Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41004
Docket No. MW-41037
11-3-NRAB-00003-090390

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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, Simon Contracting and Mike Becker Contracting) to perform Maintenance of Way and Structures Department work (snow removal and related work) between Mile Posts 248.0 and 315.35.0 on the Huntington Subdivision of the Oregon Division on January 27, 28, 29, 30, 31, February 1, 2 and 3, 2008 (System File C-0852U-161/1501128).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intention 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 S. Braddock, E. Burton, J. Chandler, W. Cleaver, D. Coronado, J. Cosand, D. Dacus, R. Garhart, K. Gutierrez, R. Robinson, R. Shade and M. Smietana shall now each be compensated for ninety-six (96) hours at their respective time and one-half 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.

This claim protests the Carrier's use of 24 employees from three outside contractors to perform snow removal on a two shift, 24-hour basis from the right-of-way on a stretch of track on the Huntington, Oregon, Subdivision in the Northwest District on various claim dates in January and February 2008, using front end loaders, graders and bulldozers. The Carrier did not dispute the fact that no notice was given or take specific issue with the number of hours worked by the contractors' employees. The Organization did not contest the Carrier's assertion that the Claimants were fully employed elsewhere on the claim dates, some at great distances from the work area at issue.

The Organization contends that (1) this is scope-covered work reserved to employees of the Track Sub-department under Rules 1, 9, 10, 13, 15 and 16 of the Agreement and has been customarily and traditionally performed by them and not contractors (2) the exclusivity doctrine does not apply to contracting transactions, and (3) the Carrier failed to meet its burden of proving that any of the conditions of Rule 52(b) existed. In this regard it asserts that (1) the Claimants were all qualified Group 19 Roadway Equipment Operators (REOs) (2) the Carrier failed to allege the existence of an "emergency" until its final denial letter (after the Organization pointed out in its appeal that no emergency situation was relied upon) and (3) did not establish any factual basis to support such situation, relying on Third Division Awards 29164, 32160, 32414, 32861, 36015, and 39139 , as well as Public Law Board No. 7096, Award 14. The Organization urges the Board to reject the new evidence and arguments proffered by the Carrier in its Submission with respect to the existence of an emergency. The Organization also contends that the Carrier

violated its commitments under the Berge-Hopkins December 11, 1981 Letter of Understanding to make a good faith attempt to reduce the incidents of contracting. Finally, the Organization argues that the Carrier's "fully employed" defense does not negate the fact that the Claimants were denied work opportunities supporting a monetary remedy, citing Third Division Awards 30301, 37572, 37316, and 39139, as well as Public Law Board No. 7101, Award 9.

On the property, the Carrier argued that the Claimants did not possess sufficient skill and ability to safely and efficiently perform the duties or operate the equipment. It also asserted that (1) it customarily and historically has used contractors to perform snow removal work (2) the prior and existing rights language of Rule 52(b) applies and (3) this work is not exclusively reserved to employees under the Agreement, citing Third Division Awards 27010, 32367, 33420, and 33645. The Carrier pointed out that three of the Claimants were working in areas far remote from the track at issue and were unavailable for this work on the claim dates. The Carrier contended that the work was the result of winter weather in the area creating snow that had to be removed immediately for it to continue services without delay, and that it met the definition of an "emergency" situation set forth in Third Division Award 20527, so it has broader latitude in assigning work and it did not need to serve prior notice of its intent to contract in this situation, citing Third Division Awards 29999 and 38953. The Carrier submitted a statement from Manager of Track Maintenance J. Halsell concerning specifics about the weather written in response to a separate claim involving a different area, as well as a Report of the Western Region showing 188 Portland Division delay incidents within the timeframe at issue. In its Submission, the Carrier also included exhibits showing the section of the track at issue, track speeds and timetables, and asserts that this was rugged terrain with elevations of 3,400 feet and heavy ascending grades requiring helper service with trains, and that the areas along the right-of-way must be kept open due to drainage restrictions so its vehicles could traverse. It argues that the Organization never refuted its assertion of an emergency on the property and the principle of stare decisis applies, citing Third Division Awards 39006 and 39294. Finally, the Carrier argues that because there was no loss of work opportunity for the Claimants, no monetary remedy is appropriate, relying on Third Division Awards 31171, 31284, 31652, and 36676.

