

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44854
Docket No. MW-46817
23-3-NRAB-00003-210781**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

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

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Koppers Railroad Structures, R. V. Enterprises and Cranemasters) to perform routine Maintenance of Way and Structures Department work (including but not limited to removing old bridge panels, laying new bridge deck panels, installing hook bolts, setting outer guard timber, installing walkway, installing handrail posts, setting up concrete forms, pouring concrete, stripping the concrete forms and assisting with the tie in of the new and old track) in the vicinity of Mile Post 516.6 on the Portal Sub beginning on April 8, 2019 and continuing through May 2, 2019 (System File C-40-19-080-20/2019-00010396 SOO).**
- (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 said work and failed to enter good-faith discussions to reduce the use of contractors and increase the use of its Maintenance of Way forces as required by Rule 1 and Appendix O.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants C. Brossart, D. Voeller, T. Steinbrenner, T. Waling, J. Sanders, R. Kohler, T. Lucy, T. Dosch, J. Blixt and J. Maurice shall now be allowed a proportionate share each of one thousand one**

hundred thirty-six (1,136) hours at their applicable straight time and/or overtime rates of pay for all wages, benefits and work opportunities lost beginning April 8, 2019 and continuing through May 2, 2019.”

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.

On February 1, 2019 the Carrier's Chief Labor Officer issued a letter to the Organization's Vice General Chairman - Burlington System Division announcing the Carrier's intention to contract out work in connection with a derailment that occurred on January 28, 2019:

Please be advised that it is CP's intention to contract the following:

Subject: Repair derailment on 5-span bridge

Where: Portal Sub Milepost 516.60
Kenmare, ND

When (tentative)

Commencing: February 1, 2019

Completion: March 8, 2019

Scope

Remove and replace steel diaphragms; heat

**straightening bent steel components and
install new timber bridge ties and walkway.**

Reasons for contracting out:

Contractor using specialized equipment and procedures, including heat straightening utilizing special torch heads and specialized knowledge not possessed by Carrier forces. Emergency repair (unplanned work). Bridge currently under 25 mph slow order and daily inspection. Koppers, Inc. will be completing the work.

CP forces to provide flagging for track protection. Carrier's right to subcontract is based upon Agreement language, Board Award and past practice. Should you desire to discuss further, please advise of dates you would be available to do so, as the Carrier must arrange with Engineering representatives.

On February 5, 2019 a pre-contract meeting convened to discuss the repair work necessitated by the derailment; however, no arrangements or resolutions were agreed-upon. On or around the date of the pre-contract meeting Koppers, Inc. began heat straightening work and continued with it until completion. From April 8, 2019 through May 2, 2019, contract forces performed maintenance-of-way work customarily and traditionally performed by the force. In this regard the force also performed work on this project.

On June 5, 2019 the Organization filed a claim alleging violations of Rule 1 - Scope, Rule 2 - Classification of Work, Rule 3 - Seniority - Sub Department Limits, Rule 4 - Seniority, Rule 6 - Seniority Limits and Appendix O. The Carrier denied the claim on August 2, 2019. Thereafter the Organization appealed the claim up to and including the Carrier's Highest Designated Officer where it was denied on November 25, 2019. The parties convened in conference in 2020 with discussions continuing over the course of months culminating with a final conference on October 12, 2020 followed by the Carrier's after-conference letter dated October 23, 2020 and the Organization's after-conference letter dated May 18, 2021. This claim dated July 29, 2021 is presented for final adjudication. The Board is fully informed of the on-property record and each party's position and argument in its submission including awards submitted in support thereof.

A summary of the Carrier's position and argument follows. The burden of proof resides with the Organization; it fails to carry its burden on the alleged rules violations. Third Division Awards 39618 and 39885, among others, confirm the Carrier's practice to contract out bridge maintenance and repair work. Although Rule 1 and Appendix O provide conditions and procedures for notifying the Organization, neither the Rule nor Appendix restrict or prohibit contracting out. In other words, the Carrier retains its right to contract out work including work subject to Rule 1 - Scope.

During a pre-contract meeting on February 5, 2019 the Carrier detailed the scope of repairs on the 5-span bridge where each span exceeds twenty-seven (27) feet: several spans and beams damaged; panel repairs required; walkway issues. Repairs required specialized equipment not possessed by the Carrier (heat straightening torches) and specialized skills not possessed by the force. The derailment was an unplanned event necessitating additional forces; the Agreement does not require the Carrier to maintain additional forces for an unplanned incident. The majority of contract work would be handled by Koppers, Inc., but it may determine to use a subcontractor for specialized repairs. The Carrier's force will provide flag protection and assist with building track panels. Notice was provided at least fifteen (15) days prior to contractors commencing the work. The Carrier's notice and discussions with the Organization addressed removal of old bridge panels, installation of new panels and hook bots, setting the outer guard timer, installation of walkway and handrail posts, setting up and stripping concrete forms, pouring concrete and other track maintenance work.

The bridge remained in service with a twenty-five miles per hour (25 mph) slow order plus daily inspections; its limited use impacts the Carrier's network and ability to operate freight traffic in the area. These conditions represent an emergency - - traffic movement affected and additional forces required to remedy the situation in the least amount of time possible. The force was unavailable due to other assignments as well as not possessing specialized skills for specialized equipment.

Numerous awards, including on-property Third Division Awards 38963 and 40252, confirm that the Carrier is not required to piecemeal a project; however, the Carrier's steel crew, when available, was assigned to repair the bridge. The Claimants are presenting a claim for hours in which they received pay for work they already completed. This claim is excessive and not compliant with the Agreement.

