

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45235
Docket No. MW-46413
24-3-NRAB-00003-210179**

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

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (Hulcher) to perform Maintenance of Way Department work operating SEO equipment at a derailment at the Carrier’s North Yard in Fort Worth, Texas on July 19 and 23, 2019 (System File 2409-SLA8-19108/14-20-0011 BNS).**
- (2) The Agreement was further violated when the Carrier failed to notify the General Chairman, in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto regarding the work referred to in Part above and when it failed to assert good-faith efforts to reach an understanding and reduce the amount of contracting as required by Appendix No. 8 and the December 11, 1981 National Letter of Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Cooper and M. Walton shall now each be compensated twenty-four (24) hours at their respective rates for all hours worked by the outside forces during the claim period.”**

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 Organization filed the instant claim on behalf of Claimants alleging that the Carrier violated the parties' Agreement by subcontracting out Maintenance of Way ("MOW") Department work of operating SEO equipment at a derailment at the Carrier's North Yard in Fort Worth, Texas on July 19 and 23, 2019.

The Carrier raises an initial procedural issue regarding whether the claim is timely. Based on the record before this Board, it appears that the claim was timely filed. The Organization initially filed the claim on September 6, 2019. At the time of the initial filing, the Organization made a clerical error and referred to the work dates for the claim as June 19 and 23, 2019. Subsequent filings by the Organization corrected this scrivener's error. The Organization provided the Carrier with sufficient notice that the claim occurred on July 19 and 23, 2019, not June. Further there is no evidence in the record that the Carrier was prejudiced by the Organization's clerical error. Given these facts, the Carrier's procedural argument is denied.

As to the merits of the claim, the Carrier submits that it failed to comply with the notice requirements of Appendix 8 because of an emergency situation that occurred at the North Yard, Fort Worth, Texas. The Organization does not contest that a derailment occurred. However, the Organization submits that the derailment did not give rise to an emergency and that the Carrier was obligated to comply with the notice requirements of Appendix No. 8 and the December 11, 1981, National Letter of Agreement.

In contrast, the Carrier asserts that the emergency derailment required immediate attention to restore freight service. The Carrier submits that Appendix 8 of the South Agreement includes, in relevant part, as follows:

LETTER OF UNDERSTANDING DATED SEPTEMBER 25, 1956

In connection with the application of the above, the Carrier may, without conference with the General Chairman, arrange for the use of equipment

of contractors or others and use other than Maintenance of Way employees of the Carrier in the performance of work in emergencies, such as wrecks, washouts, fires, earthquakes landslides, and, similar disasters.

The Carrier maintains that the derailment caused damage to panels, placing three (3) tracks, including the lead at North Yard, out of service. Moreover, although tracks were opened to allow freight to begin moving at restricted speed, the emergency continued. The Carrier submits that once it has shown that an emergency exists, the line does not need to be completely shut down to prove the emergency continued. Third Division Award 32273. According to the Carrier, getting the track back in service is only part of the emergency repair and remediation process. Third Division Award 40792.

According to the Organization, the Carrier failed to provide any proof that an emergency occurred. The Organization also alleges that the Carrier waited approximately 12 hours to start repair of the track. Mere assertions without more are not acceptable proof. The board cannot and will not decide this matter based on presumption, conjecture, or speculation. Third Division Award 30414. Based on arbitral precedent, when there is an irreconcilable dispute in material facts, the Board has no alternative but to dismiss the claim. Third Division Awards 31831, 38007. This finding is limited to the unique circumstances of this case.

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 28th day of March 2024.