Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36271
Docket No. MW-35904
02-3-99-3-925

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Tomascello Construction) to snow cleanup and removal at Frontier Yard in Buffalo, New York on January 15, 1998 (System Docket MW-5295).

(2) The Carrier further violated the Agreement when it failed to provide a proper advance notice of its intent to contract out the Maintenance of Way work described in Part (1) hereof.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, furloughed Class 2 Machine Operators J. E. Kilian, J. D. Geiss and Vehicle Operators G. E. Kilmer, L. E. Kolb, E. A. Scibilia and R. H. Fox shall now each be compensated for eight (8) hours' pay at their respective straight time rates of pay and for four (4) hours' pay at their respective time and one-half 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.

The operative facts in this case are not in dispute. The Carrier notified the Organization by letter dated November 26, 1997 of its intent to contract for snow removal throughout the Conrail system during the winter of 1997 and 1998. The notice specifically stated:

> "During this period, contractors, as well as employees of other crafts, will be used to remove snow in emergency and other situations as the Carrier deems necessary.
>
> It is our position that various crafts and classes of employees, as well as contractors, have historically performed this type of work. As we have done in the past, the Carrier will assign snow removal work to expedite its operations and to ensure the maximum safety to those operations."

The Organization objected to the notice by letter dated December 5, 1997, contending that such "blanket" notices were not contemplated under the parties' Agreement.

On January 15, 1998, Tomascello Construction plowed and removed snow from roads and parking facilities in and around the engine house area at Frontier Yard in Buffalo, New York. The Organization thereafter filed the instant claim, alleging a violation of the Scope Rule of the parties' Agreement. The Claimants were furloughed on January 15, 1998, and thus they were available, and, according to the Organization, fully qualified to perform the work.

The Carrier denied the claim, arguing that the work of snow removal did not accrue to the Claimants exclusively by virtue of the Scope Rule. As the claim progressed through the appeal process, the Carrier further argued that the

Organization had been notified well in advance of the claim date. In addition, the Carrier asserted that the Claimants received protective benefits for January 15, 1998, and therefore even if payment were due, it would be offset by that amount.

In its Submission and argument before the Board, the Carrier advanced several new arguments. It asserted that there were emergency snow conditions on January 15, 1998 which are exempt from the provisions of the Scope Rule. In addition, the Carrier argued that snow removal from parking lots is not work reserved to the Organization. The Carrier also took the position that there was insufficient time to call out furloughed employees. While those arguments would have been duly considered had they been raised on the property, it is quite well established that the Board cannot consider argument or evidence de novo. Accordingly, we have confined our review of this case to the arguments and evidence presented during the handling of the matter on the property.

So stating, we note at the outset that a majority of the Board Awards on this property have held that snow removal is work that comes under the Scope Rule of the Agreement and therefore notice is required before the work is contracted out. See Third Division Awards 31752, 32344 and 35835. The case cited by the Carrier, Third Division Award 30079, found no express reservation of work in the Scope Rule, but relied for its finding upon the fact that there was no clear showing as to exactly what work had been performed by the outside forces. In that case, the Board concluded that there was "insufficient evidence to make an informed decision" and thus the claim was denied. We find the factual circumstances of this case readily distinguishable, and conclude that application of existing precedent calls for the conclusion that the work at issue was scope covered.

Once that finding is made, the Carrier's exclusivity argument becomes unpersuasive. Work that is encompassed within the Scope Rule is contractually reserved to Maintenance of Way forces. This is not a class and craft dispute where exclusivity may be applicable. See Third Division Award 35835 ("The Organization's failure to demonstrate that covered employees exclusively perform the work is not a defense to contracting out claims.") and Third Division Award 31752 ("The Carrier incorrectly argued that the exclusivity doctrine is applicable to the Scope Rule.").

Thus, the real crux of this case is whether the Carrier complied with the notice provision of the Agreement before contracting out the snow removal work. The Agreement provides in pertinent part:

> "In the event the Company plans to contract out work within the scope of this Agreement, except in emergencies, the Company shall notify the General Chairman involved , in writing, as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto. . . .
>
> If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the company shall promptly meet with him for that purpose. Said Company and organization representative shall make a good faith attempt to reach an understanding concerning said contracting, but, if no understanding is reached, the company may nevertheless proceed with said contracting and the organization may file and progress claims in connection therewith."

The Carrier asserts that it complied with the foregoing notice requirement when it informed the General Chairman by letter dated November 26, 1997 of its intent to contract out snow removal work. In response, the Organization argues that the letter was a "blanket" notice which has been found insufficient in similar contexts. Third Division Awards 24242 and 25677 are cited in support thereof. In those cases, the Carrier contracted out certain excavation work and the Board concluded that the notices issued to the Organization were too vague and nonspecific to comply with the intent of the notice requirement.

