Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39731
Docket No. MW-38424
09-3-NRAB-00003-040381
(04-3-381)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Maintenance of Way work (snow removal) to outside forces (Troy Top Soil) at Saratoga Yard on December 26, 27, 28 and 29, 2002 instead of furloughed System Equipment Operator G. Hamilton; and (Dietrich) at Fort Edward Yard on December 26, 27 and 28, 2002, instead of furloughed System Equipment Operator B. Kent (Carrier's File 8-00358 DHR).

(2) The Agreement was violated when the Carrier assigned Maintenance of Way work (snow removal) to outside forces (Troy Top Soil) at Saratoga Yard on January 3, 4, 6, 7 and 8, 2003, instead of furloughed System Equipment Operator N. Smith; (Pollard) at Kenwood Yard on January 4 and 6, 2003, instead of furloughed System Equipment Operator G. Hamilton; and (Dietrich) at Fort Edward Yard on January 4 and 6, 2003, instead of furloughed System Equipment Operator B. Kent (Carrier's File 8-00359).

(3) The Agreement was further violated when the Carrier failed to comply with the advance notice requirements regarding its intent to contract out the work referenced in Parts (1) and (2) above or make a good-faith effort to reduce the incidence of subcontracting and

increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Claimant N. Smith shall be compensated for sixteen (16) hours at his respective straight time rate of pay and for twenty-three (23) hours at his respective time and one-half rate of pay, Claimant G. Hamilton shall be compensated for eight (8) hours at his respective straight time rate of pay and for twenty (20) hours at his respective time and one-half rate of pay, and Claimant B. Kent shall be compensated for sixteen (16) hours at his respective straight time rate of pay and for thirteen (13) hours at his respective time and one-half rate of pay.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Claimant N. Smith shall be compensated for thirty-two (32) hours at his respective straight time rate of pay and eleven (11) hours at his respective time and one-half rate of pay, Claimant G. Hamilton shall be compensated for eight (8) hours at his respective straight time rate of pay and eight (8) hours at his respective time and one-half rate of pay, and Claimant B. Kent shall be compensated for eight (8) hours at his respective straight time rate of pay and twelve (12) hours at his respective time and one-half rate of pay."

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 claims on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned outside forces to perform certain snow removal work, instead of assigning this work to the Claimants, all of whom were furloughed System Equipment Operators. The Carrier denied the claims.

The Organization initially contends that there can be no doubt that the snow removal work at issue is reserved to Maintenance of Way forces, that the Carrier nevertheless assigned this work to outside forces, that the hours claimed are accurate, and that the requested remedy is appropriate. The Organization asserts that the Carrier's sole defense to the instant claim was that the snowfall created an emergency situation that relieved the Carrier of its contractual obligation to assign the work to the proper employees and provide proper advance notice.

The Organization acknowledges that a significant amount of snow fell during the claim period, but it does not agree that this created an emergency. The Organization argues that there are a number of problems with the Carrier's defense. The Organization points out that simply calling something an emergency does not make it so, and the Carrier never presented any evidence to support its emergency defense. The Organization asserts that it is well established that a party asserting an alleged affirmative defense must submit proof thereof; mere assertions are not acceptable substitutes for such proof.

The Organization maintains that snow is a regular occurrence across the Carrier's property, and it comes as no surprise. The Carrier failed to present any probative evidence that the snowfall at issue was anything more than a typical winter snowfall. The facts do not support the Carrier's position that an emergency existed. The Organization contends that the hours of work performed by the contractors' employees were not continuous. The Organization suggests that if an actual emergency existed, then all available Carrier forces, including the furloughed and readily available Claimants, would have been pressed into service and would have worked continuously until the "emergency" no longer existed. Moreover, even if the snow removal work could be viewed as a bona fide emergency, the Carrier still would have been obligated to make a reasonable attempt to assign the work to the proper employees, as numerous Awards have held.

