Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31752
Docket No. MW-30693
96-3-92-3-475

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement on January 11, 1991 when it assigned outside forces (Central Jersey Contracting) to perform vehicle operators work (operated four (4) dump trucks, equipped with snow plows, and one (1) fuel truck) to remove snow at Newark and Elizabeth, New Jersey and fuel two (2) "snow jet" machines at Croxton and Oak Island Yards on the New Jersey Division (System Docket MW-1903).

(2) The Carrier further violated the Agreement when it failed to provide advanced written notice of its intention to contract out the track maintenance work described in part (1) hereof.

(3) As a consequence of the violations referred to in parts (1) and/or (2) above, Vehicle Operators S. Vaughn, J. Dacosta, C. Falcoa, S. Aguiar and D. Seamanik shall each be allowed eight (8) hours pay at the Vehicle Operators rate of pay for their lost work opportunity."

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.

On January 11, 1991, it snowed in the Newark/Elizabeth, New Jersey, area. On that date, the Carrier contracted with Central Jersey Contracting to perform the work of snow removal on its New Jersey Division. The Carrier engaged the Contractor to perform snow removal on January 11 without giving prior notification to the General Chairman in accordance with the Maintenance of Way Scope Rule.

On January 24, 1991, the Organization filed a claim on behalf of the Claimants alleging that the Carrier's contracting out of snow removal work on January 11 violated the Scope Rule. Apparently, all Claimants were fully employed on January 11 and suffered no actual wage loss as a result of the lost work opportunity.

The Carrier denied the claim by arguing that the work of snow removal did not accrue to the Claimants exclusively by virtue of the Scope Rule. Furthermore, the Carrier contends that an emergency situation existed creating an exception to the notification requirement of the Scope Rule. Finally, the Carrier argues that even if the Scope Rule applied and the Agreement was violated the Claimants were not damaged since they were all fully employed during the time period of the alleged contract violation.

The Organization argues that the work of snow removal is clearly established in the Scope Rule and that the Carrier failed to establish the existence of an emergency exempting it from the Scope Rule prior notification requirement.

Finally, the Organization argues that Third Division precedent exists awarding money damages to employees for lost work opportunities, even though those employees are fully employed at the time of violation.

After considering the contentions of the parties, we find that the Carrier, in fact, violated the Scope Rule by contracting out snow removal work on January 11, 1991. Rule No. 1 of the Agreement between the Organization and the Carrier states:

"Scope

These rules shall be the agreement between Consolidated Rail Corporation (excluding Altoona Shops) and its employees of the classifications herein set forth represented by the Brotherhood of Maintenance of Way Employes, engaged in work generally recognized as Maintenance of Way work, such as, inspection, construction, repair and maintenance of water facilities, bridges, culverts, buildings and other structures, tracks, fences and road beds, and work which, as of the effective date of this agreement, was being performed by these employees, and shall govern the rates of pay, rules and working conditions of such employees."

The seniority classes and primary duties of each class listed under Track Department Paragraph B(2) provide for the operation of bulldozers, front end loader, backhoe and jet snow blowers.

Clearly, the work in question comes under the Maintenance of Way Scope Rule. The Carrier incorrectly argued that the exclusivity doctrine is applicable to the Scope Rule. (*Third Division Awards 27012 and 27636.*) It has repeatedly been held that the Carrier cannot contract Scope Rule work unless it first notifies the General Chairman, e.g., *Third Division Awards 19552, 23928, 27012 and 27636.* Therefore, in the event that the Carrier plans to contract out work covered by the Scope Rule, absent an emergency, the Carrier is obliged by the Agreement, to notify the General Chairman involved.

Next, the Board must consider whether a snowfall may be cause for an emergency situation, thereby relieving the Carrier of its pre-subcontracting notification requirement. The parties expressly recognize this possibility in the contract by suggesting that an emergency may exist as a result of a heavy snowfall. Given the Carrier's assertion that an emergency existed such an affirmative defense to a Scope Rule contracting out violation, the Carrier bears the burden of proving that an actual heavy snowfall occurred on January 11, 1991. The mere assertion that an emergency existed is insufficient to establish an affirmative defense on which the Carrier bears the burden of proof.

A review of the record indicates that the Carrier failed its burden of proving that an actual emergency existed thereby exempting it from the contractual requirement to notice the General Chairman prior to contracting out Scope Rule work. Consequently, we find that an actual violation of the Scope Rule occurred when the Carrier contracted out snow removal work in its New Jersey Division on January 11, 1991, without notifying the General Chairman in advance.

