

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43735
Docket No. MW-42812
19-3-NRAB-00003-140523**

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

**(Brotherhood of Maintenance of Way Employes 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 assigned outside forces (Hulcher Services, Inc.) to perform Maintenance of Way Department work (track repair) near Northfield, Minnesota along the Albert Lea Subdivision in Seniority District T-7 on July 13 and 14, 2013. (System File B-1301C-151/1590245 CNW).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance notice of its intent to contract out the aforesaid work and when it failed to make a good-faith effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 1 and the December 11, 1981 National Letter of Agreement (Appendix ‘15’).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Campbell, J. Horstmann, L. Nordman, C. Peterson, T. Woodfill, A. Morreim, D. Seeger, J. Kockler, J. Clausen, F. Pearson, S. Seible and N. Berg shall now each ‘...be compensated for the lost opportunity to work, All man/ hours of straight time, overtime, and double time, divided equally per claimant at the appropriate rate, that the contractor’s employees**

performed Maintenance of Way work.’”

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.

The Claimants have established and hold seniority in their respective classes within Seniority District T-2 of the Carrier’s Track Subdepartment of Maintenance of Way and Structures Department.

This claim arose after the Carrier used a contractor on July 13 and 14, 2013 to perform track repair, including track washouts, after a large storm. The Organization argues that track maintenance work, including the repair of tracks in this case, falls under Rule 1, Scope and other rules.

Rule 1 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 work of maintaining tracks and the roadbed 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 repaired tracks and roadbeds after storms as part of their work of maintaining and repairing tracks and related structures.

The Organization argues that if the Carrier wishes to contract out work which falls within the scope of Rule 1, two requirements must be met. First the Carrier must provide proper advance notice of its intent to contract out the work, so that the parties have an opportunity to discuss the Carrier's intent. In addition the Carrier must

demonstrate that the work falls under one of the exceptions enumerated in Rule 1,B under which the Carrier is permitted to contract out such work.

The Organization claims that the Carrier has failed to meet either requirement of Rule 1,B cited above. The Organization argues that the Carrier provided no advance notice of the contracting out of this work and the Organization had no opportunity to discuss or suggest alternatives to the contracting out. The Organization argues further that the Carrier has not established that one of the exceptions enumerated in Rule 1,B applies.

The Carrier argues that the work performed was of an emergency nature. In relation to the Carrier's ability to contract out emergency work, the Carrier relies upon the following language of 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 also relies upon the language of Rule 1, B which states that advance notice will be required "except in 'emergency time requirements' cases." The Carrier argues that it was not required to provide advance notice in this case, but that it did provide advance notice by letter dated October 12, 2012 of its intent to utilize contractors to perform emergency work for the period covered by this work. A conference was held between the parties over this notice.

Once the Organization has established that the work in dispute falls under Rule 1, Scope, the Carrier bears the burden of proving that an emergency exists. Third Division Award 32414. 36854. Simply asserting that an emergency exists is not enough to establish that a particular situation meets the standard of an emergency under the Agreement and the decisions of this Board. In defining what constitutes an emergency, the parties cite Third Division Award 20527, in which this Board ruled,

"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...”

In support of its view that this was work of an emergency nature, the Carrier provided the statement of Manager of Track Maintenance David Jack who stated that, “This was a declared emergency situation,” and that a majority of the forces used in the emergency work were Carrier forces. The Carrier provided evidence that the washouts followed a severe storm which dropped nine inches of rain in a twelve-hour period, resulting in “multiple track outages that included a 450 ft. washout” at one location. The Carrier presented photographs showing that there was a washout of the roadbed affecting the tracks at the location of the disputed work.

The Carrier has established that there was an emergency situation in this case. The nature of emergency situations precludes the possibility of providing notice 15 or more days in advance of the work being performed by contractors, as is normally required under Rule 1, B. The Rule does not require the Carrier to provide advance notice in the emergency situation at issue in this claim.

The Organization argues that even in an emergency situation, however, the Carrier must make a reasonable effort to call and use its employees as stipulated by Agreement rules. Third Division Awards 21222, 40372. The statements provided by the Organization and the Carrier demonstrate that Carrier forces were brought in to work on the emergency situation with the contractors at the time of the washout on Saturday, July 13. Additional Carrier forces were brought in on Monday, and provided the majority of the crew working on the washout.

The Organization therefore has not provided sufficient evidence to prove that the Carrier did not make a reasonable effort to use its own forces in this emergency situation. In the case of emergencies, the Carrier has broader latitude in assigning work, including the use of outside forces. The Carrier exercised that latitude in this case to use both contractor and Carrier forces in addressing this situation. The Organization has not established that the Carrier violated the Agreement when contractor forces were used to perform a portion of the work during this emergency. Therefore, the claim is denied.

AWARD

Claim denied.

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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.