The Organization insists that the absence of any evidence to support the Carrier's "emergency" defense can only lead to the conclusion that there was no "snow emergency." The Organization therefore contends that there can be no doubt that the Carrier violated the Agreement when it assigned outside forces to perform work that is undisputedly reserved to its Maintenance of Way forces.

The Organization goes on to contend that there is no evidence whatsoever that an emergency existed in this matter or that the Carrier made any attempt to notify the General Chairman of its intent to contract the snow removal work. The Organization therefore asserts that there can be no doubt that the Carrier violated Rule 1.3 and Appendix H. The Organization submits that the Carrier simply failed to comply with its "good-faith" promises in Appendix H. Moreover, the Carrier made no attempt to assign the work to the Claimants, who were qualified, willing, and available to perform the work.

The Organization asserts that because the Carrier did not dispute the number of employees used by the three named contractors at the three identified locations, and because it did not dispute the number of hours claimed for the work performed by the outside forces, there can be no doubt that the facts of this claim are accurate. The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that there was no Agreement violation in connection with this matter. Addressing the "advance notice" issue the Carrier asserts that at no time during the on-property handling of this claim did the Organization raise an argument that an advance notice was required in these incidents. In fact, the claims do not refer to any advance notice, but instead allege only that Rule 1 and Appendix H were violated because the Carrier hired a contractor rather than using its own forces.

The Carrier points out that even if the Organization had raised the issue of advance notice, which it did not, Rule 1.3 expressly provides that such notice is not required in the case of an emergency. Moreover, Rule 1.3 defines "emergency" as including heavy snow. The Carrier emphasizes that the Organization never disputed that there was a heavy snowfall during the claim period. The Carrier asserts that because there is no dispute between the parties that a snow emergency existed in both incidents, no advance notice was required under Rule 1.3 of the parties' Agreement.

The Carrier additionally contends that in the event of an emergency, the Carrier may take whatever action it deems appropriate to cope with the problems. It emphasizes that the regularly assigned System Equipment Operators were working during this emergency removing snow. The Carrier submits that the fact that the instant claims are on behalf of furloughed System Equipment Operators, and not those holding permanent headquartered positions, supports this fact. The Carrier submits that all available regularly assigned System Equipment Operators were used for snow removal, as was all available Carrier snow removal equipment. The Carrier insists that the heavy snow emergency that existed for several days required it to hire the contractor, with equipment and operators, to assist the Carrier's own equipment and operators with the work.

The Carrier points out that, contrary to the Organization's position that the snow caused only several hours of inconvenience, the heavy snow affected the Carrier's operations for several days. The Carrier emphasizes that in many cases, due to the large volume of snow, it was necessary to remove the snow and pile it at remote locations.

The Carrier insists that it works to limit the use of contractors, but the use of a contractor with equipment and operators was necessary in the instant case, and it was allowed under Rule 1.3 of the parties' Agreement. Moreover, the contractor required that its own operators be used on its equipment.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the parties' Agreement when it retained outside forces to remove snow on several dates in December 2002 and January 2003. Consequently, the claim must be denied.

The record clearly reveals that there was a large snowfall and the Carrier did not have sufficient equipment or ready employees to perform the work. Although the Carrier gave no notice to the General Chairman, it is clear from Rule 1.3 that, in cases of emergencies, the Carrier does not have to notify the General Chairman in writing and give him or her 15 days' notice. Also, in that Rule, it states that the word emergency applies to "heavy snow."

The record is clear that the Carrier was facing a large snowfall on the two occasions in question. Although the Organization argued that the Carrier should have known that it often snows in this part of the country, it is also clear that this case involves two very large snowstorms in a one-week period and that an emergency was created that required the Carrier to retain a subcontractor to assist the Carrier's employees and equipment in the snow emergencies.

It is fundamental that the Organization bears the burden of proof in cases of this kind. In this case, the Organization failed to meet that burden, and 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 26th day of June 2009.