Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40078
Docket No. MW-40646
09-3-NRAB-00003-080491

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(Union Pacific Railroad Company (former Chicago and North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Sauder Snow Removal) to perform Maintenance of Way and Structures Department work (snow removal) on the Illinois River Bridge Road and the South Pekin parking area on February 6, 2007 (System File S-0701C-354/1474214 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advanced notice of its intent to contract out the aforesaid work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(b) and Appendix 15.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Reagan shall now be compensated for ten (10) hours 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.

On February 6, 2007, the Carrier utilized outside forces to clear snow from the Illinois River Bridge Road and South Pekin parking area. According to the Carrier, four inches of snow fell that day and:

> "[t]he union was served notice of our intent to use a contractor for this work. We do not have the adequate equipment [to] complete this work. The contractor[s] are called when the emergency snow condition is called."

This claim has merit.

First, in Third Division Award 40079, the Board discussed the impact of emergencies on the Carrier's obligations under the Agreement:

> "Third Division Award 20527 sets forth the standard for an 'emergency:'
>
> > We have heretofore defined an emergency as 'an unforeseen combination of circumstances which calls for immediate action' (Award 10965). . . . [I]t is well established that the Carrier, in an emergency, has broader latitude in assigning work than under normal circumstances; in an emergency Carrier may assign such employees as its judgment indicates are required and it is not compelled to follow normal Agreement procedures."

And, as discussed in Third Division Award 32862, ". . . [t]he burden rests with the Carrier to demonstrate the existence of the emergency."

The Carrier has not shown that a four inch snowfall adversely impacted its operations to the extent necessary to be considered an "emergency." The snowfall was not that heavy and the work was performed on a road and parking area.

Second, the Carrier asserts that it served notice on the Organization of its intent to contract out the work. The Organization disputes that assertion. The Carrier failed to produce a copy of that notice. We therefore cannot find that such notice was issued by the Carrier as required by Rule 1(B).

Third, this is a contracting dispute. The fact that scope covered work has not exclusively been performed by the covered employees is not a complete defense by the Carrier to its obligations to the Organization in these disputes. "[E]xclusivity is not a necessary element to be demonstrated by the Organization in contracting claims." Third Division Award 32862, supra and Awards cited therein. The question in contracting disputes is whether the contracted work falls within the scope of the applicable schedule agreement. Snow removal is classic Maintenance of Way work covered by Rule 1.

Fourth, the fact that the Claimant worked on the claim date does not deprive him of a remedy. The Claimant lost work opportunities due to the Carrier's violation of the Agreement. See Third Division Award 32862 supra:

> "The record shows that Claimants worked at the site at the time the contractor's forces were present. The Carrier argues that granting relief to Claimants who were employed at the site is unfair. That argument is not persuasive so as to change the result. The remedy in this case seeks to restore lost work opportunities. It may well be that Claimants could have performed the contracted work (or the work they actually performed) on an overtime basis or could have resulted in more covered employees being called in to work on the project. Indeed, had the Carrier given notice, those questions could have been the subject for discussion in conference between the parties. On balance, having failed to give the required notice, the Carrier cannot now argue that the result is unfair."

The Claimant shall therefore be compensated for the number of hours worked by the contractor on February 6, 2007 consistent with the provisions of the Agreement.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of November 2009.

CARRER MEMBERS' DISSENT
to
THIRD DIVISION AWARD 40078 – DOCKET MW-40646

(Referee Edwin H. Benn)

The Majority's decision in this case appears to condone the Organization's tactic of "lying behind the log." To the extent the Award relies on that improper practice, the Award is flawed, and its reasoning and conclusion should be avoided in future matters. Therefore, this dissent is necessary.

The Majority states that it cannot find that notice was issued by the Carrier as required by Rule 1(B) because the Organization disputed the Carrier's assertion that notice had been served and the Carrier did not produce a copy of the notice. The Majority's finding, however, does not comport with the on-property record. To be sure, the Organization initially raised its standard allegation, as it admittedly does in virtually every contracting case regardless of the actual facts, asserting that notice had not been served. The Carrier unequivocally refuted that allegation, however, producing a statement from the local manager which pointed out that notice had indeed been served.

