Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40857
Docket No. MW-41305
11-3-NRAB-00003-100168

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

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Hodgeson and Son Contracting) to perform Maintenance of Way and Structures Department work (removing snow and cleaning right of way) on the LaGrande Subdivision of the Oregon Division on January 6, 2009 (System File C-0952U-152/1515353).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intent to contract out said work or make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant R. Robinson shall now be compensated for ten (10) hours at his respective Group 19 straight time 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.

By letter dated August 12, 2008, the Carrier advised the Organization's General Chairman as follows:

> "Subject: 15-day notice of our intent to contract the following work:
>
> Location: Various points across the Union Pacific System
>
> Specific Work: provide all labor tools, equipment, and materials necessary to provide snow removal services at various locations through the 2008-2009 snow season."

A conference on the notice was held on August 28, 2008, without reaching an understanding.

On January 6, 2009, the Carrier contracted the disputed snow removal work. This claim followed.

Rule 52 – CONTRACTING provides:

> "(a) By agreement between the Company and the General Chairman, work customarily performed by employees covered under this Agreement may be let to contractors and be performed by contractors' 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 when work is such that the Company is not adequately equipped to handle the work; or when emergency time requirements exist which

present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces. In the event the Company plans to contract out work because of one of the criteria described herein, it will notify the General Chairman of the Organization 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. Said Company and organization 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 organization may file and progress claims in connection therewith.

(b) Nothing contained in this rule will affect prior and existing rights and practices of either party in connection with contracting out. It's purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith.

(c) Nothing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster.

(d) Nothing contained in this rule will impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

The Organization argues that the Carrier's notice was deficient. We disagree. Contrary to the Organization's position, the notice issued by the Carrier

was sufficient under Rule 52. See e.g., Third Division Award 40756 (where the notice given under Rule 52 provided "Location: Various points across the Union Pacific System" and describing the work to be contracted covering the period January 10, 2008, through December 31, 2008) and Awards cited therein quoting similar notices found to be sufficient.

The Carrier argues that the record shows a fundamental dispute of facts requiring that the claim be dismissed. We disagree. In the original claim letter dated January 19, 2009, the Organization alleged that the contracting occurred ". . . between mileposts 283.0 and 284.0 on the La Grande Subdivision within the Oregon Division and Northwest District." The Carrier responded that there was no right-of-way road between those mileposts. In reply, the Organization submitted a letter from the Claimant stating that:

> "In the original claim I inadvertently stated mile post 283.0 to 284. Actually the spot was in and around Lagrande Yard mile post 289.0 to about 290.20. I made a mistake on the mile post but that does not change the fact that snow was being plowed by a contractors grader when UPs GP 49 was sitting idle."

We do not view the initially incorrect but then corrected location to amount to a disputed issue of fact in the record so as to cause the Board to dismiss the claim. The error was corrected, and in the further progressing of the claim on the property, the Carrier did not dispute the assertion that the work occurred at the corrected location. The error was therefore technical, at best.

The Carrier argues that the work in dispute has not been shown to be exclusively performed by scope-covered employees. However, in contracting disputes, the Organization does not have to demonstrate performance of work by scope-covered employees on an exclusive basis. See Public Law Board No. 7096, Award 1 between the parties:

> "The Carrier initially argues that the disputed work is not exclusively reserved to the Maintenance of Way craft. For the sake of discussion, in this case we will assume the Carrier is correct. However, '. . . exclusivity is not a necessary element to be demonstrated by the Organization in contracting claims.' Third Division Award 32862 and awards cited therein."

See also, Third Division Award 40373 between the parties (". . . contrary [to] the Carrier's position, '. . . exclusivity is not a necessary element to be demonstrated by the Organization in contacting claims'" [citing Third Division Award 32862, supra]).

Turning to the merits, Rule 9 provides that ". . . maintenance of roadway and track . . . cleaning right of way . . . and other work incidental thereto will be performed by forces in the Track Subdepartment." Rule 10(a) provides that "[w]ork in connection with the operation, care, maintenance (running repairs) and servicing of roadway equipment (including attachments thereon) assigned to work in the Roadway Equipment Subdepartment will be classified as work of Roadway Equipment Operators." There is no real dispute that the type of snow removal work performed by the contractor has been performed by scope covered employees.

The Carrier is correct that in what it refers to as "mixed practice" cases, the Board has found that contracting of scope covered work is permissible under Rule 52 where the Carrier has contracted that work in the past. See e.g., the Board's recent decisions in Third Division Awards 40755 (fence construction work) and 40756 (vegetation control).

