Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41466
Docket No. MW-41402
12-3-NRAB-00003-100294

The Third Division consisted of the regular members and in addition Referee Barry E. Simon when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(The Belt Railway Company of Chicago

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Firestone) to perform Maintenance of Way work (plow snow) on BRC (Belt Railway of Chicago) property on December 6 and 16, 2008 and continuing (System File B-0904B-101).

(2) The Agreement was further violated when the Carrier failed to give the General Chairman proper advance notice in writing of its intention to contract out the work in question or make a good-faith effort to reach an understanding in accordance with Rule 4.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants A. Hernandez and J. Romanowski shall now each be compensated for six (6) hours at their respective straight time rates of pay and for ten (10) hours at their respective time and one-half rates of pay for the hours expended by the outside forces in the performance of the aforesaid work on December 6 and 16, 2008 and they shall be compensated at their respective and applicable rates of pay for

any and all straight time and overtime hours expended by the outside forces in the performance of such work subsequent to December 16, 2008."

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.

It is undisputed that the Carrier utilized an outside contractor (Firestone) on December 6 and 16, 2008, for the purpose of removing snow from parking lots on its property. Two employees of Firestone performed this work for six hours each on December 6 and for ten hours each on December 16. The Organization filed this claim on behalf of two covered employees for the hours worked by the contractor's employees.

The Organization argues that the work of plowing and clearing snow from parking lots has routinely and customarily been performed by covered employees. It asserts the Carrier made no attempt to assign the Claimants to perform this work, nor did it provide the General Chairman with advance notice of its intent to contract out the work. It contends the Carrier thus violated Rule 4 of the Agreement, which reads as follows:

"Rule 4 - CONTRACTING OUT OF WORK

In the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the

General Chairman in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto.

If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the carrier shall promptly meet with him for that purpose. Said Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting, but if no understanding is reached the carrier may nevertheless proceed with said contracting, and the organization may file and progress claims in connection therewith.

Nothing in this Rule shall affect the existing rights of either party in connection with contracting out. Its 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."

The Carrier argues that the issues presented herein have been resolved on this property by the Board in Third Division Awards 37024, 37025 and 41010, all of which were authored by Referee Gerald E. Wallin. With respect to the notice issue, Award 37024 held:

"We conclude that the record fails to establish a notice violation for two independent reasons. First, a rule of reason in the application of labor agreements is implied along with an obligation to act in good faith. While many, if not most, kinds of work can be planned and scheduled far in advance, recovery work made necessary by severe weather events usually cannot. The record does not establish that the Carrier had sufficient advance notice of the heavy snowfall so as to be able to provide the requisite written notice. Given the impossibility of compliance with Rule 4 under these circumstances, common sense requires that the lack of notice must be excused.

> Second, as previously noted, the record shows that the contractor forces were used one year earlier for similar snow removal without any objection by the Organization. Nothing in the record suggests that the Organization insisted on advance notice in connection with such contracting of work. Thus, the Carrier could properly rely on the Organization's conduct and conclude that it did not need to give notice for such work until after the Organization properly notified it to the contrary. The instant record is devoid of evidence that the Organization so notified the Carrier that it was insisting upon strict future compliance with Rule 4."

Inasmuch as the record before the Board does not indicate that the Organization had since notified the Carrier that it must comply with the notice requirement in the event it elects to utilize the services of a contractor to perform snow removal, we must find that Award 37024 is controlling on that issue.

As to the Carrier's use of a contractor for snow removal, we find that this was addressed in Award 41010, holding as follows:

> "Although the record developed by the parties on the property jousted over whether an emergency existed and, if so, how long it lasted, the record shows that the pivotal issue in this dispute is whether the type of snow removal work in question is covered by the scope of the Agreement. No specific reservation of work language was cited to identify scope coverage. In the alternative, careful examination of the record does not reveal any actual evidence that BMWE-represented employees have performed the work in question in response to a significant weather event without augmentation on a historical, customary, and traditional basis. Such evidence is necessary to establish scope coverage in the absence of explicit reservation of work language in the Agreement."

We find nothing in the record of the instant case to distinguish it from the case cited above. While the Organization has asserted the instant case does not involve heavy snows that would qualify as an "emergency condition," we understand Award 41010 to find such a distinction to be immaterial. The

Organization has not established that snow removal work of this nature is covered by the scope of the Agreement, regardless of the depth of the snow. Accordingly, we do not find that the Agreement was violated.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of November 2012.