

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 45176  
Docket No. MW-43863  
24-3-NRAB-00003-230212**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(BNSF Railway Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (haul rip rap and move rock onto the shoulder of the track) between Mile Posts 9 and 13.2 on the Ravenna Subdivision of the Nebraska Division on May 6, 7 and 8, 2015 (System File C-15-C100-113/10-15-0280 BNR).**
- (2) The Agreement was further violated when the Carrier failed to comply with the advance notification and conference provisions in connection with the Carrier’s plans to contract out this work or to 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.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Schrage, B. Snyder, C. McCoy, G. Stall, M. Reynolds, T. Scott, L. Miller, B. Gerken, C. Whitbeck, C. R. Kelley, T. Lyons, J. Lyons, M. Portenier, P. Fries, C. Hilbers, T. Meyer, J. Kujath, G. Fabian, J. Epp and C. M. Kelley must each be paid for twenty-four (24) hours at their respective straight time rates of pay and for eighteen (18) hours at their respective overtime rates of pay for the work performed by the outside contractors on the claim dates.**

**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 within various classifications of the Carrier's Maintenance of Way and Structures Department.**

**In early May 2015, the state of Nebraska experienced severe thunderstorms, tornadoes, and flooding rains. Due to the severe storms, the governor of Nebraska successfully petitioned the President to declare this region of the state a disaster. Due to the storm, the Carrier's tracks in the affected areas were taken out of service.**

**In order to correct the issue, on May 6, 7 and 8, 2015, the Carrier assigned outside forces (Hulcher Professional Services) to perform embankment stabilization work, including hauling rip rap and moving rock onto the shoulder of the track, between Mile Posts 9 and 13.2 on the Ravenna Subdivision of the Nebraska Division. The contractors utilized excavators, front end loaders, and lowboy dump trucks.**

**In a letter dated June 4, 2015, the Organization filed a claim on behalf of the Claimants. The Carrier denied the claim in a letter dated July 27, 2015. Following discussion of this dispute in conference, the positions of the parties remained unchanged, and this dispute is now properly before the Board for adjudication.**

**The Organization contends that track roadway construction, maintenance and repair work, including hauling rip rap and moving rock onto the shoulder of the track is typical Maintenance of Way ("MOW") work and that such work has customarily and historically been assigned to and performed by the Carrier's MOW forces and is contractually reserved to them. The Organization contends that the Carrier never denied the work occurred but instead asserted that the Organization did not meet its**

burden of proof. The Organization contends that this defense is without merit.

The Organization further contends that the Carrier failed to comply with the Note to Rule 55 and Appendix Y by failing to provide proper advance notice of its plan to use outside forces and failing to make good faith efforts to reduce the incidence of subcontracting. The Organization contends that the Carrier admitted that it did not notify the Organization of its intention to use outside contractors.

The Organization contends that the Carrier failed to prove its affirmative defense that an emergency justified this action. The Organization contends that had emergency conditions existed, the Carrier would have immediately removed the track from service in order to allow contractor forces to perform the work and return the track to service in a timely fashion. The record does not establish that the Carrier's operations were brought to an immediate halt or that the track condition affected the movement of trains.

The Carrier contends that the Organization has failed to produce evidence that the work occurred as claimed, or to show the work was actually performed by a contractor. The Carrier further contends that the Organization has failed to demonstrate that this work was customarily performed by its members.

The Carrier contends that the disputed work was part of its response to an emergency situation and thus, is expressly exempted from the contracting provisions in Rule 55. The Carrier contends that in an emergency situation, it is afforded wide latitude to restore service and need not give notice of its contracting out. The Carrier contends that the Organization never refuted its assertion that emergency conditions existed, necessitating the use of outside forces.

The Carrier has asserted that it used outside forces to respond to an emergency situation. This Board has defined an emergency as "an unforeseen combination of circumstances that calls for immediate action." Third Division Award 20527; Third Division Award 10965. This Board has also suggested that an event which is neither sudden nor unforeseeable, such as a heavy snowstorm, is not an emergency. However, where an emergency exists, this Board has held that a Carrier may take whatever action it deems appropriate to cope with its problems. Third Division Award 26677.

Here, the Carrier's mainlines were taken out of service due to severe storms, including severe thunderstorms, tornadoes, and flooding rains. The Organization acknowledges this fact but asserts the flooding had not yet reached the tracks when

the Carrier assigned the contractors to work. However, the Carrier responded it was acting to correct the issue as quickly as possible. A state of emergency was declared by the President for the state of Nebraska. Under the circumstances, the Carrier enjoyed wide latitude to address the problem, including the use of contractors without advance notice to the Organization.

**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 22<sup>nd</sup> day of February 2024.