Once the Carrier pointed out that notice had been served, the Organization merely replied:

> "[The Carrier's appeal denial] attached a letter from Manager Stewart in which he stated the union was served notice of our intent to use a contractor for this work. However the Brotherhood did not agree to let the Carrier contract out work the Carrier's forces has (sic) historically performed and have the necessary equipment to remove snow from roads and parking areas."

Thus, the Organization's response did not question the Carrier's assertion – to the contrary, its reply tacitly concedes that notice had been served, arguing only that the Organization did not agree to the proposed contracting. If the Organization had any question as to whether notice had been served, it certainly did not raise the issue when it should have and when

the Carrier would have had the opportunity to produce a copy of the document.

In such circumstances, the Carrier's unrefuted statement that notice had been served should have been considered as proven fact. No citation of authority is necessary for that most basic principle of arbitration decision making. The Organization's attempted resurrection of that argument in its Submission came too late and should have been ignored based on the on-property record. Instead, however, the Majority rewarded the Organization for keeping silent until the on-property record had closed, and for once again regurgitating in its Submission its rote argument of lack of notice. Such a finding is contrary to long-standing arbitral precedent and cannot form the basis for a sustaining award. In light of this plainly erroneous finding, the Carrier Members respectfully dissent.

Michael D. Phillips
Michael D. Phillips

Michael C. Lesnik
Michael C. Lesnik

November 19, 2009

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBER'S DISSENT
TO
AWARD 40078, DOCKET MW-40646
(REFEREE BENN)

The Organization is compelled to respond to the Carrier's dissent in order to set the record straight.

It should first be noted that the comment that the Organization was "laying behind the log." referenced prominently in paragraph one of the Dissent is completely without merit. There was no ambush of the Carrier wherein it was at all baffled by the initial claim. It was a straight forward time claim because the Carrier contracted out the snow removal work that the Claimant had been performing since he was assigned to a speed swing position **at** the location of the claimed work just months prior to the initial claim.

Second, the Board clearly held that snow removal work is "classic Maintenance of Way work covered by Rule 1." For the Carrier to prevail in this case it was incumbent upon it to show a reason for contracting out this work as outlined in the Scope Rule. Scope - Rule 1(b) states:

> "B. Employees included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common Carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission.
>
> By agreement between the Company and the General Chairman, work as described in the preceding paragraph, which is customarily performed by employees described herein, may be let to contractors and be performed by contractor's forces. However, such work may only be contracted provided that special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or unless work is such that the Company is not adequately equipped to handle the work; or time requirements must be met which are beyond the capabilities of Company forces to meet.
>
> In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Brotherhood in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. If the General Chairman, or his

> "representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. The Company and the Brotherhood representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached, the Company may nevertheless proceed with said contracting and the Brotherhood may file and progress claims in connection therewith. ***"

As noted above, there are exceptions built into the Scope Rule that the Carrier could use as justification for assigning the work to outsiders rather than the Maintenance of Way employes. One of those exceptions was attempted by the Carrier during handling of this dispute on the property. The Carrier alleged that the snow storm which brought the snow resulted in 'emergency time requirements' which necessitated assigning the work to an outsider. The Board clearly held that no emergency existed. The Rule obligates the Carrier to cite an exception outlined in the Scope Rule in order to justify its decision to contract out Scope covered work. The Carrier failed to do so. What it did do was initially argue that the work was not scope covered and, therefore, notice was not necessary. In later correspondence it alleged that notice had been issued and within the same paragraph it alleged that an "emergency" existed. In support of its position was an e-mail message alleging that notice had been served. That was the state of the record on the property. The Board correctly found that the Carrier did not prove an "emergency time requirement" or support its affirmative defense that it issued a notice for the Scope covered work at issue here. Hence, the Board was correct to sustain the claim. The mere unsubstantiated assertion of a notice being filed is insufficient proof that such was the case. As has been said many times in this line of work, merely stating that it is so does not make it so. For these reasons the Organization must respond to the Carrier's ill-advised dissent and concur with the findings of the Board.

Respectfully submitted

Roy C. Robinson
Labor Member