BEFORE
PUBLIC BOARD No. 7100

Award No. 7
Case No. 7

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)	
	)	
	)	
	)	
VS.	)	**PARTIES TO**
	)	**DISPUTE**
UNION PACIFIC RAILROAD COMPANY	)	

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

Appeal by the Organization on behalf of District B-2 employees: J.D. Short, S.J. Bishop, R.E. Eller, D.J. Murphy, E.C. Lindloff, D.E. Austin and T.B. Poland, hereinafter referred to as "the Claimants." The claim alleges the Carrier violated the Agreement when it assigned a contractor, a Nebraska Division employee, a C&NW System Bridge & Building ("B&B") Gang and District B-4 employees, to perform Maintenance of Way and Structures Department work (repair bridge, right of way and related work) on District B-2 at Mile Post. 49 on the Hollingsworth Spur Industrial Lead in Des Moines, Iowa on the Perry Subdivision, beginning on May 26, 2004 through June 22, instead of assigning the repair work to the Claimants on District B-2.

In addition, the Claim alleges the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract the repair work to outside forces or make a good faith attempt to reach an understanding concerning the subcontracting of the work as provided by Rule 1(B) of the Agreement. As a remedy, the Organization asks for the Claimants to be compensated for an appropriate share of 2122.5 hours of straight time, 952.5 hours of overtime and 29.5 hours of double time that the Contractor, a Nebraska Division employee, a C&NW System B&B gang and District B-4 employees spent performing the repair work on District B-2, at the applicable rate of pay."

FINDINGS:

The following facts are undisputed: all the Claimants hold seniority in various classes of the Maintenance of Way and Structures Department, in the Bridge & Building ("B&B") Subdepartment on District B-2. During the period in question, the Claimants were regularly assigned to perform work on Carrier's bridges, buildings and other structures as follows: Murphy and Lindloff were assigned to Gang 2924 and Austin to Gang 2916 in Mason City, Iowa; Short, Bishop and Eller were assigned to Gang 2906 in Trenton, Missouri; and Poland was assigned to 2836 working as crane operator on District B-2.

From May 26, until June 22, Carrier assigned the work to repair the bridge and right of way at MP 49 on the Hollingsworth Spur Lead located on the Perry Subdivision in Des Moines, IA ("MP 49") to: Belger Construction, a contractor; Weigel, a Nebraska Division employee; District B-4 employees Fisher and Hicks; and C&NW System B&B Gang 4092. The work was necessary to repair the damage caused by heavy rainfalls. The work performed consisted, in part, on removing debris, driving new piling, straighten out bridge decking, filling in dirt and ballast around the bridge at MP 49. The Carrier did not furnish advance written notice to General Chairman regarding the contracting of the disputed work to Belger Construction.

The Organization argues the work in question has been customarily and historically performed by and is contractually reserved for District B-2, a Division of the Maintenance of Way forces, in accordance with Rules 1(B), 2, 3, 4, 5, 7, 23, 30 and 31 of the November 1, 200 Agreement.

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 the 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 contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's Employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless 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 the 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 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 it no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith. (See Appendix 15)

(Emphasis added)

RULE 2- <u>SUBDEPARTMENTS</u>

The following subdepartments are within the Maintenance of Way and Structures Department.

A. Bridge and Building Subdepartment

* *

1. B&B & Painter Foreman
2. B&B & Painter Assistant Foreman

*****

5. B&B Carpenters
*****
11. Machine Operators
*****

RULE 3- CLASSIFICATION OF WORK

* * *

B. An employee directing the work of employee and reporting to officials of the Company shall be classified as a Foreman.

C. An employee assigned to assist a Foreman or Track Supervisor in the performance of his duties shall be classified as an Assistant Foreman.

* * *

E. An employee assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures including the building of concrete forms, etc., shall be classified as a B&B Carpenter.

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I. An employee qualified and assigned to the operation and servicing of machines used in the performance of Maintenance of Way and Structures Department work shall be classified as a Machine Operator.

* * *

RULE 4-SENIORITY

* * *

D. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company.

* * *

RULE 5- SENIORITY DISTRICTS

Seniority Districts are identified as follows:

B&B

B-2

***

Each Seniority District shall be divided into Zones to be known as Zone A, Zone B, etc.

