Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37288
Docket No. MW-37432
04-3-02-3-489

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Pollard Construction) to perform Maintenance of Way work (snow removal) at Kenwood Yard on March 5 and 6, 2001, instead of Special Equipment Operator D. Jordan (Carrier's File 8-00188 DHR).

(2) The Agreement was further violated when the Carrier failed to comply with the advance notice requirements regarding its intent to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Special Equipment Operator D. Jordan shall be now be compensated for eight (8) hours' pay for each date of March 5 and 6, 2001 at his respective straight time rate of pay and for any and all hours expended by the outside forces after normal work hours on the aforesaid dates 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 claim involves the Carrier's use of a contractor, without prior notice, to perform snow plowing normally performed by the Claimant on the claim dates. During the on-property correspondence, the Carrier asserted that emergent work conditions caused by the snow storm required the assistance of a contractor to respond. The Organization alleges a violation of Rules 1, 3, 11, 20 and Appendix H, in that the Claimant was the senior equipment operator at the location with machinery available to do the snow removal, and such "emergent condition" was no reason to deprive the Claimant of this work opportunity. The Organization also stated in its appeal that the operations of the yard were up and running in a short period of time and the Carrier could have gotten additional machinery from rental locations and called in furloughed employees if it needed to, noting that the issue of time sensitivity was irrelevant because the contractor returned on a second day. The Carrier's final denial, which was not responded to, indicates that the work was of an emergency nature and not covered by Appendix H so no notice was required. It notes that the contractor was called in to provide assistance to BMWE-represented employees in removing snow, the Claimant was fully employed as an Operator on the claim dates and was not harmed, and that it did not have other available equipment and/or Operators to perform the work in question. The Carrier asserts that it need not call in furloughed employees in an emergency situation because it would require a physical and drug test for which there was no time.

The Organization argues that the Carrier failed to prove its affirmative defense of a snow emergency by anything other than assertion, which does not meet its burden of proof, citing Third Division Awards 18331, 18393, 20223, 20310 and 21904. The Organization asserts that the Carrier's failure to give advance notice violated Appendix H, relying on Third Division Awards 31752 and 32344. Finally, the Organization contends that full employment is not a defense to a monetary claim in the absence of proper notice, citing Public Law Board No. 2960, Award 136; Third Division Awards 27185 and 27014 among others.

The Carrier contends that it established that an emergency situation existed on the claim dates due to the snow storm, permitting it to dispense with the required notice for contracting, noting that the contractor assisted BMWE-represented employees with snow removal. The Carrier argues that the Organization failed to refute its contention that an emergency existed, claiming only that it was no reason to deny the Claimant the work opportunity, and therefore it failed to prove a prima facie case of a violation of the Agreement, citing Third Division Awards 32344, 30079 and 29999. The Carrier requests that the claim be denied, noting that the Board has held that recalling furloughed employees or obtaining additional snow removal equipment on short notice is impracticable in an emergency, relying on Public Law Board No. 2960, Award 163; Third Division Awards 13858, 12299, and 10079.

A careful review of the record convinces the Board that this case turns on whether the Carrier met its affirmative defense of an emergency, thereby permitting the use of a contractor without advance notice and affirming that it need not rent equipment or recall furloughed employees. Public Law Board No. 2960, Award 163; Third Division Awards 10079, 12299, and 13858. We cannot accept the Carrier's argument that the Organization did not dispute the existence of an emergency on the property and only said it was not a reason to deny the Claimant the work opportunity. In the Organization's July 31, 2001 appeal it states: "No matter what the conditions, the operations of the yard were always up and running in a short period of time," and notes that the issue of time sensitivity is irrelevant because the contractor returned for a second day. The Board believes this is enough to dispute the Carrier's claim of an emergency and to shift the burden back to the Carrier to further prove its defense.

In its last substantive correspondence on the property, the Carrier specifies the nature of the emergency and that the contractor was assisting employees in snow removal, and also asserts that the Claimant was working as an Operator on the claim dates and that it had no other available Operators or equipment to perform the work in question. These assertions remained unrebutted between August 24, 2001 and the filing of the Notice of Intent on July 31, 2002. While it is unclear from the record if the Claimant was working on snow removal on the claim dates, the Board finds the Carrier's unrebutted statements sufficient in this case to carry its burden of proving the existence of an emergency requiring the use of a contractor to supplement its own work force in performing the snow removal work in issue. Accordingly, we find no violation of the Agreement in the Carrier's failure to provide advance notice or recall furloughed employees under the facts of this case.

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 17th day of November 2004.