Given that we have found a violation of the Scope Rule, we next must consider whether an award of damages is appropriate in this instance.

The Organization argues that the Third Division has repeatedly determined that it is invested with authority to award monetary damages even though the actual Claimants suffered no actual monetary loss.

The Carrier argues that ample precedent exists which support its view that the Claimants must suffer actual damages in order to be compensated in accordance with the claim otherwise, the Carrier is forced to pay a penalty payment unauthorized by the Agreement. In *Third Division Award 26593*, we pondered the divergent views of awarding damages to fully employed Claimants.

> "Having concluded that we have jurisdiction to consider the issue of damages, we must consider the carrier's argument that even if, assuming *arguendo*, the agreement was violated, claimant suffered no loss of earnings and therefore the Board has no authority to award damages.
>
> On this issue, too, there are strong opposing views. Many awards support the proposition that even where there is a contract violation, the claim will not succeed unless there is a showing of actual loss of pay on the claimant's part. The opposing line of cases finds that to limit damages, in effect, gives a carrier a license to ignore the contract provisions.
>
> A third viewpoint which has also been expressed is the conclusion that each case must be considered on its merits taking into consideration such factors as intent or motive on the part of the carrier.
>
> We find, as did the Board in Third Division Award No. 23928, that to determine intent or motivation on the part of the carrier, would 'only add a new element of uncertainty in the relationship of the parties' and require the Board to rest on that somewhat slippery slope of subjective considerations. We are of the view that a better purpose is served in the long run which clearly provides a guideline for the parties in the future. With that in mind, we have concluded that there is no prohibition from awarding damages where there is no actual loss of pay. That finding is based on our belief that in order to provide for the enforcement of this agreement, the only way it can be effectively enforced is if a claimant or claimants be awarded damages even though there are no actual losses.

Numerous other awards have reached the same conclusion, holding that where, as here, claimants by carrier's violation lost their rightful opportunity to perform work, they are entitled to a monetary claim. See Third Division Awards 21678, 19899, 19924, 20042, 20338, 20412, 20754, 20892. Accordingly, we will rule to sustain the claim in its entirety."

Applying the findings of Third Division Award 26593 establishing a monetary remedy for fully employed claimants alleging Scope Rule violations, we will sustain this claim in its entirety. We find as we did in Award 26593, that there is no prohibition from awarding damages where there is no actual loss of pay and that the only way the Scope Rule can be effectively enforced is to award damages even though there is no actual loss.

AWARD

Claim sustained.

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 24th day of October 1996.

CARRIER MEMBERS' DISSENT
TO AWARD 31752 (Docket MW-30693)
(Referee Mikrut)

This Carrier has used contractors (as well as its own employees) for snow removal for about as long as there has been snow to be removed. Notice has not heretofore been required, nor has it been given. The events of January 1991 (the claim period) were neither new nor extraordinary. Yet, this award would appear to find a new obligation in an Agreement in effect since 1982.

In fact, these same parties had the same issue before this same tribunal in 1994, which found in favor of the Carrier. Third Division Award No. 30079 involved a 1989 claim by the BMWE due to the Carrier's assignment of outside forces to perform snow removal work. The Organization further alleged a violation in the Carrier's failure to provide advance written notice of its intent to contract the work. In Award No. 30079 the Carrier argued in its submission to the Board: "For many years both on Conrail and its predecessor railroads, local management has contracted with outside firms across the system for emergency snow removal. Outside contractors are lined up every year well in advance of the first snowfall to assure availability in case of railroad operating emergencies caused by snow."

The Board in Award 30079 found the issue to be decided was: "whether the Carrier violated the Agreement when it assigned outside forces to perform snow removal work on the Youngstown line at Ashtabula, Ohio." The Board found that "<u>There is no express violation of the disputed work in the Scope Rule</u>." In denying the claim, the Board went on to find insufficient evidence to support the Organization's claimed violation.

Award 31752 involves the same issues as Award 30079, yet is nowhere cited by the Board. The factual record before the Board in Award 31752 is very similar to that before the Board in Award 30079. By its terms Award 31752 erroneously purports to rely on the rules and not upon evidence of past practice. In all respects, the two awards are virtually identical, yet with different outcomes.

We dissent from Award 31752 as it was incorrectly decided and utterly fails to reconcile or consider the prior precedent contained in Award 30079; as well as Third Division Award 26482 (1983 incident) and SBA 1016 Award 42 (1986 incident) also involving the same parties. For that reason this decision must be considered an aberration and of no precedent.

We Dissent.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik