Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38142
Docket No. MW-36838
07-3-01-3-372

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Davidson & Sons Contracting Company) to perform Maintenance of Way work (operate equipment to remove snow from right of way) on the Oakridge District of the Oregon Division on January 13, 14, 15, 17, 18, 19, 20, 21, 24, 25, 26, 27 and 28, 2000 and continuing instead of Machine Operator W. P. Grotte (Carrier's File 1228447 SPW).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance written notice of its intent to contract out the work in Part (1) above in accordance with Article IV of the May 17, 1968 National Agreement.

(3) As a consequence of the violation referred to in Parts (1) and/or (2) above, Claimant W. P. Grotte shall now '. . . be compensated for all wages and benefits lost from January 13, 2000 through January 28, 2000, and continuing until the violation ceases to exist. His payment shall be an equal and proportionate share of all hours worked by the Davidson & Sons employees, which shall be no less than the one-hundred & four (104) straight time hours and the twenty (20) overtime

hours already identified herein, and will be applicable to the Claimant's last assigned position in Class 17. The above compensation will be in addition to any compensation he may have already received.'"

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 Claimant holds seniority in the Track Sub-department on the Oregon Division, Eastern Seniority District. In January 2000, he was assigned as a Class 17 Tractor-Bulldozer Operator headquartered at Eugene, Oregon.

On January 13-15, 17-21 and 24-28, 2000, the Carrier utilized Davidson & Sons Construction Company to remove snow from the right-of-way on the Oakridge District of the Oregon Division. The Claimant did not regularly work on this territory. He was headquartered at Eugene, Oregon, approximately 200 miles away.

On March 13, 2000, the Claimant filed a claim contending that he should have been assigned the snow removal work contracted to the Davidson & Sons Construction Company in January 2000. He alleged that snow removal from the right-of-way has customarily, historically and traditionally been performed by the Carrier's Sub-department employees. He maintained that this work is encompassed within the scope of the Agreement.

The Carrier denied the claim arguing that the Scope Rule in question is general in nature. Therefore, the Organization must demonstrate that snow removal is reserved exclusively to Sub-department employees, which was not established, according to the Carrier. The Carrier insists that it has always contracted the removal of snow from its right-of-way.

There is no question that the Carrier has the right to contract work within the scope of the Agreement provided it complies with the conditions set forth in Article IV of the May 17, 1968 National Agreement. The Carrier asserts that it met these conditions on July 9, 1999, when it sent Service Order 1550 to the General Chairman notifying him of its intent to provide fully operated, fueled and maintained equipment to perform snow removal services on an "as needed" basis. The General Chairman was adamant that he never received this Service Order.

The Board is unable to resolve this factual dispute. The dichotomy cannot be reconciled. Therefore, we are unable to address the issue of whether the notice requirement mandated by Article IV of the May 17, 1968 National Agreement was met in this case.

We find that the Carrier has the right to use a contractor to clear snow from the right-of-way during an emergency. However, any emergency caused by the snow storm in the Cascade Mountains in January 2000, would not have lasted 13 days by any reasonable standard. Nevertheless, the Claimant had no contractual right to snow removal work on the Oakridge District even if there was no emergency.

As observed above, the Claimant was headquartered at Eugene, Oregon, on the Eastern Seniority District approximately 200 miles from the Cascade Mountains. He was fully employed on his territory between January 13 and 28, 2000. Moreover, if overtime was worked during the snow removal on the Oakridge District, employees regularly assigned to that territory had preference to the overtime work. The Claimant had no preference to overtime on this territory. Because the Claimant lost no earnings, regular or overtime, when a contractor was used to remove snow from the right-of-way on the Oakridge District in January 2000, the claim must be denied.

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 23rd day of April 2007.