Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37276
Docket No. MW-36389
04-3-00-3-631

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
(
(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 (Armand Cassil) to plow and spread salt in parking lot, right of ways and around switches at Sterling Yard on January 14, 15, 16, 17 and 18, 1999 (Carrier's Files MW-5491 and MW-5492).

(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 violation referred to in Parts (1) and/or (2) above, Class 2 Machine Operator A. Harvey shall now be compensated for forty-six (46) hours' pay 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.

The instant dispute combined two separate claims challenging the Carrier's use of one contractor employee to perform snow removal work over five consecutive days at its Sterling Yard facility. The employee worked ten hours each of the first four days and six hours on the fifth day. It is undisputed that he operated a Caterpillar No. 0415 front end loader on the claim dates.

It is also undisputed that the Claimant is headquartered at Mound Yard and that the front end loader he normally operates stood idle at Mound Yard on the claim dates. Although the record establishes that Sterling Yard is some 20 miles north of Detroit, it does not explain where Mound Yard is located in relation to either Detroit or Sterling Yard.

The Organization contended that snow removal work is reserved by the effective Scope Rule and that the Carrier also failed to properly provide the General Chairman with the requisite advance notice of its intent to contract the work in dispute. When the Carrier asserted that it had provided notice dated November 13, 1998 to cover the 1998-1999 winter season, the Organization denied receiving it. The Carrier did provide a copy of the notice for the record.

Although the Carrier maintained that it had provided proper notice, it also contended that a heavy snow emergency relieved it of any notice obligation. In addition, the Carrier provided work records to support its contention that all of its employees either worked 16 hours on the claim dates or declined the opportunity to do so. It is undisputed that the Claimant did work 16 hours on each of the claim dates.

The Carrier also disputed that snow removal work is covered by the Scope Rule.

Several of the factors in dispute are readily resolved by well-settled means arising from prior Awards between these same parties. Scope coverage of snow removal work has been recognized in the majority of the Awards that have addressed the issue. See Third Division Award 32344 and cases cited therein. That recognition has been subsequently followed. See, for example, Third Division Award 35835. Thus, the Carrier is required to provide notice of its intent to contract out snow removal work in accordance with the dictates of the effective Agreement.

Because of the unpredictable nature of snowfall events, however, a "blanket" type of notice, issued in advance of the snow season, not only makes common sense, but has been found to be acceptable for this kind of contracting. See Third Division Award 36271.

Regarding service of notice, in the absence of an established practice or Agreement language that eliminates the requirement, it is generally the burden of the party claiming to have sent something through the mail to prove that it was, in fact, mailed and/or received. The record does not establish that the Carrier was relieved of this requirement, nor does it contain acceptable proof of mailing or receipt. Thus, on this record, we must find that the Carrier's "blanket" notice was not provided.

The remaining question, however, is whether emergency circumstances relieved the Carrier of compliance with the notice requirement. It is the pivotal issue. On this regard, it is clear that the parties' Agreement lists "heavy snow" among the example conditions that constitute emergencies. Moreover, the Agreement explicitly carves out an exception to the notice requirement in the event of such emergencies.

In developing the record on the property, the Carrier repeatedly referenced 24 inches of blowing snow to support its contention that there was an emergency. The Organization never effectively refuted either the magnitude or the character of the snowfall. Moreover, the Organization never effectively refuted the contention

that all of the Carrier's forces were contacted and allowed to work 16 hours per day to cope with the weather. The deployment of Carrier forces in this manner for five consecutive days is entirely consistent with the presence of extraordinary, or emergency, circumstances while trying, as the Carrier contends, to minimize the effects of fatigue and its resultant adverse impact on safety. Although the Organization countered with the assertion that there could not be a true emergency because the Carrier did not require its forces to work 24 hours around the clock, we note that the Agreement does not impose such a continuous duty requirement to prove the fact of a qualifying emergency. By its terms, the Agreement requires only proof of "heavy snow."

Given the foregoing discussion, we find this record to sufficiently establish the existence of a heavy snow emergency. It follows, therefore, that the Carrier did not violate the Agreement as claimed.

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 5th day of November 2004.