Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35835
Docket No. MW-32420
01-3-95-3-302

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on March 14 and 15, 1993 when it assigned outside forces (Delta Railroad Construction) to provide a dump truck with snow plow and front end loaders with operators to plow snow from the roadways in the Ashtabula area and Carson Yard on the Cleveland and/or Youngstown Seniority Districts (System Docket MW-3344).

2. The Carrier further violated the Agreement when it failed to provide advance written notice of its intention to contract out the Maintenance of Way work described in Part (1) hereof.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above:

   (a) Furloughed employee C. J. Felice shall be allowed six (6) hours' pay at the vehicle operator's straight time rate for work performed on March 14, 1993 and he shall be allowed eight and one-half (8.5) hours' pay at the applicable Class 2 Operator's straight time rate for work performed on March 15, 1993 [a total of fourteen and one-half (14.5) hours' pay]. Also, "*** all other lost credits and/or benefits normally due must be paid. ***"

(b) Furloughed employe R. A. Ortiz shall be allowed six (6) hours' pay at the vehicle operator's straight time rate for work performed on March 14, 1993. Also, "*** all other lost credits and/or benefits normally due must be paid. ***"

(c) Furloughed employes M. Pertronio and N. Cardera shall each be allowed five (5) hours' pay at the applicable Class 2 Operator's straight time rate for work performed on March 14, 1993. Also, "*** all other lost credits and/or benefits normally due must be paid. ****"

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.

Without prior written notice to the Organization, on March 14 and 15, 1993, the Carrier contracted out the plowing of snow on roadways in the Ashtabula area and Carson Yard on the Cleveland and/or Youngstown Seniority Districts. At the time, the Claimants were furloughed Machine and Vehicle Operators holding seniority in those districts. Three separate claims followed on their behalf claiming entitlement to the contracted work.

In pertinent part, the Scope Rule provides:

> "In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, 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. "Emergencies" applies to fires, floods, heavy snow and like circumstances.
>
> 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. Said Company and organization representatives shall 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 organization may file and progress claims in connection therewith."

The claims have merit.

Covered employees operate equipment used in snow removal operations (e.g., front end loader, backhoe, jet snow blower, snow flanger, snow plow, FEL with snow blower, beilhack snow blower, etc.). Snow removal work is therefore "work within the scope of this Agreement." See Third Division Award 32344 between the parties (" . . . a majority of the Board Awards have held on this property that snow removal work is work that comes under the Scope Rule of this Agreement, and thereby requires notice prior to contracting."). See also, Third Division Award 31752 also between the parties ("Clearly, the work in question [snow removal] comes under the Maintenance of Way Scope Rule.").

Because snow removal work is scope covered work, the Carrier was obligated to give the Organization notice of its intent to contract out that work ("In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved, in writing, as far in advance of the date of the contracting transaction as is practicable. . . ."). The Carrier did not do so. A violation of the Scope Rule has been shown.

The Carrier's arguments do not change the result.

First, the Carrier's argument that the work involved was snow removal from roadways as opposed to tracks and roadbed does not change the result. For purposes of the Carrier's notice obligation under the Scope Rule, the only question is whether the work was "within the scope of this Agreement." As discussed, it was. The Carrier's failure to give the required notice to the Organization therefore violates the Scope Rule.

Second, on the property, the Carrier asserted that:

> "The contractor work in question was necessary to provide the most prompt possible response to an emergency situation created by a persistant [sic] and heavy snow storm.
>
> Conrail did not possess the equipment necessary to sufficiently respond to the widespread problems created by the storm."

While, as the Carrier points out, the Scope Rule contemplates a "heavy snow" storm as an "emergency" thereby relieving the Carrier of its notice obligations for contracting out such work, aside from the Carrier's general assertion that there was a "persistant [sic] and heavy snow storm," from this record we know nothing about the nature of weather conditions on the date in question. The burden is on the Carrier to demonstrate the existence of an "emergency." See Third Division Award 32419 ("The Carrier bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees."). The Carrier has not met that burden.

The fact that the Scope Rule defines "heavy snow" as an emergency, does not relieve the Carrier of its burden to demonstrate the existence of an emergency. See Third Division Award 31752, supra [emphasis added]:

> "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." (Emphasis added)

In this record, the Carrier merely asserted the existence of a "heavy snow storm." Aside from that general assertion, however, the Carrier has not met its burden to demonstrate that there was, in fact, a "heavy snow storm" to a degree contemplated by the Scope Rule that would make such a storm an "emergency."

Third, the Carrier further asserted on the property that snow removal is not " . . . reserved exclusively to the BMWE craft" and that "[s]now removal has been historically performed on this property by virtually every craft as well as outside contractors." The Organization's failure to demonstrate that covered employees exclusively perform the work is not a defense to contracting out claims. See Third Division Award 31752, supra ("The Carrier incorrectly argued that the exclusivity doctrine is applicable to the Scope Rule").

Fourth, the Carrier's reliance upon Third Division Award 30079 between the parties in support of its position that the Organization must show reservation of the work by evidence of custom, practice and tradition has been considered. The subsequently issued Third Division Awards 31752 and 32344, supra, between the parties better address the relevant considerations and, in our opinion, are binding to resolve the dispute.

This case is decided only upon the failure of the Carrier under the provisions of the Scope Rule to give the required notice to the Organization that it " . . . plans to contract out work within the scope of this Agreement. . . ." Had the Carrier given that notice and, if requested by the Organization, met with the Organization as provided in the Scope Rule, the Carrier may well have been in a better position to argue the merits of the types of positions it took before the Board (" . . . if no understanding is reached, the Company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith"). However, because the Carrier failed to give that required notice, the process contemplated by the Scope Rule was frustrated. See Third Division Award 32862 involving a similar failure to give notice for contracting out work within the scope of that agreement:

> "We recognize that the result in these cases where no notice is given may be anomalous. It may well be . . . that had the Carrier given notice, (and because of lack of skills of the employees, need for specialized equipment, etc.), the Carrier may have been able to contract the work.

* * *

But, our function is to enforce language negotiated by the parties. In [the agreement] . . . and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. . . ."

The function of a remedy is to make whole those employees adversely affected by a demonstrated contract violation. Therefore, as a remedy, the Claimants shall be made whole for the lost work opportunities.

The claims are sustained.

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 18th day of December, 2001.