Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38355
Docket No. MW-37380
07-3-02-3-347

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division
(
(Grand Truck Western 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 (Perrin Construction Company) to perform Maintenance of Way work (plowing snow) in the Flint Yard, Flint Michigan on January 8, 9, 10, 11 and 12, 2001, instead of Machine Operators B. Rathbun, W. Ide, R. Wicke, S. MacDonald, T. Daniels, D. Klumpp and W. Johnson (Carrier's File 8365-1-751).

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

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants B. Rathbun, W. Ide, R. Wicke, S. MacDonald, T. Daniels, D. Klumpp and W. Johnson shall now each be '. . . compensated all wages, including overtime hours, plus all credits and benefits due to the aforementioned violations which created a loss of work opportunity.'"

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 essential facts in this case are not in dispute. In December 2000, the state of Michigan, including the Carrier's Flint Yard in Flint, Michigan, experienced a considerable snowfall. After the initial snowfall and for subsequent snowfalls in December, BMWE-represented employees plowed Flint Yard with a front-end loader. In early January, the area underwent a "January thaw" with temperatures warmer than usual during the day. The combination of warmer, snow-melting days and below freezing nights resulted in an accumulation of ice along and between the tracks.

In order to clear the ice, the Carrier contracted Perrin Construction, which used four or five of its machines with operators to plow ice and snow between January 8 and January 12, 2001. During that same time, the Carrier's single front-end loader was used by Claimant B. Rathbun, to plow ice and snow as well.

The Organization filed the above claim on February 23, 2001. It maintained that the contractor had worked each day cited, for a period of time from eight hours to ten hours, in violation of the Scope Rule of the Agreement. The Organization further contended that the Carrier violated the December 11, 1981 Berge/Hopkins Letter of Understanding when it failed to give the General Chairman adequate notice of its intent to contract out the work in question.

In its April 17, 2001 denial of the claim, the Carrier insisted that the railroad was in an emergency situation, because the snow and ice "hindered mechanical and transportation employees from safely performing their duties." The Carrier asserted that it did not have sufficient equipment to handle the snow and ice; thus, "it was necessary to use the Contractor to eliminate the safety hazard in a timely manner."

The Organization appealed the Carrier's denial in a letter dated May 10, 2001. In that letter it disputed the Carrier's assertion that the situation constituted an

emergency. In particular, the Organization pointed out that because Flint, Michigan, is situated in the "snow belt" a December/January snow fall could certainly not be defended as an unanticipated "emergency." Moreover, the Organization insisted, the contractor in question worked no more than ten hours per day, which further suggests that the situation was not, in fact, a genuine emergency.

Correspondence continued between the parties through October 17, 2001, during which time the matter was also conferenced on the property.

As noted above, there is no dispute that the Carrier contracted out snow plowing and ice clearing on the days in question. There is also no question that on occasion BMWE-represented employees performed such work. Accordingly, under normal circumstances, in accordance with the Scope Rule of the Agreement, the Carrier is obliged to give the General Chairman 15 days' notice of its intent to contract out work previously performed by BMWE-represented employees. See for example, Third Division Awards 32344 and 35835. As has been noted on this and other Boards, the only circumstance that permits the Carrier to avoid this obligation is in the case of a genuine emergency, the definition of which many Boards have established over the years. Furthermore, it is a defense that has been looked at critically by the Board, because it constitutes pleading a circumstance that allowed the Carrier to temporarily place in abeyance the Parties' clear contract language.

In the present case, the Organization contended that, because the Carrier is in an area that receives considerable snowfall in the winter months, the snowfall that took place during the period of December 2000 through January 2001 could not constitute a legitimate surprise to the Carrier, let alone a genuine emergency. The Carrier defends its argument on this point by including in its correspondence on the property newspaper clippings detailing the unusual quantity of snow and consequent result that the city and county in which Flint Yard is located were also uncharacteristically overwhelmed by the quantity of snowfall. The Organization counters the Carrier's assertion by pointing out that it had various pieces of equipment available to it, and BMWE-represented employees to operate that equipment, which could have dealt with the snow and ice in lieu of contracting out the work.

The Carrier argued persuasively that the equipment cited by the Organization was in no way sufficient to the task of clearing paths and walkways between the tracks. Further, it points out that trains had to be moved from tracks to clear areas for the plows. Thus, it was impossible for the contractor to work "around the clock." Finally,

the Carrier notes that the contractor did not permit rental of its equipment for such a short time without using its own operators. Moreover, the Carrier reiterates that Claimant Rathbun was, in fact, operating the Carrier's single piece of snow removal equipment during the entire time the contractor was working. Furthermore as noted in Third Division Award 37276 (Referee Wallin) "the Agreement does not impose . . . a continuous duty requirement [on the contractor] to prove the fact of a qualifying emergency."

In light of the foregoing, we find that the Organization has not shouldered its burden of persuasion in this matter and the instant claim is 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 5th day of September 2007.