This case is one of six claims submitted by the Organization protesting the contracting of snow removal during various periods in January and February 2008 in the Northwest Region. The arguments made by the parties are strikingly similar

to those dealt with by the Board in Third Division Award 41003 and the crux of the issue herein is also whether the Carrier met its burden of proving the existence of an emergency justifying the assignment of the disputed snow removal work to contractors without prior notice to the Organization. We adopt the same reasons set forth in Award 41003 to support our conclusion that the Organization made out a prima facie case of a violation of the Agreement by the Carrier's contracting the snow removal work on the claim dates without prior written notice, and that the burden shifted to the Carrier to prove its defense of the existence of an emergency on each of the claim dates that justified using a contractor rather than qualified employees who held seniority on the district. See Third Division Awards 18331 and 20310. The Carrier cannot meet its burden merely by arguing that because the Board has previously recognized its ability to contract out snow removal in emergency situations (Third Division Award 29999) such decision should be held to be stare decisis herein, because the issue of whether an emergency existed must be based on the specific facts of each case. There is no dispute that the Carrier is permitted to contract out work of this nature when it meets its burden of establishing the existence of an emergency as set forth in Rule 52(b).

Unlike the situation in Award 41003, the Carrier did present some evidence with respect to the weather during this time period. What was submitted was an e-mail statement from a Manager of Track Maintenance on another Division in a different state that was drafted in response to a different claim. That statement speaks of (1) the heavy snowfall during February 2008 in Idaho, and weather conditions on the Shoshone District in Idaho (2) the amount of snowfall, and (3) its work-related impact causing an emergency service disruption in that area. In its August 22, 2008 denial, the Carrier asserts that this statement references the same general area of the claim at hand. Shoshone, Idaho, is in mid/central Idaho; the claim deals with a section of the Huntington Subdivision in South Eastern Oregon. It is not obvious from the record that the weather and work conditions existing on the Shoshone District in Idaho were the same as those on the Huntington Division in Oregon. Additionally, the report mentions no specific dates in February where record snowfall occurred; the claim encompasses the last week of January and the first three days of February 2008. A review of the Report of the Western Region reveals that the delay incidents listed are for various purposes, including weather conditions, over the Portland area (which is in the western part of Oregon). The Report shows that there were weather-related incidents between 7:54 P.M. on January 28 and 3:18 A.M. on January 29, 2008, in the area of Huntington; most of the other areas reporting weather delays (including the Portland Subdivision on

January 27, 2008, for ice storms) encompass the January 28 and January 29, 2008, service dates. There is no evidence that these storms were sudden or unforeseeable, or that the snow was extreme and constant over the entire eight- day claim period where scheduled snow removal crews could not have handled at least some of it. See Third Division Awards 29164 and 39139. Even accepting that the Report confirms the existence of a snow-related emergency in parts of Oregon during the January 27–29, 2008, period (with Huntington hit on January 28–29) it shows nothing about the continuation of the snow emergency into January 30, 31, February 1, 2 and 3, 2008, when contractor employees also performed snow removal work in the area.

Thus, the Board concludes that the Carrier did present evidence of snow-related service delays in Oregon during the period of January 27–29, 2008, in support of its asserted emergency defense permitting it latitude in its assignment of snow removal work, including to contractors without prior notice to the Organization, on those dates. The Organization did not effectively rebut this evidence. However, the broad general statement of Manager Halsell about the conditions on the Shoshone District in February are insufficient to meet the Carrier's burden of establishing the continuation of the emergency after January 29, 2008, or the existence of another weather-related emergency during the period of January 30 through February 3, 2008. Therefore, we sustain the portion of the claim dealing with those five dates only.

With respect to the remedy, we find the Carrier's arguments that the Claimants (Group 19 REOs) did not have the skill and ability to perform the work or operate the equipment, and were fully employed elsewhere on the claim dates, to be without merit in the absence of a showing that the Carrier could not have scheduled the necessary "non-emergency" snow removal work from January 30 through February 3, 2008, so as to permit the Claimants or other similarly situated employees to be assigned this work. Accordingly, the evidence is insufficient to deny monetary compensation for the loss of work opportunities to the Claimants who had seniority under the Agreement. See Third Division Award 36964, as well as Public Law Board No. 7101, Award 9 and Public Law Board No. 7096, Awards 14 & 15. Because the Carrier did not dispute the number of hours worked by the contractors' employees on the claim dates, the claim will be sustained with respect to the five claim dates between January 30 and February 3, 2008, and denied with respect to January 27, 28 and 29, 2008.

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 20th day of July 2011.