***

Zones of the above seniority districts are identified geographically as set forth in Appendix '8'

* * *

RULE 7-SENIORITY LIMITS

A- Separate seniority in the B&B and Track Subdepartments shall be established in the following classes:

B&B Subdepartment

1. B&B Foremen (including Classes 2&3)**
2. Assistant B&B Foremen (including Assistant Foremen Truck Drivers)**

****

4. B&B Carpenters (including Masons and Lead Carpenters)*

* * *

B. Supplemental rosters, where applicable, shall be maintained separately for the following classification for the Seniority Districts identified in Rule 5:

***

2. Track-B&B Machine Operators and Assistant Machine Operators
***

C. A system seniority roster shall be maintained for Heavy System Machine Operators.

* * *

RULE 23- WORK WEEK

* * *

L. Work on unassigned days-Where work is required to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who shall otherwise not have 40 hours of work that week; in all other cases by the regular employee.

(emphasis added)

* * *

RULE 30- OVERTIME

Time worked continuous with and following a regular eight-hour period shall be computed on the actual minute basis and paid for at time and one-half rate, with double time on actual minute basis after sixteen hours of work in any twenty-four period computed from starting time of employees' regular shift or after sixteen (16) continuous hours of service.

RULE 31- CALLS

A. Employees called to perform work not continuous with regular work period shall be allowed a minimum of two hours and forty minutes at rate and one-half, and if held o duty in excess of two hours and forty minutes shall be compensated on a minute basis for all time worked. When necessary to call employees under this rule, the senior available employees in the gang shall be called

B. Double time compensation shall be allowed on actual minute basis after sixteen (16) hours of work in any twenty-four (24) hour period, computed from the starting time of employees' regular shift, or after sixteen (16) continuous hours of service.

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Appendix "8" In pertinent part:

Seniority Districts B-2 and T-2

ZONE A

Nevada to Millerton
Bondurant to Des Moines
Des Moines to Slater
Slater to Woodward
Des Moines to Perry
Perry to Dawson
Des Moines

Work coming within the Scope of the Agreement, i.e., work in connection with the construction, maintenance, repair and dismantling of bridges, buildings and other structures and facilities used in the operation of the Company in the performance of common Carrier service on the operating "property", may only be performed by outside forces in accordance with Rule 1(B) Paragraph 2, which provides:

"By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employee described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through a 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 the Company forces to meet."

Appendix 15 In pertinent Part:

During negotiations leading to the December 11, 1981 National Agreement, the parties reviewed in detail existing practices with respect to contracting out of work and the prospects for further enhancing the productivity of the Carrier's forces.

The parties expressed the position in these discussions that the existing rule in the May 17, 968 National Agreement, properly applied, adequately safeguarded work opportunities for their employees while preserving the carrier's right to contract out work in situations where is warranted. The organization, however, believed it necessary to restrict such carrier's rights because of its concerns that work within the scope of the applicable schedule agreement is contracted out unnecessarily.

Conversely, during our discussions of the carrier's proposals, you indicated a willingness to continue to * explore ways and means of achieving a more efficient and economical utilization of the work force.

The parties believe that there are opportunities available to reduce the problems now arising over contracting of work. As first step, it is agreed that a Labor-Management Committee will be established. The Committee shall consist of six members to be appointed within thirty days of the date of the December 11, 1981 National Agreement. Three members shall be appointed by the Brotherhood of Maintenance of Way Employes and three members by the National Carrier's Conference Committee. The member of the Committee will be permitted to call upon other parties to participate in the meetings or otherwise assist at any time.

The initial meeting of the Committee shall occur within sixty days of the date of the December 11, 1981 National Agreement. At that meeting, the

parties will establish a regular meeting schedule so as to ensure that meetings will be held on a periodic basis.

The Committee shall retain authority to continue discussions on these subjects for the purpose of developing mutually acceptable recommendations that would permit greater work opportunities for maintenance of way employees as well as improve the carrier's productivity by providing more flexibility in the utilization of such employees.

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 employees.

The parties jointly reaffirm 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 interest of improving communications between the parties on subcontracting, the advance notices shall identify the work to be contracted and the reasons thereof.

