Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36854
Docket No. MW-36214
04-3-00-3-409

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Chicago &
(Northwestern Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (remove snow from parking lot and control points) at Denison, Iowa on February 23, 1999 and March 8, 1999 instead of calling and assigning furloughed Common Machine Operators S. Reineke, N. Laybon and M. J. Pruitt (System File 4RM-9038T/119181 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written notice of its intent to contract out the above referenced work as required by Rule 1(b).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants S. Reineke, N. Laybon and M. J. Pruitt shall now each be compensated for eleven (11) hours' pay at their respective straight time 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 Organization alleges that the Carrier failed to provide proper advance notice of its intent to bring in an outside contractor for the routine removal of snow at five control points at Denison, Iowa, as well as in the Denison parking lot. This work was undisputedly performed on two separate dates: February 23 and March 8, 1999. The Organization maintains that the work was Scope protected and belonged to employees who were in furloughed status and should have been called and properly compensated to perform the work.

The Carrier maintains that there has been no Agreement violation. It argues that the Scope Rule provides the Carrier the right to perform work under the conditions at bar. Additionally, notification was not required due to the instant facts. Those facts included the emergency nature of the snow removal, the lack of equipment at the points required, and the fact that the Claimants lacked the skills to utilize the equipment. The Carrier maintains that while rental equipment was available more than 100 miles away, it would have to be rented for 30 days for the required one day of use.

Our review finds that the work of maintaining the Carrier's right-of-way belongs to BMWE-represented employees. Such work includes routine snow removal. The Scope Rule and notification state that:

> ". . . work as described in the preceding paragraph which is customarily performed by employes described herein, may be let to contractors and be performed by contractor forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, . . . are required; or unless work is such that the Company is not adequately equipped to handle the work; or, time

> requirements must be met which are beyond the capabilities of the Company forces to meet.
>
> In the event that the Company plans to contract out work because of one of the criteria described herein, it shall notify. . . 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, except in "emergency time requirements" cases. . . ."

Central to this dispute is the issue of the emergency nature of the snow removal. The Organization challenged the Carrier's affirmative defense of an emergency. The Organization asserts that this was not an emergency. The Organization states that trains continued to operate, the railroad was not shut down and the work did not continue around the clock. It further argues that there is no evidence provided by the Carrier that it lacked skills, available equipment or time to perform the snow removal. As this was essentially routine each winter, the Carrier had an obligation to meet with the General Chairman to work out mechanisms to afford this work to BMWE-represented employees, rather than to those foreign to the Agreement.

It is essential for the Carrier in this instance to prove its affirmative defense of an emergency. Without an emergency and without substance to its assertions, they remain only assertions. The Carrier's statements that, "Mother Nature covered the earth with snow and with the operation of the Carrier being suspended, an emergency condition existed," or "Management took only the steps needed to safely return the Carrier's operation to normal," do not provide probative evidence.

The only evidence of record in this instant case provided by the Carrier is a statement off the property by the Manager Track Maintenance (MTM). In full and without corrections it reads:

> "There is no equipment owned by the UP railroad in this area that could have cleaned the snow in this area that the men could have run, so there was no need to call men if equipment not available. As far as renting equip of this type you would have to go to DesMooines or Omaha to maybe find this kind of equipment and would have to rent for a minimum of 30 days for one day use. There for a contractor was used to remove the snow. There was 3 different

> machine used to do this work but only one man was operating these machines at any give time, because I only had one flagman to cover the work being done. Do not feel this claim should be payed account the availability of equipment was not there and this snow has to be removed on a timely basis, so we can get to switch heathers and repair them and fill the propane tanks as need. I can not wait until roads are cleared to move machines in from a rental center a 100 miles away and allow the rail road to be shut down that long."

The Carrier argues that it has Award support in similar cases, but those cases are not similar as in each, the proof of a significant snow emergency was clear and unrefuted (Third Division Awards 29999, 30000; Public Law Board No. 2960, Award 163). If there were a major snow emergency proven in this record that was significant, unforeseen and a situation requiring emergency actions, it would be supported by the cited Awards. However, the Carrier failed to prove an emergency. We find no proof that this was anything other than routine snow removal for this area of the railroad that should have been predicted. The Organization maintained throughout this dispute that it was nothing more than "simple and basic equipment to perform the snow removal work," available locally, and with no evidence in the above statement that the MTM "tried to rent/lease equipment locally on an as needed basis." The Organization argues throughout this claim that:

> "The Carrier has failed to make the connection between accumulated snow fall on the parking lots and control point access roads and emergency conditions. No cessation of train operations occurred. Trains do not operate over parking lots and access roads. The fact the contractor employees only worked 5.5 hours demonstrates the work was routine midwestern winter work."

The Board cannot conclude from the Carrier's evidence that this was a snow emergency that could not have been considered what the Organization called it; "simple and routine snow removal work performed by a contractor." The Carrier failed in its affirmative defense. The Board finds no evidence in this record that the parties have ever consulted over this issue on this property by prior notification.

Accordingly, the issues left to be resolved are twofold. The first is over the ineligibility of Claimant Reineke. The Board finds that he is eligible unless he waived his rights to pre-existing claims when he resigned. Secondly, there is no

proof in this record that the contractor did not use three employees, but only that: "There was 3 different machines used to do this work but only one man was operating these machines at any given time, because I only had one flagman to cover the work being done." After full consideration of the hours worked, the claim will be sustained as presented for the two 5 ½ hour days, of 11 hours total.

AWARD

Claim sustained in accordance with the Findings.

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 28th day of January 2004.