed. In addition, the Carrier argues that the Appendix Y is not applicable until the Organization proves that the disputed work is reserved to Maintenance of Way forces, and it does not apply on this property. The Carrier also argues that the Organization has failed to prove damages.

The Organization's claim is based on the undisputed fact that the Carrier failed to comply with the advance notice and meeting provisions of the Note to Rule 55 and Appendix Y. The Carrier argues that it was not necessary to comply with these provisions in this case because of the "emergency time requirements" exception contained in the Note to Rule 55. As stated in the Note to Rule 55, "Nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees included within the scope of this Agreement performed by contract in emergencies that affect the movement of traffic when

additional force or equipment is required to clear up such emergency condition in the shortest time possible.”

It is the Carrier’s burden to demonstrate the existence of an emergency, which would include such factors as the nature, extent and duration of the emergency. See Third Division Awards 31835 and 32862. The Carrier argues that “emergency” should be defined as “[a]n unforeseen combination of circumstances which calls for immediate action.” Third Division Award 36982. The Organization argues that “emergency” should be defined as “the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt.” Third Division Award 24440. Both of these definitions share the element of an unforeseen circumstance, but the latter definition’s requirement that operations are brought to an immediate halt is a narrow take on the contractual term “affect the movement of traffic.” Certainly, when operations are brought to an immediate halt, traffic has been affected, but there may be other circumstances where operations are affected without being brought to an immediate halt. The Organization also submits that a broken track is not, “*ipso facto*,” an emergency, citing Third Division Award 20310 and Public Law Board 2206, Award 52. A review of these cases shows that they do not find that a broken track is not an emergency *per se*, but in those cases, there was insufficient evidence in the record to find that emergencies existed.

In this case, the evidence establishes that on August 5, 2013, there was a report of a broken rail in the middle of a street crossing in Sheridan, Wyoming. This led to the Carrier imposing a speed restriction to 10 mph that resulted in several trains being delayed. A BNSF crew was called in to fix the broken rail, and vehicle traffic on the street was closed and detoured two blocks away. The BNSF crew could not make the repairs immediately because there was no loader available to take out the concrete crossing planks. The Carrier brought in a contractor with a loader to pull the concrete crossing planks, and the BNSF crew worked between trains to make the repairs.

Under these circumstances, the Carrier has met its burden to establish the emergency time restriction exception to providing advance notice of the contracting. Under this exception, an emergency can be said to exist under circumstances “that affect the movement of traffic.” That occurred here when, after the report of a broken rail, the Carrier reasonably imposed speed restrictions that resulted in train delays.

Additional equipment was required to “clear up such emergency condition in the shortest time possible” because a BNDF loader that was necessary to make the repairs was not available and would have had to have been brought in from out of town. The repairs would not have been made in the shortest time possible if the Carrier had to wait to bring in a loader from another location or attempted to meet the advance notice requirement before using a contractor.

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.