Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41003
Docket No. MW-41025
11-3-NRAB-00003-090376

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

(Brotherhood of Maintenance of Way Employes 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 (Hodgeson and Son Contracting) to perform Maintenance of Way and Structures Department work (snow removal and related work) between Mile Posts 312.0 and 390.0 on the Huntington Subdivision of the Oregon Division on February 7, 8, 11, 12, 13, 14, 15, 19, 20, 21, 22, 23, 25 and 26, 2008 (System File C-0852U-160/1500462).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intention 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 H. Montgomery shall now be compensated for one hundred twelve (112) hours at his respective straight time rate of pay and for twenty-eight (28) 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.

This claim protests the Carrier's use of a contractor to perform snow removal from the right-of-way on a 78 mile stretch of track on the Huntington Subdivision in the Northwest District on various claim dates in February 2008. The Carrier did not dispute the fact that no notice was given or the allegation that one contractor employee worked for ten hours on each of the claim dates removing snow using a front end loader. The Organization did not take issue with the Carrier's assertion that this was done to help local forces manage the snow removal, or that the Claimant was a Track Inspector who was fully employed performing the federally mandated duties of his position on the claim dates.

The Organization contends that (1) this is scope-covered work reserved to employees of the Track Sub-department under Rules 1, 9, 10 and Appendix Y of the Agreement and has been customarily and traditionally performed by them and not contractors (2) the exclusivity doctrine does not apply to contracting transactions, and (3) the Carrier failed to meet its burden of proving that any of the conditions of Rule 52(b) existed. In this regard it asserts that (1) the Claimant was a qualified Roadway Equipment Operator (REO) (2) the Carrier had the necessary equipment to perform the work in the immediate vicinity (3) snow could have been removed with various types of equipment, (4) it failed to allege the existence of an "emergency" until its final denial letter (after the Organization pointed out in its appeal that no emergency situation was relied upon) and (5) did not establish any factual basis to support such situation, relying on Third Division Awards 29164, 32160, 32414, 32861, 36015, 39139; Public Law Board No. 7096, Award 14. The Organization urges the Board to reject the new evidence and arguments proffered

by the Carrier in its Submission with respect to the existence of an emergency. The Organization also contends that the Carrier violated its commitments under the Berge-Hopkins December 11, 1981 Letter of Understanding to make a good faith attempt to reach an understanding concerning the contracting. Finally, the Organization argues that the Carrier's "fully employed" defense does not negate the fact that the Claimant was denied a work opportunity supporting a monetary remedy, citing Third Division Awards 30301, 37572, 37316, 39139; Public Law Board No. 7101, Award 9.

On the property the Carrier argued that because the Claimant could not perform the work in dispute inasmuch as he was not qualified on the front end loader, which was used for the snow removal on this section of the line, and was only qualified to operate bulldozers, the claim must fail, relying on Third Division Awards 27844, 31763, 37140, and 39706. It also asserted that (1) it customarily and historically has used contractors to perform snow removal work, (2) the prior and existing rights language of Rule 52(b) applies, and (3) this work is not exclusively reserved to employees under the Agreement, citing Third Division Awards 27010, 32367, 33420, and 33645. The Carrier asserted that it was physically impossible for the Claimant to perform his Track Inspector duties and operate this equipment on the claim dates. The Carrier contended that (1) the snow had to be addressed immediately for it to continue services without delay, (2) it met the definition of an "emergency" situation set forth in Third Division Award 20527, so it has broader latitude in assigning work and (3) it did not need to serve prior notice of its intent to contract in this situation, citing Third Division Awards 29999 and 38953. In its Submission, the Carrier included exhibits showing the section of the track at issue, track speeds and timetables, and asserts that this was rugged terrain with elevations of 3,400 feet and heavy ascending grades requiring helper service with trains, and that the areas along the right-of-way must be kept open due to drainage restrictions so its vehicles could traverse. It argues that the Organization never refuted its assertion of an emergency on the property and the principle of stare decisis applies, citing Third Division Awards 39006 and 39294. Finally, the Carrier argues that because there was no loss of work opportunity for the Claimant, no monetary remedy is appropriate, relying on Third Division Awards 31171, 31284, 31652, and 36676.

A careful review of the record convinces the Board that the Organization made out a prima facie case of a violation of the Agreement by the Carrier's contracting the snow removal work on the claim dates without prior written notice,

because there is no dispute that, at the very least, there is a mixed practice of contracting this arguably scope-covered work on the property, and the Carrier admits as much in its August 12, 2008 denial and contention that the contractor was used to help local forces remove snow during this period. See, e.g. Third Division Award 29999. At that point, the burden shifted to the Carrier to prove that one of the exceptions in Rule 52(b) existed. In this case, the Carrier asserted the defense of an emergency. It was incumbent upon the Carrier to prove that circumstances were present on each of the 14 dates that justified using a contractor rather than qualified employees who held seniority on the district. See Third Division Awards 18331 and 20310. It is not enough for the Carrier to say that the Board has previously recognized its ability to contract out snow removal in emergency situations without showing that an emergency was involved in this case. There is nothing in this record to show the weather conditions in February 2008 in South East Oregon, that they were sudden or unforeseeable, or that the snow was extreme and constant where scheduled snow removal crews could not have handled it. See Third Division Awards 29164 and 39139. We find the Organization's statement that no claim of an emergency was made or existed in its appeal to be sufficient to rebut the later contention of such emergency by the Carrier made without affirmative proof on the property. The Board has consistently held that the record before it is limited to the arguments and evidence exchanged by the parties on the property (Third Division Award 37315) so the additional documents concerning the nature of the terrain and railroad timetable attached to the Carrier's Submission to the Board cannot be considered in support of its alleged emergency defense. Because the Carrier failed meet its burden of proving the existence of an emergency, the claim must be sustained.

With respect to the remedy, and the Carrier's argument that the Claimant was not qualified to operate the front end loader and was fully employed elsewhere on the claim dates, we note that, in the absence of proof that this is the only piece of equipment that could be used to perform the snow removal work in dispute, especially in light of the Organization's assertion that other equipment was available in close proximity to the work, the evidence is insufficient to find that he is an improper Claimant, or to deny monetary compensation for the loss of a work opportunity to an employee with seniority under the Agreement. See Third Division Award 36964, as well as Public Law Board No. 7101, Award 9 and Public Law Board No. 7096, Awards 14 & 15.;. Because the Carrier did not dispute the number of hours worked by the contractor employee on the claim dates, the claim will be 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 20th day of July 2011.