There is an important distinction to be drawn between those cases and this one. The timing of excavation work can be anticipated. However, both the timing and extent of snow removal work cannot be anticipated with any specificity as the work is entirely dependent upon the weather. The Carrier is required to give 15 days advance notice of its intent to contract work within the Scope of the Agreement. In light of the unpredictable and varying weather conditions which can trigger the need for snow removal, we find that the Carrier's letter in advance of the winter snow season constituted proper notice. The Organization was fully apprised of the prospective work and the operational reasons for contracting out the work. It had the opportunity to

request a meeting to discuss the matter, but there is no indication on the record that it did so. Absent any further contractual limitation on the Carrier's right to contract out the disputed work, we must rule to deny the claim.

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 28th day of October 2002.

LABOR MEMBER'S DISSENT
TO
AWARD 36271, DOCKET MW-35904
(Referee Kenis)

Through no fault of the Referee, Award 36271 is an anomaly that should carry no precedential value. The reason for this anomaly is that the parties became so caught up in their argument over the propriety of the "blanket notice", that they neglected to properly emphasize well-established principles and what should have been the key point in this dispute. Contrary to the parties' arguments, the key point was not whether the blanket notice constituted proper advance notice under the Scope Rule, but whether the snow fall in question was so "heavy" that the Carrier's MofW forces could not handle it and an "emergency" was thereby created. If the snow was sufficiently heavy to create an emergency, the Carrier was free to contract out the snow removal work without providing advance notice thereby rendering the notice issue moot. On the other hand, if the snow fall did not create an emergency, then the Carrier violated the first paragraph of the Scope Rule by contracting out the snow removal work, irrespective of whether it did or did not provide proper advance notice under the second paragraph.

Of course, as in any contracting out dispute, the threshold burden is on the Organization to show that the work in question is Scope covered. If the work is shown to be within the Scope by virtue of specific reference or past practice, then it is a violation of the Agreement to contract out the work unless the Carrier can point to an exception stipulated in the Agreement. This interpretive paradigm has been consistently applied by the NRAB and was most succinctly and recently articulated in Third Division Award 35337 involving BMWE and the former Monon Railroad, which held:

> "Rule 60 is the parties' codification of Article IV of the 1968 National Agreement. According to the Carrier, the Rule imposes only two conditions upon its ability to contract scope covered work: (1) it must notify the Organization of its intent to contract the work in question; (2) it must meet with the General Chairman in an attempt to reach an understanding concerning the contemplated contracting. The Carrier maintains that both conditions were met.
>
> Absent negotiated provisions or well established precedent providing to the contrary, and none has been cited on this record, Rule 60 is not so limited in its application as the Carrier maintains. While it is true that the 1968 National Agreement imposed the notice and meeting requirements upon participating parties, it was careful to point out that it did not affect existing rights of either party in connection with contracting out. **Generally speaking, work that falls within the Scope of a Labor Agreement is reserved to the employees covered thereby. Whether Scope coverage exists or not depends upon the language of the Scope Rule and related provisions. If there is explicit reservation language that is**

> "**usually determinative of the question. If the Scope Rule is general, however, as it appears to be here, then Scope coverage becomes an evidentiary problem. The question is whether the work has been historically, customarily and traditionally contracted out or performed by Carrier forces.**" (Emphasis in bold added)

This fundamental interpretative paradigm has regularly been applied in cases involving BMWE and Conrail. Indeed, the parties themselves reached agreement on how the evidentiary test of Scope coverage was to be applied and that agreement was memorialized in a special Addendum to Award 9 of Special Board of Adjustment No. 1016, which held:

> "1. Proposed Award No. 9 is based on an evidentiary finding that the disputed demolition work is within the M&W Scope Rule because the Organization's evidence established that said work was performed by BMWE Employees as of the effective date of the applicable Agreement, February 1, 1982, and hence was effectively encompassed within the said Scope Rule at the time of the alleged violation; the Carrier evidence concerning contracting out does not alter this finding.
>
> In contrast, the denial of BMWE claims concerning demolition work, in Third Division Awards No. 27604, No. 27626, and No. 27629, was based on failure of the Organization's evidence to show that the disputed work was within the Scope Rule.
>
> 2. **The partisan Board Members both stated the viewpoint that when the work in dispute is not explicitly mentioned in the text of the Scope Rule, the Organization, in order to prevail in said dispute, has the burden to show that the work was 'customarily and traditionally' performed by MW Employees. In view of these agreeing viewpoints it is appropriate to treat the proposed Award as meeting that standard, although a change in the Award is considered unnecessary; also, the parties can reliably regard said standard as applicable in their future submissions on contracting out disputes of the kind presented here.**" (Emphasis in bold added)

Application of the interpretive paradigm set forth by the parties in Award 9 of Special Board of Adjustment No. 1016 clearly established that snow removal work is Scope covered, not only because it is encompassed in the Scope language (i.e., "maintenance of ... tracks ... roadbed"), but because MofW employes customarily perform such work and were performing it as of the effective date of the Agreement, February 1, 1982. Indeed the parties obviously intended that

snow removal work was Scope covered because: (1) they provided in Rule 1 that MofW forces would operate a wide variety of snow removal equipment ("Snow Flanger", "Snow Plow", "Front End Loader", "Jet Snow Blower", "FEL W/Snow Blower" and "Beihack Snow Blower"); and (2) they established an exception in the second paragraph of the Scope Rule under which snow removal work could be contracted out (i.e., when the snow was so "heavy" it could not be handled by the Carrier's MofW forces and thereby created an "emergency").

