Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40081
Docket No. MW-40709
09-3-NRAB-00003-080521

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Rossi Construction) to perform Maintenance of Way and Structures Department work (snow removal) at the Proviso Yards on February 25 and 26, 2007 (System File S-0701C-358/1476266 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the aforesaid work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Duda, J. Guerrero, J. Guzman, C. Rapier, O. Juarez, A. Ayala, S. Ramirez and J. Rodriguez shall now '*** each be compensated at their applicable time and one half rate of pay an equal and proportionate share of the one hundred twenty nine (129) hours rendered by the Contractor employees on February 25, and 26, 2007.'"

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 is another claim filed by the Organization asserting violation of the Agreement by the Carrier for its use of an outside contractor at Proviso Yards for snow removal in February 2007. The dates involved in this claim are February 25 and 26, 2007.

In Third Division Award 40079, the Board found that an emergency existed as a result of a nine inch snowfall on February 13, 2007 which therefore allowed the Carrier ". . . latitude to assign work to strangers to the Agreement." In Third Division Award 40080 the Board found that the Carrier had not carried its burden to show that the emergency continued two and three days after the major snow event of February 13, 2007.

According to Manager Track Maintenance J. Goben for the dates in dispute in this case:

> "During snow operations gangs were working 12 on 12 off. Contractors were called to let men receive rest. All laid off employees were called back to work. Mr. Duda worked 12 hours on the 25th and had 8 hours class and 9 hours OT on the 26th, Mr. Ayala worked 16 hours OT on the 25th and 12 hours OT on the 26th, J. Guerrero, took off work for personal business on the 25th and worked 8 hours straight on the 26th, J. Guzman worked 16 hours OT on the 25th, S. Ramires worked 12 hours OT on the 25th and 8 hours plus 9 hours OT on the 26th, O. Juarez worked 16 hours

both days straight time and OT, Mr. J. Rodriguez was not working in Proviso at the time and did not start work until the 28th of Feb. he was off work on Medical Leave. All employees were given option to work some laid off."

In its letter of June 5, 2007, the Carrier asserts:

". . . Here the circumstances facing the Carrier fell precisely within the definition of 'emergency' set forth above. The Carrier needed to remove the snow to clear areas to keep Carrier services in this area running without delay, so a contractor was utilized to assist in the removal of the accumulation of snowfall."

The Carrier thus claims an emergency also existed on February 25 and 26, 2007.

In Third Division Award 40079, the Board discussed the impact of emergencies on the Carrier's obligations under the Agreement:

"Third Division Award 20527 sets forth the standard for an 'emergency:'

> We have heretofore defined an emergency as 'an unforeseen combination of circumstances which calls for immediate action' (Award 10965). . . . [I]t is well established that the Carrier, in an emergency, has broader latitude in assigning work than under normal circumstances; in an emergency Carrier may assign such employees as its judgment indicates are required and it is not compelled to follow normal Agreement procedures."

And, as discussed in Third Division Award 32862, ". . . [t]he burden rests with the Carrier to demonstrate the existence of the emergency."

While in Third Division Award 40079 the Board found that an emergency existed due to the nine inch snowfall on February 13, 2007, in Third Division Award 40080, the Board found that the Carrier did not meet its burden to demonstrate the existence of an emergency for February 15 and 16, 2007:

"Therefore, the real question here is whether the Carrier proved that the emergency caused by the heavy snowfall on February 13, continued on the dates of this dispute (February 15 and 16, 2007) so that the Carrier could continue to have the latitude to be excused from its obligations in contracting disputes - specifically, the obligation to give notice to the Organization of its intentions to use the contractor as required by Rule 1. The Carrier has not made that required showing.

The claimed work was performed by the outside contractor two and three days after the February 13, 2007 snowstorm. What were the conditions that caused the emergency to extend days beyond the initial snowstorm? Why is it that the Claimants could not have performed the work on the claim dates? What evidence substantiates the Carrier's assertion that the outside forces were needed in addition to the Carrier's forces to keep its operations running on the dates in this claim? This record does not disclose those required answers from the Carrier. Manager Track Maintenance Goben merely states that the Claimants worked overtime on the dates set forth in the claim and that Carrier equipment was too large to get to some areas. But those assertions do not prove that a bona fide emergency continued to exist. There comes a point in time when an emergency ends. To be allowed the ability to be excused from normal requirements of the Agreement due to an emergency, the Carrier has the obligation to prove that the emergency continued on the dates of violation claimed by the Organization. In the record developed on the property in this case, the Carrier has not done that."

Those same conclusions must be drawn in this case. There was a good deal of snow removal work being done by the Carrier at Proviso Yards on February 25, and 26, 2007. However, the Carrier has not shown through evidence developed in the record that the conditions on February 25 and 26 were such that an emergency existed. The Carrier has only shown in this case that there was a good deal of snow removal being performed. The Carrier has not shown to what extent, if any, its operations were disrupted by the snow.

In this matter, we also take notice of the historical weather data from the same internet source utilized by the Carrier in Third Division Award 40079 and as the Board found in Third Division Award 40080. That source shows that 2.3 inches of snow fell on February 25 and an additional 0.4 inches of snow fell on February 26, 2007. We cannot find that an approximate three inches of snow over a two day period constitutes an emergency.

As discussed in Third Division Award 40080, Rule 1 specifies that advance notice of the contracting transaction "except in 'emergency time requirements' cases" must be given by the Carrier for scope covered work. That was not done. The claim therefore has merit.

The fact that the Claimants worked on the days in dispute does not deprive them of a remedy. The Claimants lost work opportunities due to the Carrier's violation of the Agreement. See Third Division Award 32862 supra:

> "The record shows that Claimants worked at the site at the time the contractor's forces were present. The Carrier argues that granting relief to Claimants who were employed at the site is unfair. That argument is not persuasive so as to change the result. The remedy in this case seeks to restore lost work opportunities. It may well be that Claimants could have performed the contracted work (or the work they actually performed) on an overtime basis or could have resulted in more covered employees being called in to work on the project. Indeed, had the Carrier given notice, those questions could have been the subject for discussion in conference between the parties. On balance, having failed to give the required notice, the Carrier cannot now argue that the result is unfair."

The Claimants shall, therefore, be compensated for their proportionate share of the number of hours worked by the contractor's forces on February 25 and 26, 2007 consistent with the provisions of the Agreement. However, as Manager Track Maintenance Goben points out, certain Claimants did not work on the two dates in question (Guerrero took off work on February 25 for personal business and Rodriguez was not yet working at Proviso). With respect to Guerrero and Rodriguez, we will leave the question of entitlement to and computation of the reduction of their proportionate share of the remedy to the parties in the first instance.

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 19th day of November 2009.