The Organization contends the work in dispute is contractually reserved for employees regularly assigned to work on District B-2. It asserts the language of Rule 1(B), the Scope of the Work provision, is clear and unambiguous. Rule 1(B) of the Agreement states the Maintenance of Way and Structures Department "shall perform *all work in connection with the 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 operating property." Further, the Organization asserts Rules 2, 3, 5 and 7 establish the classes of employees within the B&B Subdepartment (such as foreman, assistant foreman, carpenters and machine operators) who are required to perform the work described in Rule 1(B). Here, according to the Organization, the bridge repair work in dispute clearly falls within the scope of Rule 1(B) and is work the

Claimants have customarily and historically performed. Nonetheless, it insists, Carrier failed to call the Claimants or assign them the work even though they were available, willing and able to perform the work during the times the work was performed.

The Organization further contends none of the work performed can be classified as "emergency work." It argues the track repaired is "nothing more" than an industrial lead which serves a few customers. The Organization maintains there was no emergency. It claims although customers "were inconvenienced," it insists Carrier's operations were never halted or severely impaired. According to the Organization, the repair was performed on a spur track where the carrier only operates a switch engine and a few cars on "as needed basis." It also claims the industries that use this track have alternate means to ship and deliver their goods.

In addition, the Organization argues Carrier violated Rule 1(B) of the Agreement as well as the December 11, 1981 Letter of Agreement, when it failed to provide the General Chairman with advance notice of its plans to contract the work to outside forces and when it failed to make a good faith effort to reach agreement before subcontracting the work. It asserts the terms of the Agreement are clear: Carrier is required "to notify the General Chairman of the organization 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." It is uncontested Carrier did not notify the General Chairman of its plan to contract the repair work to Belger Construction. In this case, the Organization maintains there was no emergency for Carrier to rely on "the emergency time requirements" exception in Rule 1(B) of the Agreement. It claims the record evidence is insufficient to establish an emergency existed.

The Organization contends Carrier failed to meet the burden to establish its affirmative defense the disputed work was of an emergent nature or to show the Claimants could not perform the work at issue. By failing to provide notice regarding the subcontracting of work, it argues, Carrier deprived the Organization of the opportunity to persuade it to assign the work to the employees covered by the Agreement instead of assigning it to outside forces; and of the opportunity to identify alternatives to the use of outside forces. In so doing, the Carrier also failed to meet its obligation to make a good-faith effort to reach an understanding with the Organization regarding the subcontracting of the work reserved for District B-2 employees. It asserts Carrier's failure to comply with the notice obligation before contracting of the work requires payment of the Claim as requested by the Organization.

The Organization asks for the Claimants to be fully compensated. It asserts the remedy requested is entirely appropriate for this type of violation despite Claimants' employment during the period in question. The Organization maintains the record is sufficient to establish loss of work opportunity. As such, they should be made whole for the loss of work opportunity.[1] It asserts the Third Division has held fully employed claimants are entitled to receive compensation when a carrier violates the contracting out provisions of the Agreement which results in loss of work opportunity. It also asserts the Third Division has held in numerous cases overtime and double pay compensation are appropriate remedies when Carrier violates the Agreement by assigning the work to outside forces.

[1] Third Division Award Nos. 37376 citing 37022, 32862,, 32338 and 29472.

Carrier, on the other hand, argues the Claim in this case is procedurally defective inasmuch as it was filed outside the sixty (60) calendar days provided in Rule 21(a) of the Agreement, which, in relevant part, provides as follows:

> All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based... [emphasis added]

Carrier argues the date of the occurrence is May 26, when the work in dispute began, and the sixtieth (60^{th}) day was Sunday, July 25. Carrier argues the claim is untimely because it was mailed on Friday, July 23 to be delivered on Saturday July 24, a non-business day. According to Carrier, the claim is "void ab initio" since its authorized representative could not have possibly received the claim until Monday, July 26, the sixty-first (61st) day of the claim. It argues the claim was delivered outside Carrier's regular business hours, which are Mondays through Fridays, excluding holidays. It also asserts the U.S. Postal Service delivery confirmation of the claim indicates it was delivered and signed by K. Burrell on Saturday, July 24. It claims its "peoplesoft records" indicate Carrier has no employee named Burrell and the zip code in the U.S. Postal Service confirmation receipt is incorrect because its zip code is 68179 and not 68102.