The Carrier argues that snow removal falls into the same "mixed practice" category. In its Submission the Carrier states:

> "In the numerous disputes that the parties have argued before this Board, the Carrier has firmly established its 'mixed practice,' i.e., for decades it has customarily contracted out various types of work that the BMWED's members have also customarily performed under the parties' Agreement. Examples of such types of work are inherently recognized in this Division's awards in favor of the Carrier. Carrier's Exhibits G are <u>all</u> Awards deciding cases where the Organization had contended the Carrier had violated the agreement when snow removal was performed by other than BMWED represented employees. All of these cases resulted in denial Awards finding the Carrier was within its right to subcontract and substantiating the practice of the Carrier under the provisions of Rule 52(b) and (d)." (Emphasis added)

That argument is not persuasive in this case.

Carrier's Exhibit G consists of Third Division Awards 29999 and 30000. Those Awards do not support the Carrier's position that snow removal contracting disputes are to be treated like other contracting disputes involving scope covered work where a "mixed practice" exists.

Third Division Award 29999 involved contracting of snow removal - but that was in an emergency:

> "This dispute was effectively described by the Carrier as follows:
>
> > 'This case is based on the use by the Company of contractors to remove snow, grade roads and install temporary bridges at various locations on the railroad's main line where emergency conditions existed. Use of the contractor was compelled by the fact that all Company forces and equipment were fully deployed. The situation driving the utilization of all available forces and equipment, including contract equipment and employes was a protracted weather emergency. In January 1989 and into March, during the time period covered by this claim, the Company was confronted by both flood and snow emergencies compounded by a sequence of weather caused derailments. . . .
> >
> > The broad extent of the problems overtaxed the Company's manpower and equipment resources and mandated extensive use of contractors. . . .'
>
> The Organization did not effectively dispute this summary of the situation. Rule 52, Contracting, provides for contracting of work when 'the Company is not adequately equipped to handle the work, or when emergency time requirements exist.' Even the need for advance notice to the General Chairman is mitigated in 'emergency time requirements' cases."

The other Award cited in Carrier's Exhibit G - Third Division Award 30000 - also involved an emergency ("[e]xcept that it involves transporting of track material rather other work in connection with the weather emergency, this dispute is closely similar to that reviewed in Third Division Award 29999, and the Board reaches the same conclusion.").

At argument, the Carrier cited another snow removal case - Third Division Award 38142 - but that case was also an emergency situation ("[w]e find that the Carrier has the right to use a contractor to clear snow from the right-of-way during an emergency.") (Emphasis added)

In emergency cases, the contracting provisions of Rule 52 do not apply and the Carrier - by Rule and precedent - has great latitude with respect to the use of contractors. See Rule 52(c) ("[n]othing contained in this rule requires that notices be given, conferences be held or agreement reached with the General Chairman regarding the use of contractors or use of other than maintenance of way employees in the performance of work in emergencies such as wrecks, washouts, fires, earthquakes, landslides and similar disaster."). See also, Third Division Award 20527 (". . . [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.").

This was not an emergency case. The Carrier has not contended that snow conditions were such that an emergency existed requiring it to utilize outside forces. Instead, the Carrier treated this snow removal dispute like other non-emergency contracting out disputes under Rule 52. The Carrier defended by arguing that it gave notice, conference was held and the contracting of the work in dispute was permissible because of a "mixed practice." No "mixed practice" of contracting out snow removal in non-emergency situations has been shown in this case. Without more of a showing of a "mixed practice," we cannot find one exists in this case.

In addition to the lack of a showing of a "mixed practice" or an emergency, facts supporting the other conditions in Rule 52 to allow contracting do not exist in this record ("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 when work is such that the Company is not adequately equipped to handle the work; or when emergency time

requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces.").

We shall therefore sustain the claim. As a remedy, the Claimant shall be made whole for the lost work opportunity. See e.g., Third Division Award 40763 ("[a]s a remedy, the Claimants shall be made whole for the lost work opportunities") and Awards cited therein. See also, Third Division Award 40078 (where the Carrier contracted out snow removal work asserting the existence of an emergency - which the Board rejected - and the Board formulated make whole relief finding that ". . . the fact that the Claimant worked on the claim date does not deprive him of a remedy . . . [t]he Claimant lost work opportunities due to the Carrier's violation of the Agreement."); Third Division Award 40080 (in a similar snow removal contracting dispute and the Board formulated the remedy for non-emergency days that "[t]he 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"); and Third Division Award 40081 (same).

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 7th day of February 2011.