A summary of the Organization's position and argument follows. Between April 8, 2019 and May 2, 2019 the Carrier assigned outside forces to perform scope-covered work. Fifteen (15) contractor employees used Carrier equipment to perform maintenance of way (MOW) work even though Claimants were available, fully qualified and willing to complete this work had it been assigned to them. By rules and past practice, this is MOW work because the force customarily and traditionally performs it. That is, Claimants perform basic bridge maintenance and associated track maintenance work with employees in B&B, Engineering Services and Track Sub-department. The Carrier did not comply with Rule 1 and Appendix O; its improper notice did not identify the MOW work which precluded good-faith negotiations to reach an understanding prior to contracting out.

During a pre-contract meeting on February 5, 2019 the Carrier stated that work would begin that day and continue to March 8, 2019; however, the work claimed by the Organization did not start until April 8, 2019 or after the completion of heat straightening. The notice of intention to contract out provided a start date and end date but the Carrier's after conference letter (October 23, 2020) states the claimed work was still in planning stage and no firm date was set to start repairs. The Carrier's position is identifying heat straightening is sufficient notice for the Organization to know that all scope-covered work in connection with it will be contracted out. This conflicts with the Chief Engineer's representation during conference that the project was specifically designed to allow forces to perform the vast majority of the work. This vague, blanket notice does not comply with Rule 1 and Appendix O because it fails to identify the claimed work. That is, removal of old bridge panels, installation of new bridge panels and hook bots, setting of outer guard timer, installation of walkway and handrail posts, setting up and stripping concrete forms, pouring concrete and other track maintenance work. The Organization is not claiming heat straightening or equipment needed to do it.

No emergency existed. Third Division Award 29467 states an emergency is a sudden, unforeseeable and uncontrollable event that brings operations to a halt and requires immediate action. As for immediate action, the claimed work did not commence until April 8, 2019 which was more than two (2) months after the derailment (January 28, 2019); the Carrier could have planned to use the force during the intervening months. Emergency is an affirmative defense which the Carrier fails to prove as shown by the slow order - a common method for protecting all manner

of track and structure defects on a railroad - - which allowed continued use of the bridge to move freight traffic.

Awards 24242, 25102, 25677 and 26762 confirm sustaining this claim. The notice was not fully developed consistent with the manifest intent and requirements in Appendix O and Rule 1. MOW claimed work did not require specialized equipment but ordinary equipment - - excavators, skid steer and loader. Even if there was an equipment-related exception in the scope rule the Carrier remains obligated by Appendix O to make a good-faith attempt to procure such equipment by renting or leasing it for the force to operate.

As for the Carrier's disputing the propriety of this claimed work and compensation for Claimants, Awards 32440 and 29313 establish that the Organization is free to name any employee in a claim and Awards 35572 and 38965 reject the Carrier's position and show that compensation for fully employed claimants is an appropriate remedy. Claimants could have performed the work on overtime or been assigned the work on claim dates and times as they were qualified and ready to work.

The Board's findings are drawn from the record established by the parties in this proceeding. The burden of proof resides with the Organization to establish that the scope-covered work claimed by the Organization was contracted out contrary to the rules. The Organization claims the following scope-covered work performed by outside forces from April 8, 2019 through May 2, 2019:

- removing old bridge panels
- laying new bridge deck panels
- installing hook bolts
- setting outer guard timber
- installing walkway
- installing handrail posts
- setting up concrete forms
- pouring concrete
- stripping concrete forms
- assisting with tie in of new and old track

Rule 1 and Appendix O apply in this situation; conditions therein must be satisfied prior to contracting out. Rule 1(c) requires “as far as in advance as practicable and in any event, not less than fifteen (15) days” notice to the Organization when the Carrier plans to contract out work requiring special skills not possessed by the force or special equipment not owned by the Carrier, time requirement are beyond the capabilities of the force. Once notice is issued the parties “shall promptly meet” and “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” subject to any subsequent claim(s) filed by the Organization. Paragraph (c) concludes with “nothing herein contained shall be construed as restricting the right of the Company to have work customarily performed by employees within the scope of this Agreement performed by contract forces when an emergency affects movement of traffic and additional force or equipment is required to clear up the emergency in the least amount of time possible.

Appendix O states that the carriers’ good-faith efforts to reduce the incidence of subcontracting and increase use of the force “to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees.” At the local level good-faith discussions will focus on reconciling differences and improving communications on subcontracting with advance notice identifying the work and reasons for contracting.

The notice dated February 1, 2019 states “Koppers, Inc. will be completing the work.” This directed and firm statement shows the Carrier’s pre-determined decision to contract out prior to engaging the Organization in discussions about the force performing the claimed scope-covered work. The force was qualified, ready and prepared to perform the claimed work during April 8, 2019 through May 2, 2019; however, the Carrier pre-determined to contract it. In doing so, the Carrier asserts the claimed scope-covered work was inextricably linked to heat straightening but it did not include the claimed work in the notice. The only scope-covered work in the notice is “CP forces to provide flagging for track protection.”

The Carrier continued planning for two (2) months or longer after Koppers commenced heat straightening; there are no indicators in this record that precluded the Carrier during that interval of time from managing the force to perform this scope-covered work. An emergency did not exist; cautionary measures were undertaken to ensure the track remained in service and available for freight traffic.

Outside force was required for heat straightening but not for this claimed scope-covered work. This was a fluid situation as shown by tentative dates for starting and completing the work; the Chief Engineer represented that the plan was to assign the majority of scope-covered work to the force but that did not occur. Conditions precedent must be accomplished prior to the Carrier's decision. Pre-determining the outcome flouts the conditions. The Board will sustain the claim on that basis.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 10th day of March 2023.