As for the underlying merits, Carrier argues it has the contractual right to contract out the work to outside forces for work needed during emergency situations. It asserts the assignment of the repair work in dispute to outside forces without the advance written notice required by Rule 1(B) of the Agreement was justified by the emergency nature of the work which was required after heavy rains damaged the bridge and industrial lead at

MP 49. It notes from May 22 to May 24, a storm with heavy rains and winds caused extensive damage throughout the State of Iowa, including the Des Moines area where MP 49 is located. It contends the high waters caused significant portions of the bridge and right of way to be damaged.

Carrier does not dispute the damaged structure is an industrial lead and not a main line track. Nonetheless, it contends the nature of the track involved in the instant dispute does diminish its importance since Carrier has an obligation to provide all of its customers, including the ones served by the industrial lead, with effective means of transportation. It claims the shippers who use the track in question handled about twenty (20) rail cars per day, which equates to total of approximately 560 cars over the period the track was unusable. According to Carrier, the shippers served by the damaged industrial lead were without their normal rail access while the bridge and the track were repaired. Therefore, the Carrier insists an emergency situation existed until in or about June 20, when service was restored.

Carrier refutes the Organization's assertion the damage caused by the heavy rains simply created "an inconvenience." It argues the Third Division has defined an emergency in numerous cases as an "unforeseen combination of circumstances which called for immediate action." Carrier maintains the extensive damaged caused by the heavy rains, which were beyond the control of the Carrier, clearly meets this definition. Carrier also refutes the Organization's claim it possessed all the equipment necessary to repair the bridge and industrial lead. In this respect, it asserts the Organization failed to submit any probative evidence to support its claim. Furthermore, it contends that even if it had all the necessary equipment, the assignment of work to outside forces was

necessary because of the logistics involved in the repair of work. It claims the bridge was completely washed out and neither traffic nor the Carrier's repair equipment could cross the bridge. Thus, Carrier determined it needed to contract for the utilization of a specialized off-track crane with high-rail attachments that could handle laterally relocating a 210,000 span and redo the approaches. Carrier asserts the Organization failed to address, as part of its *prima facie* case, how a repair of this magnitude could be accomplished by District B-2 forces without an outside contractor.

Carrier also argues the clear language of Rule 1(B) specifically provides the Carrier has no contractual obligation to utilize its own forces when an emergency time requirement exists or to provide advance written notice to the Organization when the work needed involves an emergency. In this regard, Carrier reasons the procedures contained in Rule 1(B), which require fifteen (15) days advance written notice to allow the parties the opportunity to discuss the contracting of work, is intended to address long-planned work or less pressing matters. Carrier maintains the purpose of the emergency time requirement exception in Rule 1(B) is to allow Carrier to act expeditiously in emergency situations without any unnecessary delays. Therefore, the Carrier insists it did not violated the Agreement by assigning the work to an outside contractor without providing the Organization with advance written notice.

Similarly, the Carrier contends the assignment of emergency work to employees outside District B-2 is not in violation of the Agreement. In an emergency situation, the Carrier contends, it is afforded great latitude in assigning work to promptly restore its operations. In addition, the Carrier argues the Organization's assertion the District B-2 forces were exclusively entitled to the repair work performed on the bridge and industrial

lead at MP 49,(to the exclusion of other forces), is not supported the contract language or arbitral precedent. Carrier claims the Organization is attempting to create a jurisdictional dispute between different classifications of Maintenance of Way employees (the C&NW District forces and C&NW System forces) who are in the same craft. In these circumstances, it argues, the Organization bears the burden to establish exclusivity of jurisdiction over the work in dispute. In jurisdictional dispute cases, it reasons, the burden of the Organization is significantly increased. In such type of cases, according to Carrier, the Organization bears the heavy burden of establishing the language in the Agreement "explicitly entitles the claimants to the work in dispute to the exclusion of others." Carrier asserts the Organization failed to meet its burden to establish District B-2 employees are the only employees entitled to the disputed work and the non-District B-2 forces assigned to the repair work in dispute are specifically excluded by the Agreement from performing the work in dispute. According to Carrier, the Organization failed to cite any contractual language to support its exclusivity claim. Carrier maintains District B-2 gang do not have an exclusive right to emergency repairs ahead of the system gang employees who were assigned to repair the bridge and industrial lead at MP 49.

