Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 44834
Docket No. MW-46304
23-3-NRAB-00003-201005

The Third Division consisted of the regular members and in addition Referee Richard K. Hanft when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 or otherwise allowed outside forces (Rail Works) to perform Maintenance of Way work clearing out switches, shoveling snow and lining switches at the Belt Railway of Chicago Rockwell Subdivision South end on the switching lead on February 18, 2019 (System File RI-1904B-802 BRC).

(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 T. Sipple, A. Hernandez and M. Ludwig shall now each be compensated for an equal share of all man hours expended by the contractor's employees at their applicable pay of rates."

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 the Carrier brought contractors onto the property on December 17, 2019 to augment Carrier forces in thawing switches, lining switches and snow removal work. There is photographic evidence on this record purporting to show the contractor employees performing such work.

The Organization avers that in doing so that Carrier violated the Parties' collective bargaining agreement by assigning work that has been ordinarily, customarily, traditionally, and historically performed by the Maintenance of Way and Structures Department employees consisting of cleaning out switches, shoveling snow and lining switches on the Carrier's Rockwell Subdivision South End to outside, unrepresented employees of a contractor. The Organization contends that the afore-stated work is reserved to Maintenance of Way forces by virtue of Agreement and that Carrier therefore violated the Agreement when it assigned the work to outside forces instead of assigning it to Claimants or any other Maintenance of Way Employees.

The Organization further contends that the Carrier also violated the Parties' Agreement when it failed to give the General Chairman advanced notice in writing of its intention to contract out the work in question or make a good-faith effort to reach an understanding pursuant to Rule 4 of the Parties' Agreement and further violated the provisions of the December 11, 1981 National Letter of Agreement when it failed to assert a good-faith effort to reduce the incidence of contracting out and to increase the use of Maintenance of Way forces.

The Carrier affirms that it brought contractor employees onto the property on December 17, 2019 to augment Carrier personnel in snow-removal work but asserts that the work in question has been found by at least five (5) previous Boards over the past twenty (20) years to not be scope-covered work and not exclusively reserved to BMWED-represented employees on Carrier's property. The Carrier provides Third Division Awards 39721, 41010, 41466, 37204 and 37205 as evidence of the arbitral precedent on this property, between these same parties, based on the same contact language, addressing the same issues.

The Board has carefully considered this claim, reviewed the record developed on the property and studied the arbitral precedent cited by the parties in their submissions. After thorough deliberation the Board must deny the instant claim based on the past arbitral precedent established on this property between these same parties interpreting the same Agreement language concerning the same issue and finding that snow removal work is not Scope-covered work and is not reserved exclusively to BMWED-represented employees on this property.

While prior Awards by other Boards are not binding on this Board, where a new incident gives rise to the same issue that is covered by a prior Award, the new incident may be taken to arbitration, but it may be controlled by the prior Award. The destiny of the party's claim thus may be governed by a prior Award which either precludes the claim under res judicata concepts or controls the decision on the claim by stare decisis concepts. (*See: Elkouri & Elkouri, How Arbitration Works, Fourth Edition, pps. 421-422.)*

Here, stare decisis concepts control. The use of contractor employees on December 17, 2019 gives rise to the same issue that was decided by the Boards issuing Awards 41010 and 41466.

In Award 41010, that Board found that:

> **"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 BMWED-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." Award 41010 (Wallin, 2011)."**

In Award 41466, the Board found that:

> **"As to the Carrier's use of a contractor for snow removal, we find that this was addressed in Award 41010, holding as follows: …(As cited above)…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 41466 (Simon, 2012)."

These two relatively recent Awards set forth that snow removal is not Scope-covered work and that response to weather-related events has not been proven to have been accomplished without augmentation of BMWED forces by outside contractors. Because the work in question is not Scope-covered work, Rule 1 was not violated.

Because the precedence on the property that the Organization has not established that snow removal work is covered by the scope of the Agreement, the Organization's claim that Rule 4 was violated cannot be sustained because Rule 4 states that "In the event a Carrier plans to contract out work within the scope of the applicable schedule agreement…" Because the work in question has been found to not be work within the scope of the applicable schedule agreement, Rule 4 is inapplicable and was not violated.

The Organization has failed to meet its burden of proof and the claim is therefore denied.

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 31st day of January 2023.