The Majority correctly concluded that snow removal work was Scope covered, but it then became tangled in a confusing web of the parties' own making as it sought to resolve the "blanket notice" issue. In addressing this matter, the Majority made a puzzling factual finding that was simply in error. That is, the Majority concluded that the Organization, "*** had the opportunity to request a meeting to discuss the matter, but there is no indication on the record that it did so. ***" (Award at PP. 4-5). Contrary thereto, the Organization responded to the Carrier's contracting notice in a letter dated December 5, 1997 and plainly stated, "Please arrange to list the above for discussion in compliance with the third paragraph of our Scope rule prior to making arrangements with any vendors." (Carrier's Exhibit "B" and Attachment No. 1 to Employes' Exhibit "C-5"). Hence, it is clear that the General Chairman did request a meeting to discuss the advance notice. Although there is no evidence in the record of the on-property handling that the Carrier scheduled a conference as required, there can be no question that the Carrier received the General Chairman's December 5th conference request because, at Page 2 of its submission, it acknowledged receipt and asserts that a conference was scheduled and held.

However, all of the analysis of the nature of the notice and whether a meeting to discuss the notice was scheduled and held begs the central question in the case because complying with the notice and discussion provisions does not establish a right to contract out work covered by the first paragraph of the Scope Rule. In this connection, see Third Division Awards 31798, 32190, 32508, 36022 and Award 150 of Special Board of Adjustment No. 1016 which all involved cases where Conrail complied with the notice and discussion provisions of the second and third paragraphs of the Scope Rule and BMWE contracting out claims for violation of the first paragraph of the Scope Rule were nevertheless sustained. In light of the principles set forth in these well-reasoned awards, the real question in this dispute was whether the snow fall in question was so "heavy" that the Carrier's forces could not handle it, thereby creating an emergency as contemplated by the second paragraph of the Scope Rule. If there truly was an emergency, then the Carrier was free to contract out the work, irrespective of whether it provided notice or not. However, while the Carrier alleged emergency in its advance notice letter and its submission to the Board, there was no evidence in the record to show that the snow fall in question was heavy, much less that it created an emergency. Hence, the claim should have been sustained.

In summary, the Statement of Claim charged the Carrier with a dual violation of the Scope Rule; it was charged with violating the first paragraph by contracting out the snow work and with compounding that violation by providing a blanket notice that BMWE believed to be deficient under the second paragraph. Even if the blanket notice was proper as the Majority held, the primary violation of the first paragraph should have been sustained under the principles set forth in the on-property awards referenced above. Therefore, while I recognize that the record was less than a model of clarity, I must respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member

Carrier Members' Response
to Labor Member's Dissent to
Award 36271 (MW-35904)
Referee Kenis

Were it not for the manner in which this Dissent was filed/received, we would have ignored its posturing as the usual "sour grapes". There is no factual error pointed out nor is there any specific effort to demonstrate what error was made. The Dissenter derisively notes only that the referee was confused.

However, Award 36271 was adopted on October 28, 2002, and, as noted above, the Dissent points to no defect in the facts, logic or interpretation of the material in the record. The Dissent could have and should have been filed shortly after the Award's adoption to indicate the Dissenter's feelings. But instead the Dissent was filed several months later just when a very similar claim, involving the same issue at the same location, was about to be argued. To have any purpose, a Dissent should timely indicate what was lacking in the decision. The Dissent to Award 36271 does neither.

As the addendum to Award 9 of SBA 1016 noted the Organization "...has the burden to show that the work was 'customarily and traditionally' performed by MW..." The claim that was made on the property was snow removal "from roads and parking facilities in and around the engine house area at Frontier Yard." As Dissenter notes the Scope Rule concerns the maintenance of tracks and roadbed. Much of the equipment listed by Dissenter is on-track equipment. While there may be reservation in this regard such does not extend to roads and parking facilities. To include that extension as work reserved to the craft, there has to be evidence of past performance. In this record, there is no evidence; just repetitive assertions.

Insofar as Notice is concerned, a Notice was issued and the parties had discussions. No issue was raised in the seven months of on-property handling that this one day contracting of snow removal was not properly handled. It was a non-issue! Were there some improper handling, one can be certain that the Organization would have raised it. The Organization did not. It argued that the Notice was improper here, even though the same procedure had been used for several years. This decision should put an end to that kind of argument.

Finally, despite the Majority's proper finding that the "emergency" argument was not raised on the property, the Dissenter contends that the "real question" was

whether the heavy snow constituted an emergency. A post-Award review of the on-property record confirms that arguments concerning an emergency are not included.

This Award correctly adjucated the particular issue contested.

P V Varga
Paul V. Varga

M W Fingerhut
Martin W. Fingerhut

Bjarne R. Henderson
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2/6/03