Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40080
Docket No. MW-40705
09-3-NRAB-00003-080517

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

(Brotherhood of Maintenance of Way Employes Division -
( IBT Rail Conference
PARTIES TO DISPUTE: (
(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 (Rossi Construction) to perform Maintenance of Way and Structures Department work (snow removal) at the Proviso Yards on February 15 and 16, 2007 (System File S-0701C-357/1476264 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance 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).

(3) As a consequence of the violations referred to in Part (1) and/or (2) above, Claimants S. Duda, J. Guerrero, J. Guzman, C. Rapier, O. Juarez and A. Ayala shall now '. . . each be compensated at their applicable time and one half rate of pay an equal and proportionate share of the one hundred ten (110) hours rendered by the Contractor employees on February 15, and 16, 2007.'"

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.

As discussed in Third Division Award 40079 on February 13, 2007, the Proviso Yards in the Chicago area experienced a heavy snowfall (nine inches). In that Award, the Board denied the Organization's protest over the Carrier's use of outside forces and strangers to the Agreement on the basis of a demonstrated emergency which existed on that date. This claim is for continued use of the contractor on February 15 and 16, 2007.

According to Manager Track Maintenance J. Goben:

> "[T]he men were working at least 12 on and 12 off. Rossi was called to facilitate snow removal with bobcats in areas where the railroad equipment was too large to operate between tracks; on the 15th Mr. Duda worked 8 hours with 8 hours overtime, Guerrero worked 8 hours with 4 hours OT, J. Guzman worked 8 hours with 5 hours OT, Juarez worked 8 hours with 10 hours OT, Ayala worked 8 hours with 10 hours OT, Rapier worked 8 hours with 10 hours OT."

This is a contracting dispute. The fact that scope covered work has not exclusively been performed by BMWE-represented 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 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.

In its letter of September 25, 2007, the Carrier asserts that "[t]he Carrier has to get the snow removed to keep its operation running." The Carrier thus asserts that the emergency caused by the snowfall on February 13, 2007 continued to exist on February 15 and 16, 2007.

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."

Therefore, the real question here is whether the Carrier proved that the emergency caused by the heavy snowfall on February 13, continued on the dates of this dispute (February 15 and 16, 2007) so that the Carrier could continue to have the latitude to be excused from its obligations in contracting disputes - specifically, the obligation to give notice to the Organization of its intentions to use the contractor as required by Rule 1. The Carrier has not made that required showing.

The claimed work was performed by the outside contractor two and three days after the February 13, 2007 snowstorm. What were the conditions that caused the emergency to extend days beyond the initial snowstorm? Why is it that the Claimants could not have performed the work on the claim dates? What evidence substantiates the Carrier's assertion that the outside forces were needed in addition

to the Carrier's forces to keep its operations running on the dates in this claim? This record does not disclose those required answers from the Carrier. Manager Track Maintenance Goben merely states that the Claimants worked overtime on the dates set forth in the claim and that Carrier equipment was too large to get to some areas. But those assertions do not prove that a bona fide emergency continued to exist. There comes a point in time when an emergency ends. To be allowed the ability to be excused from normal requirements of the Agreement due to an emergency, the Carrier has the obligation to prove that the emergency continued on the dates of violation claimed by the Organization. In the record developed on the property in this case, the Carrier has not done that.

As discussed in Third Division Award 40079, the Carrier provided historical weather data which showed that nine inches of snow fell in the area on February 13, 2007, which further substantiated the Carrier's assertion that an emergency existed. The Board checked the same source of data used by the Carrier in Third Division Award 40079 (an internet site) for February 15 and 16, 2007. We take notice from that same source used by the Carrier in Third Division Award 40079 that on February 14, 2007 (not a date involved in this claim) there was an additional 1.4 inches of snow added to the nine inches that fell on February 13, 2007. However, on the dates involved in this claim (February 15 and 16, 2007) the data source used by the Carrier shows that on February 15 there was no additional snow and on February 16 the month-to-date snowfall did not change from February 15, 2007. That historical weather data information further casts doubt on any assertion by the Carrier that the emergency caused by the snow of February 13 continued two and three days after the major snow event of February 13 involved in Third Division Award 40079.

Rule 1 specifies that advance notice of the contracting transaction "except in 'emergency time requirements' cases" must be given by the Carrier for scope covered work. That was not done. The claim therefore has merit.

The fact that the Claimants worked on the days in dispute does not deprive them of a remedy. The Claimants lost work opportunities due to the Carrier's violation of the Agreement. See Third Division Award 32862:

> "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 Claimants shall therefore be compensated for their proportionate share of the number of hours worked by the contractor's forces on February 15 and 16, 2007 consistent with the provisions of the Agreement.

## AWARD

Claim sustained in accordance with the Findings.

## 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.