Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40858
Docket No. MW-41306
11-3-NRAB-00003-100170

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 (Mike Simons Contracting) to perform Maintenance of Way and Structures Department work (removing snow and cleaning right of way) between Mile Posts 182.1 and 185.3 on the Portland Subdivision of the Oregon Division beginning on December 17, 2008 and continuing through January 4, 2009 (System File C-0952U-156/1516606).

(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, Claimants R. Robinson, D. Dacus, C. Fletcher and J. Minica shall now each be compensated for one hundred and eighty (180) hours at their respective and applicable rates 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:
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> Location: Various points across the Union Pacific System
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> 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 the dates set forth in the claim, the Carrier subcontracted the disputed snow removal work. This claim followed.

For reasons set forth in Third Division Award 40857, the Carrier's notice in this case (which was the same notice as in Award 40857 supra) was sufficient under Rule 52.

Similarly, for reasons set forth in Award 40857, supra and Awards cited therein ". . . in contracting disputes, the Organization does not have to demonstrate performance of work by scope covered employees on an exclusive basis."

As in Award 40857, supra, the Carrier argues that this is a "mixed practice" case in that snow removal has been contracted out in the past; notice was given; conference was held; and that it could therefore contract the work under Rule 52. The record in this case does not support that argument.

In Award 40857, supra, the Board found that "[t]he Carrier is correct that in what it refers to as 'mixed practice' cases, the Board found that contracting of scope covered work is permissible under Rule 52 where the Carrier has contracted that work in the past." Nevertheless, the Board sustained the claim because, although the Carrier has contracted out snow removal work in emergency situations, the Carrier did not demonstrate a "mixed practice" in that case of contracting out snow removal work in non-emergency situations:

> "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 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 has 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."

Here, in support of its "mixed practice" position concerning contracting of snow removal work, in its June 19, 2009, letter on the property, the Carrier refers to a statement from Manager of Track Maintenance R. Case wherein ". . . he states this work has been performed by others for many years." Case's statement attached to the Carrier's letter asserts "[t]his work [snow removal] has been done for many years by others not the BMWE." (Emphasis added)

Who are the "others" who previously performed the snow removal work? If snow removal work was previously performed by Carrier forces other than BMWE-represented employees, then the Carrier's exclusivity arguments would come into play, because although the Organization does not have to show exclusivity of performance of work in contracting disputes (Award 40857, supra), in inter-craft disputes, the Organization does have the burden to demonstrate that scope covered employees have performed the work on an exclusive basis. See Third Division Award 36762:

> "This is a dispute between employee groups concerning the assignment of snow removal work. Absent a clear reservation by Rule of that work only to the Claimant's class of employees, the Organization is required to demonstrate that such snow removal work has been historically and exclusively performed by that class of employees on a system-wide basis. See Public Law Board No. 3460, Award 65:
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> > 'The Board is constrained to note that the Organization is taking the position that not only is snow removal work reserved exclusively for employees on the Maintenance of Way category but also within that group, exclusively reserved to Track subdepartment only by historical systemwide exclusivity. Such evidence, however, is not in the record. Petitioner has failed to indicate that the work of snow removal belongs exclusively to any class of employees, much less the Track subdepartment group. Further, there is no rule support for the position that the work in question belongs to the Claimant herein. . . .'

Here, there is no Rule that clearly reserves snow removal work only to the Claimant's class of employees. Further, there is no evidence

> that the Claimant's class of employees has historically and exclusively performed this work on a system-wide basis. . . ."

But the Board cannot tell if the "others" referred to in Manager of Track Maintenance Case's statement who have previously performed snow removal work are "other" employee groups working for the Carrier or "other" outside contractors. In this case, the Carrier needed to show that the "others" were contractors who performed the snow removal work in non-emergency situations. The Carrier did not do so. Based on the record, we, therefore, cannot make the "mixed practice" finding the Carrier seeks.

Finally, as in Award 40857, supra, we find no evidence in this record for the factors in Rule 52 which would permit contracting:

> "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 Claimants shall be made whole for the lost work opportunities. See Award 40857, supra, and Awards cited.

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.