

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43724
Docket No. MW-42761
19-3-NRAB-00003-140454**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof when award was rendered.

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

PARTIES TO DISPUTE: (

**(Union Pacific Railroad Company (former Chicago
and North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier utilized outside forces (R. J. Corman) to perform Maintenance of Way and Structures Department work (clean drift wood) from bridge abutments at Mile Post 417.8 near Trenton, Missouri beginning on April 30, 2013 and continuing through May 10, 2013 (System File G-1301-C-05/1587251 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above-referenced work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1B and Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. McGinness shall now be compensated forty-two (42) hours at his applicable straight time rate of pay and eight (8) hours at his applicable overtime 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.

As set forth above, this claim was initiated on behalf of the Claimants, employees in the Maintenance of Way and Structures Department, Track Subdepartment.

This claim arose after the Carrier used a contractor to clean away driftwood and storm debris piled against a bridge. The Organization argues that cleaning of debris from the bases of bridge structures is the work of the Carrier's Maintenance of Way employees, under Rule 1, as well as Rules 2, 3, 4 and 7.

Rule 1, Scope Rule states, in relevant part,

"RULE 1 – SCOPE

...

- B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property...**

By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily

performed by employees described here, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirement must be met which are beyond the capabilities of Company forces to meet.

In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as fair in advance of the date of the contracting transaction as is practicable "and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith."

The Organization also cites the Berge-Hopkins letter, regarding the contracting out of work. The letter remains in the Agreement at Appendix 15

Maintaining bridges falls within "all work" in connection with the construction, maintenance and repair of tracks and structures used in the Carrier's operations. In addition, the Organization has presented evidence that the Claimant and other Carrier employees have performed the work of clearing accumulated debris away from bridge abutments in the past, using backhoes and other equipment, as part of maintaining tracks and structures.

The Organization argues the Carrier provided no advance notice in this case of its intent to contract out this work, and therefore the Organization had no opportunity to request a conference to discuss or suggest alternatives to the contracting of this work. The Carrier argues that the work performed was of an emergency nature and also required the use of specialized equipment. In relation to

the Carrier's ability to contract out emergency work, the Carrier relies upon the language of Rule 1, B, which requires that notice be provided at least 15 days in advance of the date of the contracting transaction, except in "emergency time requirements" cases. The Carrier also relies upon the following language from Rule 1,

"Nothing contained herein 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."

The Carrier bears the burden of proving that an emergency exists. Third Division Awards 40078, 32862. The Carrier provided the statement of Manager Christopher Gust, who stated that the work was of an emergency nature, after recent storms and flooding in the area caused a large pile-up of debris against the bridge. He stated that the work involved removing driftwood and debris from the waterway, not the abutments of the bridge. He also stated that special equipment not owned by the Company was used, a semi-floating backhoe, which was able to enter the water channel to remove the debris. The Carrier submitted a photo showing the debris, as well as the equipment operating from the water channel.

The Organization acknowledged that leading up to this work, there had been somewhat heavy rains, but stated that the storms had ended and the water had subsided. The Organization argues that there was no longer any emergency by the time the disputed work was performed.

In Third Division Award 20527, this Board ruled on what constitutes an emergency, and how work assignments may be affected during an emergency,

"We have heretofore defined an emergency as 'an unforeseen combination of circumstances which calls for immediate actions' (Award 10965)... In this Division and in the other Divisions of the Board it is well established that the Carrier, in an emergency, has broader latitude in assigning work than under normal circumstances..."

The statement and photos provided by the Carrier demonstrate that the pile of

debris against the base of the bridge is very large, and includes tree trunks and large tree limbs. The severe storms caused an unforeseen combination of circumstances which created a situation calling for immediate action to remove the debris in order to relieve the pressure on the bridge and to search for damage to the bridge structures. The Board concludes that the Carrier has established that there was an emergency situation created by the debris which built up against the bridge, and the Organization has not established that the emergency situation ended when the storms ended.

In addition, the Organization stated that the claim should be sustained because there is no proof that specialized equipment was needed. According to the Organization, the work performed was nothing more than regular and routine track maintenance, which could be performed using common hand tools and a track hoe, which are owned by the Carrier or readily available to rent. The Organization provided evidence indicating that Carrier forces had performed cleaning away of debris from the base of this bridge in the past, using such equipment.

The Carrier has established that this was not routine maintenance, but rather an urgent situation. The Carrier proved the need to use special equipment not owned by the Carrier which could operate from the middle of the water channel in order to better access the removal of the debris. Evidence from both parties demonstrates that using other land-based equipment in the past in this location resulted in the loss of the equipment in the water channel.

In Third Division Award 40374 (Referee Margo R. Newman), this Board ruled,

“We carefully reviewed all evidence regarding whether the Organization proved that the involved work belongs to BMWE-represented forces. The Organization was unable to disprove the Carrier's evidence that the rented crawler crane was different from the Carrier's equipment and could perform the work in a more efficient and timely manner. It is within the Carrier's province to make decisions concerning the efficiency of the operation, provided that it does not violate specific rights set forth in the Agreement. Based on the record before the Board, the Carrier's use of the crawler crane and contracted operator did not violate the Agreement. The Agreement specifically permits the Carrier to contract out work customarily performed by its own employees when specialized equipment not owned by the Carrier is

required.”

The Carrier has established that work performed by contractors in this case was performed under conditions which constituted an emergency, as defined in decisions of this Board. In the case of emergencies, the Carrier need not provide advance notice of the contracting out of work and the Carrier has broader latitude in assigning work. The Carrier exercised that latitude in this case to use contractor forces to perform emergency work and to obtain the use of special equipment not owned by the Company which was brought in to address this emergency. The Organization has not been able to disprove the Carrier’s position that special equipment was needed in this case, and could perform the work in a more efficient manner than the Carrier’s equipment.

Based on the record before the Board, the Carrier’s use of this contractor equipment and operators did not violate the Agreement. The Organization has failed to meet its burden to demonstrate that the work involved belongs to BMWE-represented forces, under the emergency situation involved in this claim. The claim is therefore 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 18th day of June 2019.