

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41006
Docket No. MW-41041
11-3-NRAB-00003-090394**

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 (Hodgeson and Son Contracting) to perform Maintenance of Way and Structures Department work (snow removal and related work) between Mile Posts 328.0 and 383.0 on the Huntington Subdivision of the Oregon Division on January 9, 10, 16, 17, 18, 21, 22 and 23, 2008 (System File C-0852U-155/1498399).**
- (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 sixty-four (64) hours at his respective straight time rate of pay and for sixteen (16) 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 case is another in the series of claims 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 the same as those dealt with by the Board in Third Division Awards 41003 and 41004, and the finding of 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 is adopted in this case. As in those cases, the crux of the issue herein is whether the Carrier met its burden of proving the existence of an "emergency" justifying the assignment of the disputed snow removal work to a contractor employee without prior notice to the Organization. See Third Division Awards 18331 and 20310. 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). See Third Division Award 29999. The Organization admitted the urgency of snow removal in this case, but contended that it did not amount to an emergency because there was no showing of a suspension of service for any of the reasons listed in Rule 52. The Carrier submitted a number of articles from its Northwest Passage Newspaper for the First Quarter of 2008 indicating the historical amounts of snow falling in the Spokane area, and thanking named employees for their hard work and service in dealing with these extreme weather conditions. In its denial, the Carrier argued that the Organization never challenged the existence of this weather emergency on the property, so that additional proof was unnecessary.

This claim protests the Carrier's use of a single contractor employee to perform snow removal from the right-of-way on a stretch of track on the Huntington Subdivision of the Oregon Division on the eight claim dates in January 2008, using a front end loader. The Carrier asserted that the Claimant did not have sufficient fitness and ability to be assigned to the duties of a front end loader as required by Rule 10, relying on the Machine Operator Qualification Database (MOQD) showing that the Claimant had not qualified on such equipment. The Organization took issue with the accuracy of the MOQD asserting that Roadway Equipment Operators (REOs) are called upon to operate lots of equipment not listed on the MOQD, and stated that the Claimant had requested training in, or operated, other types of equipment that could have been used to remove snow.

A careful review of the record convinces the Board that the Carrier presented evidence of the existence of an unprecedented amount of snowfall in the Pacific Northwest in January and continuing through mid-February, and that the Organization did not take issue with the accuracy of this information. The question remains whether such evidence is sufficient to meet the test of an "emergency" set forth in Third Division Award 29164 - the need to act immediately to deal with the effects of a sudden or unforeseeable combination of circumstances. The record makes clear that the Carrier has a gang safety action plan which includes getting ahead of snow accumulations, and its newspaper articles reveal that it uses its own employees in furtherance of such plan whenever possible. However, the record does not indicate why a front end loader had to be the equipment utilized for this snow removal work (in fact, a different piece of equipment was featured in one of the articles in the newspaper) that the Claimant was not qualified to operate other equipment that could be used for this purpose, or why the Claimant was not utilized on overtime to perform this work when the contractor employee received daily overtime during the claim period. Unlike the situation in Third Division Award 41005, the Carrier did not assert or prove that all of its employees on this Division were working 12-hour days in order to effectuate the necessary snow removal and/or work related to restoring service affected by the extreme weather. Because the record does not provide evidence of actual train delays or other service interruptions on the Huntington, Oregon, Subdivision during the claim dates, or reveal why additional hours could not have been granted to employees covered by the Agreement, such as the Claimant, to perform the required snow removal work rather than scheduling a contractor employee to repeatedly work ten-hour days over an eight-day period, we conclude that the Carrier has not met its burden of establishing the existence of an emergency permitting the contracting in this case.

The Carrier did not dispute the number of hours worked by the contractor employee. In accord with the rationale set forth in Award 41003, we will sustain the claim and direct a monetary remedy to the Claimant.

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.