

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45138  
Docket No. MW-42899  
24-3-NRAB-00003-220902**

**The Third Division consisted of the regular members and in addition Referee Sarah Miller Espinosa 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 assigned outside forces (Hulcher, Inc.) to perform Maintenance of Way and Structures Department work (repair track) on the Mankato Subdivision at Mankato, Minnesota on October 7, 8 and 9, 2013 (System File B-1301C-177/1595847 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 above-referenced 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 Appendix ‘15’.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Campbell, S. Pettis, D. Balow, J. Popp, A. Hervey, R. Melheim, C. Gronewold, E. Nelson, A. Hartman, B. Bass, D. Clough, D. Brooks, M. Ganzer, T. Lane, A. Steffen and A. Stenen shall each ‘... be compensated for the lost opportunity to work, one hundred and fifty eight (158) hours of straight time and thirty six (36) hours of overtime, divided equally per claimant at the appropriate rate, for all hours that the contractor’s employees performed Maintenance of Way work.’ (Emphasis in original).”**

**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 claim was made on behalf of the named Claimants. At the time of the dispute, the Claimants established and held seniority within various classifications.

In this case, on October 7, 2013, a Canadian Pacific (CP) train derailed two units at Milepost 83 on the Carrier's main line. Both derailed units were leaking diesel fuel and the derailment was impeding the movement of traffic. The Carrier utilized outside forces to repair the affected track on October 7, 8, and 9, 2013.

Rule 1B is central to the determination of this claim. Rule 1B states:

**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 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. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.**

By agreement between the Company and the General Chairman work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contract's forces. However, work may only be

contracted provided that special skills not possessed by the Company's Employees, special equipment now 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 requirements 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 far in far 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.

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.

In addition to Rule 1B, the Berge-Hopkins letter, which is located at Appendix 15 in the Agreement, is also referenced by the Organization in support of its position.

The Organization established that the work at issue, track repair, is within the scope of Rule 1. As stated in Third Division Award 43737 (Referee Jeanne M. Vonhof), this Board has consistently held that "if the work comes within the scope of Rule 1, the Organization need not establish that it has performed the work exclusively in the past. Exclusivity is not a necessary element to be demonstrated by the Organization in contracting cases."

The Organization argues in part that, because notice was not provided at least 15-days in advance, the Carrier violated the notice requirement of Rule 1B. This argument, however, ignores the emergency provision of Rule 1B. That is, nothing in Rule 1B “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.”

An emergency is an unforeseen combination of circumstances that calls for immediate action. A derailment, by its very nature, is an unforeseen combination of circumstances. The derailment of two units that are impeding the movement of traffic calls for immediate action and precisely fits the criteria established to allow contracting under emergency circumstances. Therefore, no violation of the Agreement was established.

Thus, the claim is 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 28<sup>th</sup> day of November 2023.