

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41005
Docket No. MW-41040
11-3-NRAB-00003-090393**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Parsons Contracting) to perform Maintenance of Way and Structures Department work (snow removal and related work) between Mile Posts 238.0 and 289.0 on the Nampa Subdivision of the Idaho Division on February 5, 6, 7, 8, 11 and 12, 2008 (System File C-0852U-162/1501131).**
- (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, Claimants K. Hymas and J. Wigington shall now each be compensated for fifty-nine and one-half (59.5) hours at their respective and applicable rates 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 is another claim submitted by the Organization protesting the contracting of snow removal during various periods in January and February, 2008 in the Northwest Region. The arguments made by the parties are strikingly similar to those dealt with by the Board in Third Division Awards 41003 and 41004, and the crux of the issue herein is also whether the Carrier met its burden of proving the existence of an "emergency" justifying the assignment of the disputed snow removal work to contractors without prior notice to the Organization. We adopt the same reasons set forth in Award 41003 to support our conclusion 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, and that the burden shifted to the Carrier to prove its defense of the existence of an emergency on the claim dates that justified using a contractor rather than qualified employees who held seniority on the district. See Third Division Awards 18331 and 20310. The Carrier cannot meet its burden merely by arguing that because the Board has previously recognized its ability to contract out snow removal in emergency situations (Third Division Award 29999) such decision should be held to be stare decisis herein, because the issue of whether an emergency existed must be based on the specific facts of each case. There is no dispute that the Carrier is permitted to contract out work of this nature when it meets its burden of establishing the existence of an emergency as set forth in Rule 52(b).

This claim protests the Carrier's use of two contractor employees to perform snow removal from the right-of-way on a stretch of track on the Nampa, Idaho, Subdivision in the Northwest District on the six claim dates in February 2008, using a front end loader and fuel truck. The Carrier did not dispute the fact that no notice was given or take specific issue with the number of hours worked by the contractor employees. The Organization did not contest the Carrier's assertion that (1) the Claimants were fully employed on the claim dates (2) all available Carrier forces were working 12-hour shifts during this period, or that (3) Claimant Hymas received triple time on three of the claim dates.

Unlike the situation in Award 41003, the Carrier did present evidence with respect to the weather during this time period. What was submitted was the same e-mail statement from Manager of Track Maintenance Halsell that was submitted on the property in response to the claim addressed in Award 41004, where the Board rejected its application, noting that it had been prepared in response to a different claim. A review of that statement reveals that it is clearly applicable to the facts in the instant claim. It notes that during February 2008, Idaho experienced the heaviest snowfall in more than ten years, with the entire Shoshone District being devastated by 24 inches of heavy snowfall and 48–60 inches of snow drifts, making it impossible for employees to get to switches to shovel them out. Moreover, propane tanks for switch heaters were empty, causing an emergency service disruption in that area. Manager Halsell also stated that all Carrier equipment was in use across the service unit and all available employees were working long 12-hour shifts in an attempt to keep traffic moving. The Carrier also submitted a Report of the Western Region revealing 155 delay incidents totaling 1,739.3 hours on the Pocatello Subdivision, including the Nampa area, encompassing the period from February 6–11, 2008. In its denials, the Carrier noted that the contractor employees were called in to assist local forces, who were unable to keep up with the unexpected weather conditions and had to be sent home after 12-hour shifts to get rest, and had no possible loss of earnings.

The Board concludes that the Carrier did present evidence of snow-related service delays in the vicinity and during the dates encompassed by this claim in support of its asserted emergency defense permitting it latitude in its assignment of snow removal work, including to contractors without prior notice to the Organization. See, e.g. Third Division Awards 29999 and 38953. The Organization

did not effectively rebut this evidence. Accordingly, the Organization failed to meet its burden of proving a violation of the Agreement in this case.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 20th day of July 2011.