

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 45663
Docket No. MW-48618
26-3-NRAB-00003-240207

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan 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 Inc.) to perform routine Maintenance of Way and Structures Department work (work associated with replacement of bridge deck ties on a railroad bridge) in the vicinity of Mile Post 0.49 on the Withrow Subdivision beginning on August 15, 2022 and continuing through August 17, 2022 (System File C-76-22-080-29/2022-0030906 SOO).
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairperson with proper advance written notice of its intent to contract out the work referred to in Part (1) above and when it failed to enter into good-faith discussions to reduce the use of contractors and increase the use of 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 J. Kuss, R. McCumber, C. Hoffert, N. Higgins, T. Waling, W. Springstead and D. Voeller shall now be allowed ‘... a proportionate share each of one hundred eighty (180) hours at their applicable straight-time and/or overtime rates of pay for all time, benefits, and work opportunities lost and to which they were entitled by virtue of their seniority rights and regular assignments – but

which they were denied (sic) lost beginning on August 15 and continuing through August 17, 2022.”

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 dispute involves whether the Carrier violated the Agreement when it assigned outside forces (Koppers Inc.) to perform work associated with replacement of bridge deck ties on a railroad bridge) in the vicinity of Mile Post 0.49 on the Withrow Subdivision beginning on August 15, 2022 and continuing through August 17, 2022.

The parties agree that the instant dispute is covered by Scope Rule 1(c), which states:

When the Company plans to contract out work because the work requires special skills not possessed by the Company's employees, special equipment not owned by the Company, special materials available only when applied or installed through supplier, or when time requirements must be met which are beyond the capabilities of Company forces to meet, the Company shall notify the General Chairman of the Brotherhood in writing as far in advance as practicable and in any event, not less than fifteen (15) days prior thereto. 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 representative should 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 herein contained shall be construed as restricting the right of the Company to have worked customarily performed by employees included within the scope of this agreement performed by contract in emergencies that affect the movement of traffic when additional forces or equipment is required to clear up such emergency condition in the shortest time possible.

Appendix O to the Agreement is also applicable to this matter. It states, in relevant part:

The carriers assure you that they will assert good-faith efforts to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employes.

The parties jointly reaffirmed the intent of Article IV of the May 17, 1968 agreement that advance notice requirements be strictly adhered to and encourage the parties locally to take advantage of the good faith discussions provided for to reconcile any differences. In the interests of improving communications between the parties on subcontracting, the advance notice shall identify the work to be contracted and the reasons therefor.

The Carrier contends that the claimed work was emergent and required specialized equipment not available at the time due to the emergent need of repairs, and that it sent a contracting notice to the Organization advising them of these circumstances on August 2, 2022.

The Organization contends that the work at issue is basic bridge maintenance work which unquestionably belongs to the B&B Sub-department employes, and that the Carrier failed to provide proper notice under the Agreement so that it was impossible to have good-faith discussions for the purpose of reaching an understanding concerning the Carrier's desire to contract out the work in accordance with the spirit and intent of the Scope Rule and Appendix O. Specifically, the Organization contends that the Carrier did not substantiate that there was an emergency that authorized the Carrier to contract the work.

In contracting cases, the Organization bears the initial burden to establish a prima facie case of a claim to the work under the Agreement, and to produce sufficient evidence to establish a violation of the Agreement. Third Division Awards 44259, 41159 and 36208. In this matter, the Organization met this burden because the Carrier did not dispute that the work at issue was scope-covered or that it was performed by the contractor.

Once the Organization has established a prima facie case, the burden shifts to the Carrier to establish as an affirmative defense that it met its obligations under Rule 1(c), including that at least one of the reasons in the Rule that allows contracting applies. Third Division Awards 44259, 40411 and 39685. Under Rule 1(c), when the Carrier plans to contract out work, the Carrier is obligated to provide notice to the Organization and—if the Organization requests a meeting to discuss the matter—the parties must meet and they “should” make a good faith attempt to reach an understanding concerning the contracting. Under Appendix O, the Carrier’s obligations in conferencing are no longer stated as merely an intention, as the Carrier pledged that it “will” assert good faith efforts to reduce the incidence of subcontracting and increase the use of MOW forces. Appendix O also requires that the Carrier “in the interests of improving communication ... on subcontracting ... shall identify the work to be contracted and the reasons therefor.” Because the Scope Rule identifies MOW work and preserves that work to MOW employees, it is implicit that the reasons the Carrier may contract work are limited to those in Rule 1(c), which the Carrier must identify and explain to meet its contractual obligations.

In the instant case, the Carrier’s notice to the Organization of intention to contract claimed that the reason for contracting was “emergent work due to bridge condition.” The Agreement does permit the Carrier to contract work involving “emergencies that affect the movement of traffic when additional forces or equipment is required to clear up such emergency condition in the shortest time possible.” This description of “emergencies” is consistent with the often used definition that an “emergency is the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt.” Third Division Award 24440.

When the Carrier asserts an emergency as an affirmative defense, it has the burden to show how the circumstances prevented assignments in accordance with the Agreement. Third Division Awards 44854 and 43650. Here, beyond the assertions in the Carrier’s notice of emergent conditions, there is no evidence in the record upon which

to find that emergency conditions existed that would permit the Carrier to avoid its notice obligations under the Agreement. For this reason, the Carrier has not met its burden to establish that it met its obligations under Rule 1(c).

There remains the issue of determining an appropriate remedy. The Organization seeks to have Claimants J. Kuss, R. McCumber, C. Hoffert, N. Higgins, T. Waling, W. Springstead and D. Voeller compensated for a proportionate share each of one hundred eighty (180) hours at their applicable straight-time and/or overtime rates of pay for all time, benefits, and work opportunities lost from August 15, 2022, through August 17, 2022. The requested remedy raises the issue of whether it is appropriate to compensate the Claimants when they were gainfully employed and unavailable for work. It is an axiom in the law that there is no right without a remedy and many boards have recognized that if there are no consequences for violating a labor agreement that violations are likely to continue. Third Division Awards 19899, 20633, 21340, 30970, 35169, 37470, 40567, and PLB 2206, Award 52. Consistent with these principles, compensation is an appropriate remedy when there has been a violation of the Agreement, notwithstanding that the Claimants may have been gainfully employed or otherwise unavailable at the time of the violation.

Regarding the amount of compensation to be awarded to the Claimants, any compensation awarded should be reasonable in view of the record evidence and realistically related to the amount of work actually contracted that represents the loss of work opportunity for the members of the craft. PLB 6204, Award 32. The Carrier did not dispute the Organization's claim that the contractor employees performed the work identified in the claim. Under the circumstances presented in this case—where the Claimants were gainfully employed during the relevant period—damages at the overtime rate are unreasonably punitive. Therefore, the Claimants shall be compensated at their straight time rate for a proportionate share of 180 hours worked by contractor employees on the dates identified above.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of March 2026.