Lastly, Carrier asserts the remedy sought by the Organization is excessive because the Claimants were fully employed during the period in question and thus, have not suffered any loss of employment. It urges any claim for overtime or double time rate pay for work not actually performed is improper. Further, it contends, the Organization failed to provide any evidence to support the alleged number of hours worked by the contractor or the other non-District B-2 employees covered by the Agreement. It also asserts the compensation is granted only to qualified employees who lost work opportunity as a

result of being furloughed as a direct result of the assignment of work in violation of the Agreement.

We reject Carrier's assertion the claim was untimely filed. The probative evidence is sufficient to show the claim was served within the sixty (60) days provided in Rule 21(a) of the Agreement. Carrier's assertion a claim or grievance must be presented during its business hours, i.e., Monday through Friday, excluding holidays, is simply not supported by the clear and unambiguous language of the Agreement. The Board agrees the date of the occurrence in this case is May 26th, when the repair work in dispute was first assigned. Therefore, the 60th day of the Claim is Sunday, July 25th. The U.S. Postal Service confirmation receipt shows the Claim was delivered to the Carrier on Saturday, July 24th. The Board considered the Carrier's assertion it "peoplesoft" do not show an employee named K. Burrell, who signed the delivery confirmation, on its records and the zip code in the confirmation receipt is incorrect. This Board believes, in this case, the "peoplesoft" records, without additional probative evidence, is insufficient to establish K. Burrell was not employed by Carrier or that Burrell was not authorized to sign the delivery receipt. Board also notes the address in the envelope where the claim was sent contains the full address with the correct zip code. Further, there is nothing in the delivery confirmation receipt to indicate the claim was returned to the sender or had to be re-delivered because it was sent to the wrong address. Under these circumstances, the Board concludes the probative evidence is sufficient to show the claim was served on the 59th day.

Notwithstanding, the Board finds the Carrier met its burden of proof to establish the repair work in dispute involved an emergency as defined by the Agreement and

arbitral precedent. An emergency is "a sudden, unforeseeable and uncontrollollable nature of the event that interrupts operations and brings them to an immediate halt."[2] It is uncontested the storm on May 22-24 and the heavy rains it brought with it caused extensive damage to the bridge and industrial lead at MP 49. Further, the record evidence is sufficient to establish service to the industries served by the industrial lead was halted and severely impeded by damaged caused by heavy rains. This is clearly an unforeseeable and uncontrollable event which disrupted the operations and brought them to an immediate halt. The Board rejects the Organization's assertion there was no emergency simply because the bridge and track in question was an industrial lead and not a main line track. The record evidence shows service was halted for the shippers who use this industrial lead, which handles about twenty (20) rail cars per day. Similarly, the general assertion the bridge and track have been previously washed out by heavy rains is not sufficient to deny the emergent nature of the situation.

Therefore, for all the foregoing reasons the Board concludes the repairs in this case involved an emergency. In these circumstances, it is well settled, Carrier may assign employees as its judgment deems appropriate and is not compelled to follow normal Agreement procedures, Third Division Award no. 36982. Thus, the Board finds the use of non District B-2 forces covered by the Agreement was not in violation of the Agreement.

Likewise, the Carrier's use of an outside contractor without advance written notice was not in violation of Rule 1(B) of the Agreement. The language in Rule 1(B) is clear and unambiguous. It provides the Carrier may contract out the work customarily performed by its employees without advance written notice when "emergency time

[2] Award 24440

requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces." Here, the record is clear Carrier responded to an emergency caused by the storm which caused extensive damage to the bridge and industrial lead. Thus, the Board concludes the repair work in dispute falls within the emergency exception provided in Rule 1(B) of the Agreement.

Accordingly, the claim is denied.

AWARD

Claim denied.

Martin F. Scheinman, Esq. Chairman
Neutral Member

Carrier Member

Organization Member

Dated: December 10, 2008

Brotherhood Case 7.awd