

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 44403
Docket No. MW-43217
21-3-NRAB-00003-200342

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

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

PARTIES TO DISPUTE: (

(BNSF Railway Company (Former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned outside forces (Hulchers Inc.) to perform Maintenance of Way and Structures Department work (remove and pile spilled coal away from the roadway near the B4 stub) in the Hobson Yard, Lincoln, Nebraska on May 18, 2014 (System File C-14-C100-155/10-14-0301 BNR).
- (2) The Carrier violated the Agreement when it assigned outside forces (Hulchers Inc.) to perform Maintenance of Way and Structures Department work (load, remove and haul clean spilled coal from the B4 stub) in the Hobson Yard, Lincoln, Nebraska to Milford, Nebraska on May 28, 2014 (System File C-14-C100-157/10-14-0303).
- (3) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance notification of its intent to contract out the work described in Parts (1) and/or (2) above 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.
- (4) As a consequence of the violations referred to in Parts (1) and/or

- (3) above, Claimants R. Brennen, J. Francke, H. Peleyo, M. Sailors and J. Butcher shall each now ‘... be paid four (4) hours overtime at the appropriate rate of pay as settlement of this claim.’
- (5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimants R. Brennen, H. Peleyo, L. Miller, M. Lane, M. Hammond, K. Kildow, T. Brandt and M. Sailors shall each now ‘... be paid eight (8) hours straight time and two (2) hours overtime at the appropriate rate of pay as settlement of this claim.’”

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 case as presented to the Board actually involves two separate claims that were combined for presentation to, and decision by, the Board because they involved the same issues and the same facts. First, the Organization alleges that the Carrier used an outside contractor (Hulchers) on May 18, 2014, to remove coal that had spilled onto the service road near the B-4 Stub Track in the Hobson Yard, Lincoln, Nebraska, following a derailment. The basis for the Claim is that the Carrier failed to provide notice of its intent to contract out the work, nor did it submit evidence to support its contention that the situation constituted an emergency under the Note to Rule 55, which does not require notice. The Organization alleges a further similar violation of the Agreement when Hulchers returned to the area on May 28, 2014, and removed, cleaned up and hauled away coal from the B4 Stub. The Carrier denies that cleaning up coal spilled from a customer’s cars is Scope-covered work; moreover, this was an emergency situation, for which notice under the Note to Rule 55 is not required.

The Note to Rule 55 establishes the parties' rights and obligations regarding contracting out of bargaining unit work. If the disputed work is work "customarily performed" by bargaining unit employees, the Carrier may only contract out the work under certain exceptional circumstances:

[S]uch 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 when work is such that the Company is not adequately equipped to handle the work, *or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.* (Emphasis added.)

The Note to Rule 55 also exempts the Carrier from its obligation to notify the Organization "as far in advance of the date on the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, *except in 'emergency time requirements' cases.*" (Emphasis added.)

The record before the Board, which includes employee statements about what happened, establishes that there was a derailment on the B-4 Stub that resulted at least in enough coal spilling onto the service road next to the B-4 Stub to render it impassable. Claimant Monte Sailors described the accident:

The facts of this claim are that a new trainman in the Lincoln Yards did not throw the derail and two cars spilled clean coal on the B-4 Stub track. MOW foreman (not a track inspector as stated in the declination) was called in to access [sic] the situation... This claim was not a [sic] emergency and did not stop rail traffic. This claim was for the clean coal that was dumped on the roadway and moved to the side of the road so that automobile traffic could get through...

In its initial declination for the May 18, 2014, Claim (dated August 18, 2014), the Carrier stated:

There was a derailment of two coal cars on B-4 Stub track involving tracks blocked used for switching movements. A BNSF Track Inspector was brought in once the situation was determined to be beyond the scope of BNSF's forces' capability to re-rail cars or perform maintenance until the wreckage was cleared. The Organization's assertion that BNSF contracted

to clear to move coal for autos does not account for the derailment that needed to be cleared in this service interruption condition that impacted car movement....

The Carrier's initial declination for the May 28, 2014, claim, also dated August 18, 2014, used slightly different language:

There was a derailment of two coal cars on B-4 Stub track involving tracks blocked used for switching movement. This was an emergency situation requiring remediation for coal cleanup running into a drainage ditch for which BNSF forces were not prepared or able to respond. The assertion that BNSF contracted to clear to move coal does not account for the derailment that needed to be cleared and coal debris that required removal to prevent runoff into water drainage; which was the result of a service interruption condition that had environmental remediation impact.

The undisputed facts are that there was a derailment on the B-4 Stub track involving two coal cars, and that coal from the derailed cars spilled onto the service roadway to the point where automobiles could not get through. While the implication from the first claim is that the derailment occurred on May 18, 2014, the record does not, in fact, include the date of the derailment.

Ordinarily, a derailment is an emergency of some sort: here, there were overturned coal cars that needed to be righted and/or removed from the track; enough coal spilled onto the adjacent service road to close it to traffic. The Organization characterizes the derailment that occurred here as *de minimis*: it insists that train movements were not affected and the coal that was spilled was "clean" coal of the sort ordinarily cleaned up by MoW forces. The time lag of ten days between the work performed by the contractor indicates that there was no emergency. In these two claims, the Organization did not address the derailment as such; it focused strictly on the coal cleanup.

The Carrier paints a different picture: the derailment blocked tracks that were used for switching movements and interrupted service. An inspection determined that re-railing the cars was beyond the capacity of Carrier forces. It was necessary to call in an outside contractor on an emergency basis to clear the wreckage and to clear coal from the service road so that it could be used. Moreover, it was appropriate for the contractor to return a short time later to complete the job it had started. The record

does not include any statements or other evidence from the Carrier about what happened or how the Carrier dealt with the derailment.

Both versions of events cannot be true, and the Board has no way of determining whether the derailment—which we know did occur—constituted an actual emergency and whether the Carrier’s actions were consistent with an emergency. For instance, if the derailment occurred on May 14 and the Carrier called in Hulcher to re-rail the cars, it would make sense for the Carrier to have asked the contractor to clear the spilled coal from the roadway while it was on site as part of the initial response to the accident—but the record is devoid of such information. In the end, the Board is left with an irreconcilable dispute in critical facts. And there is considerable Board precedent that in such cases, the Board is constrained to dismiss or deny the claim. As stated in Public Law Board 5405, Award 18 (O’Brien 1994):

Based on the record before us, this Board is unable to determine if the Claimants were, in fact, runaround en route as the Carrier maintains, or whether they were placed out of turn after they arrived in Trinidad, as the Organization insists. This, of course, is an essential element of the claim before us.

Inasmuch as this Board is unable to resolve this material factual dichotomy, we have no alternative but to dismiss the instant claim due to this factual dispute without addressing the merits before us.

The two claims before the Board here present a similar problem. It is impossible to determine the extent to which the derailment presented a true emergency. If it did, the Carrier was not required to provide notice pursuant to the Note to Rule 55 when it called in a contractor to remove the spilled coal from the service road and from the B-4 Stub track. If not, the Board would have to address the merits of the case. In light of the dispute in facts, however, that is not necessary.

AWARD

Claim dismissed.

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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 13th day of April 2021.