Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41678
Docket No. MW-40908
13-3-NRAB-00003-090202

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line 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 (Zacher Excavating) to perform routine Maintenance of Way & Structures Department Machine Operator work (operate backhoe) at Mile Post 142.6 on February 13 and 14, 2007. (System File C-07-080-012/8-00228-138 Soo).

(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 and when it failed to enter a good-faith discussion to reduce the use of contractors and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix O.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant B. Adams shall now be compensated for twenty (20) hours at the Group 2 Rank A Machine Operator's 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.

There is no dispute that on the claim dates in question, February 13 and 14, 2007, the Carrier assigned Zacher Excavating forces instead of Maintenance of Way and Structures Department employees to break up an ice flow on tracks in the vicinity of Mile Post 142.6 on the Elbow Lake Subdivision.

According to the Organization, one of the contractor's employees was utilized for ten hours each day operating an "ordinary" backhoe to perform the work. The Organization refutes the Carrier's position that the circumstances in question constituted an "emergency" situation, which prior Board decisions have defined as "an unforeseen combination of circumstances that calls for immediate action." The Organization further argues that in contending an emergency situation existed under the given circumstances, the Carrier bears the burden of proving by substantive evidence, that, in fact, the subject situation constituted an emergency situation. The Organization submits that the Carrier failed in its burden to prove an emergency situation existed under the given prevailing circumstances. Rather, the Organization submits that the work involved in addressing the ice flow on the two claim dates in question constituted typical routine Maintenance of Way work. As such, the Organization submits that the Claimant, who was on furlough status and on the proper call list and qualified to operate a Carrier-owned ordinary backhoe to perform the work in question on both claim dates, should have been summoned by the Carrier to perform the work. The Organization contends that the fact that the Carrier utilized the services of an outside contractor instead of the Claimant to perform the work in

question without giving it advanced notice that it was going to contract out the work serves to substantiate the instant claim that the Carrier violated applicable Rules of the December 31, 2001 Agreement, and as such, the Board should sustain the claim as presented.

On the other hand, the Carrier asserts that the circumstances arising on February 13 and 14, 2007 constituted an emergency due to the fact the ice flow rose up to and over the rail, which the Carrier contends is not a "normal" situation in that it was not a "minor" icing situation. As proof, the Carrier produced a photograph taken of the portion of the track in question, which shows the ice buildup over the top of the rail which required said ice flows to be removed immediately given that such conditions can lead to a derailment. The Carrier notes that until the ice flow conditions were cleared up, trains needing to move through that portion of the track were discontinued. As additional evidence the circumstances in question constituted an "emergency" as that term has been defined by prior Board decisions, the Carrier notes that it was in no position to plan for such work in advance and, therefore, there was no opportunity to give the Organization advance notice of its intention to contract out the work. Additionally, the Carrier asserts that the claim as presented is flawed because the named Claimant was not on the proper call list and would not have been summoned to perform the work in any event – emergency or no emergency. The Carrier further refutes the Organization's assertion that it is prone to acting in bad faith by deeming a situation as an emergency for the sole and specific purpose of not utilizing Maintenance of Way employees to perform work that those employees have traditionally and historically performed. The Carrier asserts that the work at issue was not work reserved to a Crane Operator. The Carrier further asserts that the applicable provisions of the Agreement cited by the Organization place no obligation on the Carrier to fill emergency service in seniority order and moreover, the Organization failed to provide any evidence of such a contractual obligation.

In review of the Parties' respective positions, the Board finds the Carrier's position to be more persuasive in that it provided substantive proof, namely, the photograph depicting the ice flow conditions that required immediate removal to restore safe train movement through the affected portion of the track. As such, the Carrier was able to show, contrary to the Organization's claim, that the ice flow conditions did, in fact, constitute an emergency as that term has been defined by the Board in prior decisions and therefore, in resorting to utilize outside contracting forces

to perform the necessary immediate removal of the ice from the track, the Board finds the Carrier did not violate any of the cited Rules of the Agreement.

Because the Board finds that an emergency did exist, the Carrier was well within its rights to contract out the work in question.

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 18th day of June 2013.