

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40860
Docket No. MW-41309
11-3-NRAB-00003-100181**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Jack Parson Construction) to perform Maintenance of Way and Structures Department work (removing snow and cleaning right of way) between Mile Posts 217.0 and 392.0 on the Nampa Subdivision of the Idaho Division on December 26, 29, 30, 31, 2008 and January 9, 2009 (System File C-0952U-157/1517225).**
- (2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Hymas shall now be compensated for forty-three (43) hours at his respective Group 19 straight time 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.

This case raises the same issues concerning the Carrier's contracting of non-emergency snow removal work with sustaining Awards issued by the Board in Third Division Awards 40857, 40858 and 40859. As in those Awards, the record in this case also does not demonstrate the existence of a "mixed practice" where the Carrier contracted non-emergency snow removal work. For the same reasons discussed in those Awards, this claim also has merit.

Several disputes raised on the property do not change the result.

First - and going to the "mixed practice" assertion by the Carrier - the Carrier produced a listing with its Submission showing 27 instances of contractors performing snow removal work. We find those listed instances insufficient to establish the "mixed practice."

Of the 27 instances, 16 are specifically listed as occurring in 1955, with the balance prior to 1988. The 1955 instances are remote in time. But most important, the Carrier's listing where contractors performed snow removal work does not show that the contractors were utilized for non-emergency work. And as explained in Awards 40857, 40858 and 40859, supra, and Awards cited therein, the Carrier clearly has the right by Rule and precedent to utilize contractors for emergency snow removal work. However, to prevail in this case, the Carrier must show a "mixed practice" of non-emergency snow removal work performed by contractors. The Carrier's listing does not elevate to that level - it simply lists those instances where "snow removal" was performed by contractors. The Board cannot tell if the instances were emergencies or non-emergencies.

Second, the Carrier contends that the Claimant was not qualified to work on the equipment utilized by the contractor while the Organization disputes that assertion. The result in this case is not determined by the exact piece of equipment

utilized by the contractor, but is determined by the nature of the work - non-emergency snow removal - and whether the contracting of that work was a "mixed practice" where both scope-covered employees and outside forces performed that work. That was the argument advanced on the property - not that the Carrier had to contract the work because it did not possess the necessary equipment. Whether the Claimant was qualified on the equipment chosen by the contractor to perform the work is therefore irrelevant.

Third, and as in Awards 40857, 40858 and 40859, *supra*, the Claimant shall be made whole for the lost work opportunities. There appears to be a dispute on the property concerning the extent of the work performed by the contractor's forces and the dates the work was performed. In its letter of April 13, 2009, the Carrier asserted "... nowhere within your claim have you provided any proof or evidence to support your assertion that the alleged work was performed on the days and for the hours documented. . . ." Compare the Organization's May 30, 2009, response wherein it contended "[t]he dates and hours the contractor performed the work grieved herein were documented through eye witness accounts of BMWED M/W employees who recognized this work as belonging to BMWED forces pursuant to our Collective Bargaining Agreement . . . [and w]e have no reason to doubt that the work took place as outlined in the claim correspondence." The Organization also produced a statement from the Claimant to that effect.

As we did in Award 40859, *supra*, we view this issue as going to the extent of the remedy and shall remand the question to the parties for a check of the Carrier's records:

" . . . [I]n the exercise of our remedial discretion to formulate remedies, because there was an initial dispute concerning the precise days on which the contractor performed the work, the extent of relief granted to the Claimants shall be limited to the number of hours actually worked by the contractor's forces during the period set forth in the claim. The matter is remanded to the parties for a check of the Carrier's records to determine that amount."

AWARD

Claim sustained in accordance with the Findings.

Form 1
Page 4

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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 7th day of February 2011.