PUBLIC LAW BOARD NO. 1844

AWARD NO. 16

CASE NO. 8

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, on January 21, 1976, it assigned the work of removing snow from the depot platforms at West Chicago, Winfield, Wheaton, College Avenue, Glen Ellyn, Lombard and Villa Park to outside forces (Carrier File 81-1-240).

(2) Furloughed Machine Operator Rogelio Aguirre be allowed six and one-half hours' pay at time and one-half rate because of the violation referred to within Part (1) of this claim."

OPINION OF BOARD:

In the early morning hours of January 21, 1976 Carrier employed an outside contractor to remove the snow from suburban station platforms. The contractor used his own rubber-tired tractor which was equipped with a snow plow to remove the snow. At the time this work was performed Claimant who held seniority as a Common Machine Operator was furloughed. The instant claim was filed on his behalf by the Organization alleging a violation of the Scope Rule and seeking compensation for Claimant at the overtime rate for the time expended in removing the snow by the outside contractor. The claim was denied through the highest levels on the property essentially because Carrier maintains that the removal of snow from station platforms is not work "customarily performed" by the employees covered by Rule 1.

Close examination of the language of Rule 1 shows that the standard principles for interpretation of Scope Rules are of only limited assistance in this case. Generally we could find guidance in the principle that the Organization has the burden of showing reservation of work by express contract language or exclusive reservation by custom, practice and tradition. That general maxim of contract interpretation is of assistance in cases involving socalled general scope rules. But here in Rule 1 we deal with a specifically worded Scope Rule and not one of the general variety. The record is additionally complicated because many collateral issues were discussed by the parties on the property and some were raised de novo before our Board but the core of this dispute remains the question whether the work in dispute is covered by Rule 1. If the work of snow removal on station platforms comes within the coverage of Rule 1 then Carrier has the burden of showing that it gave requisite notice to the General Chairman before subcontracting said work and that the subcontracted work falls within one of the exceptions stated in Rule 1. If on the other hand the work is not covered by Rule 1 then Carrier is presumably free to exercise managerial discretion in allocating the work.

The question before us may be further narrowed to a determination whether the removal of snow on station platforms fairly falls within the description of work reserved to employees of the Maintenance of Way and Structures Department by Rule 1. The operative language from Rule 1 is as follows:

"Rule 1 -- Scope

* * *

"(b) Employes included within the scope of the Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission." (Emphasis added)

Emphasizing the words underlined supra, and giving those words their common ordinary meaning we are persuaded that the removal of snow from station platforms is work in connection with the maintenance of structures and other facilities used in the operation of the company, etc. The express contract language constitutes an exclusive reservation hence the words "all work" and ordinarily we would have no need for recourse to past practice, custom or tradition in the face of such clear and unambiguous language. Carrier however contends that the work granted to the employees by the above quoted language is in effect taken away by the first sentence of the second paragraph of Section (b) to wit "by agreement between the Company and the General Chairman, work as described in the preceding paragraph which is customarily performed by employees described herein, may be let to contractors and be performed by contractors' forces." With emphasis on the words "customarily performed by employees described herein" Carrier offers evidence that the work of platform station snow removal has not as a matter of custom, practice and tradition been performed exclusively in the past by M of W employees. Accordingly Carrier contends that the work is thereby taken out from coverage of Rule 1 and neither the work reservation provisions nor the notice and consultation for subcontracting provisions are applicable in this case. Our primary obligation in this case is to determine the intent and meaning of the language of Rule 1 as it was written by the parties. Analysis of Section (b) of that Rule shows that the first paragraph expressly reserves exclusively to M of W employees certain specifically described work including "all work in connection with the maintenance of structure and other facilities." The words could hardly be more clear and that paragraph

contains no separate qualification that said work must have been customarily performed by the M of W forces in years preceding the effective date of the Agreement. The question thus becomes whether it is proper to construe the words of Paragraph 2 in Section(b) to impose such a qualification on the coverage of the Scope Rule. Examination of Paragraph 2 shows that the subject matter thereof is a qualified right to subcontract Scope Rule work under certain specified conditions. Paragraph 3 also deals with subcontracting and imposes upon Carrier the obligation of prior notice and consultation before entering into contracting transactions, even if subsequently the transaction is found to have come within one of the specific exceptions listed in Paragraph 2. Construing these contract provisions in context we cannot agree with Carrier that the first sentence of the subcontracting provision is intended by the parties to limit and qualify the coverage of the specifically worded work reservation set out in Paragraph 1 of Section (b). To do so would have the effect of transforming the specifically worded work reservation clause into a "general" scope rule in which custom, practice, and tradition become the sole governing indicator of coverage. If the parties had intended such a result they would not have agreed to a specifically worded work reservation clause. Thus we find it consistent with the manifest intent of the parties to construe the phrase in Section 1 of Paragraph 2 ("work as described in the preceding paragraph which is customarily performed by employees described herein") as words of description rather than as words of limitation or qualification.

Based upon the foregoing it is clear that the work of snow removal on station platforms is covered by Rule 1. Accordingly the evidence of custom, practice, and tradition becomes largely irrelevant in the face of the express contract language. See Awards 18287, 18628, and 19976. The unrefuted record shows that Carrier officials did not provide the notice and consultation required by Rule 1 before

contracting out this work. Assertions of emergency are not persuasive on this record. There is no question that Carrier thus violated Rule 1 when it failed to notify the General Chairman of its plans to contract out the work. Having made this finding there is no need to look behind the conflicting arguments relative to the availability of equipment. These are matters which the parties might have discussed under the procedures provided in Rule 1 for notice and consultation but they have no bearing on whether the notice should have been given in the first instance. See Awards 19305, 19399, 19657, 20071, and 20275. On the facts of record before us there was in this particular case a proven loss of work opportunity by Claimant and we shall sustain the claim for monetary damages. Carrier assertions of Claimant's ineligibility to recover were raised de novo before our Board and may not be considered. Perusal of the record shows no persuasive basis for the payment of damages at the overtime rate and consistent with the principle of make whole damages we shall sustain the claim for six and one-half hours at the applicable pro rata rate.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;

2. that the Board has jurisdiction over the dispute involved herein; and

3. that the Agreement was violated.

AWARD

The claim is sustained to the extent indicated in the Opinion.

Dana E. Eischen, Chairman

O. M. Berge, Employee Member

R. W. Schmiege, Carrier Member

Dated: Aug 18, 1977