Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37024
Docket No. MW-36847
04-3-01-3-421

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Belt Railway Company of Chicago

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (J. Corman and J. T. Enterprise) to remove snow on its fire roads and parking lots and remove snow and excess ballast from its switches on February 8, 9, 10, 11, 12, 13, 17, 18 and 19, 2000 (System File BRC-6643T).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance notice in writing of its intention to contract out the work in question in accordance with Rule 4.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimants listed below shall each be compensated seventy-two (72) hours' pay at their applicable rates of pay and thirty-six (36) hours' pay at their applicable time and one-half rates of pay.

J. Oliveras	M. Gonzalez	P. Rodriguez	G. Guzman
L. Villafuerte	P. Oropez	L. H. Jimenez	J. Oliver
R. Zavala	A. Hernandez	J. Ezparza	S. Ramirez
J. Mosquedo	J. Hernandez	R. Median	J. Moralez
R. Avalos	D. Carter	J. Santoyo"	

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 record herein establishes certain important facts. It is undisputed that employees of outside contractors were used to assist Carrier forces in performing the work described in the Statement of Claim. It is also undisputed that the Carrier did not provide the General Chairman with a 15-day advance written notice of its intention to augment its forces with contractor employees. One year earlier, in January through March 1999, contractor forces were similarly used to assist Carrier forces in the removal of snow and ice; no claims were filed by the Organization to challenge the use of such contractor forces. Rule 4 of the parties' Agreement requires the 15-day notice only in the event the Carrier plans to contract out work within the scope of the Agreement. Rule 1 is a general Scope Rule that does not describe any types of work as being reserved to covered employees. Similarly, Rules 2, 3, and 6, cited by the Organization, do not explicitly reserve any work to covered employees; they are general provisions pertaining to seniority and job titles.

In its final correspondence on the property, the Organization submitted some 30 signed statements that contended that contractor forces had not been used for "snow duty" at any time prior to 1999. The Carrier did not provide any evidence on the property to refute these statements.

In its Submission, the Carrier included four additional pieces of evidence. This consisted of weather data for the time period in question, a tabulation showing the daily hours worked by each of the 19 Claimants, accounts payable vouchers showing the past use of contractor forces to assist with snow removal as far back as 1994, and contractor pay claims pertaining to the instant dispute that reflect less hours worked than the total

sought by the Claimants. It is clear that this evidence is new; it was not properly introduced into the record while the claim was being handled by the parties on the property. It is well settled that such new evidence and related argument may not be considered by the Board. Thus, we have given this untimely evidence no weight.

According to the assertions in the Carrier's initial reply to the claim, the contractors were used in an emergency response to heavy snow which also prevented it from giving a 15-day advance written notice. Careful review of the record shows that the Organization never effectively refuted the characterization of the snowfall as being "heavy."

We conclude that the record fails to establish a notice violation for two independent reasons. First, a rule of reason in the application of labor agreements is implied along with an obligation to act in good faith. While many, if not most, kinds of work can be planned and scheduled far in advance, recovery work made necessary by severe weather events usually cannot. The record does not establish that the Carrier had sufficient advance notice of the heavy snowfall so as to be able to provide the requisite written notice. Given the impossibility of compliance with Rule 4 under these circumstances, common sense requires that the lack of notice must be excused.

Second, as previously noted, the record shows that contractor forces were used one year earlier for similar snow removal without any objection by the Organization. Nothing in the record suggests that the Organization insisted on advance notice in connection with such contracting of work. Thus, the Carrier could properly rely on the Organization's conduct and conclude that it did not need to give notice for such work until after the Organization properly notified it to the contrary. The instant record is devoid of evidence that the Organization so notified the Carrier that it was insisting upon strict future compliance with Rule 4.

On the merits, the issue of scope coverage of the disputed work was joined on the property along with certain other contested points. The Carrier noted that the disputed work was not reserved by explicit Agreement language and that past practice permitted the use of contractor forces for snow emergencies. While the Organization took a different view of these aspects, it did not refute the practice assertions from 1999. Moreover, its signed statements from BMWE-represented employees, which are nearly identical in their wording, refer to past performance of "snow duty" and not emergency removal of heavy snow. Thus, we are confronted with conflicting factual evidence that we have no proper means of resolving without exceeding our review authority or

indulging in an impermissible degree of speculation. Under the circumstances, we find the record evidence insufficient to sustain the Organization's burden of proof to establish scope coverage of the disputed work.

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 18th day of May 2004.