Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35841
Docket No. MW-33813
01-3-97-3-298

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Clinchfield
(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 to clear trees and cut brush from the right of way between Mile Post 87, Waycross to Mile Post 1, Elkhorn City on January 11 through 31, 1996 [Carrier's File 12(96-0527) CLR].

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance written notice of its intent to contract out said work as required by Rule 48.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. B. H. Whitson, R. L. Stephens, J. W. Peterson and W. L. Lasley shall each be allowed one hundred forty-six (146) hours' pay at their respective time and one-half 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.

On January 10, 1996, there was a storm in the Virginia area which dropped 18 inches of snow and caused the stoppage of train traffic due to trees and brush laden with snow fouling the track. Without prior notice to the Organization, the Carrier utilized the services of a contractor, Utilco, to clear trees and brush between Mile Post 87 at Waycross, Virginia, and Mile Post 1 at Elkhorn City, Virginia, on the Fremont Branch of the former Clinchfield Railroad during the period January 11 through 31, 1996.

Claimants B. H. Whitson and W. L. Lasley state they worked on a ditcher work train until the main line was cleared and, after the contractor was brought in "[w]e were not ask[ed] to work anymore overtime." Claimant R. L. Stephens states that he was available on all of the dates covered by the claim, except for January 19 through 26, 1996 when he took a week's vacation. Claimant J. W. Peterson states that he also was available on all dates, with the exception of January 20, 1996, when he took a personal leave day. The Carrier asserts that its records show that the Claimants received some overtime during the period of the claim.

The Carrier asserts that even though traffic was restored, the amount of destructive force caused by the storm left a deteriorated condition in many locations that had to be rectified. According to the Carrier, it did not have the equipment available to continue cleaning up after the storm to avoid additional track blockage, and contracted the work to ensure that the lines remained open and safe. The Carrier also asserts that the work in question did not exclusively accrue to the Claimants.

In short, this record shows that there was a severe snow storm on January 10, 1996 that shut down train traffic; without prior notice to the Organization, the Carrier brought in a contractor to clear trees and brush that fouled the track as a result of the storm; traffic was restored within a day of the storm; the contractor worked from January 11 through 31, 1996; as a result of the Carrier's bringing in the contractor, the Claimants lost overtime opportunities; and Claimants Stephens and Peterson took some time off during the period the contractor forces performed the disputed work.

services, we cannot find that the Carrier has shown as its burden requires that emergency conditions existed for the entire period the contractor performed the work. At some point prior to January 31, 1996, the emergency no longer existed and the Carrier was obligated to comply with the provisions of Rule 48.

Therefore, by failing to notify the Organization that it was going to continue to use the contractor for the time it did after the emergency was over, the Carrier violated Rule 48. Had the Carrier complied with Rule 48 and had the conference provisions of that Rule been followed ("If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction . . . [s]aid Carrier and organization representatives shall make a good faith attempt to reach an understanding concerning said contracting. . . ."), it may well be that this claim could have been avoided. See Third Division Award 32862 involving a failure to give notice for contracting out work within the scope of that Agreement:

> ". . . [O]ur function is to enforce language negotiated by the parties. In [the agreement] . . . and as a result of negotiations, the parties set forth a process of notification and conference in contracting disputes. The Carrier's failure to follow that negotiated procedure renders that negotiated language meaningless. This Board's function is to protect that negotiated process. . . ."

The real question in this case is the remedy.

The Board has substantial discretion to formulate remedies. We have found that an emergency existed thereby allowing the Carrier to use a contractor, but we have also found that the emergency did not exist for the entire period the contractor performed services. It is not clear from this record precisely when the emergency conditions ended. We do know that traffic was moving again about one day after the storm, but it would be naive for us to conclude that the emergency was over as soon as the traffic began to move. The storm appeared particularly vicious and tree and brush damage from 18 inches of snow along such a length of track involved in this dispute cannot reasonably be removed overnight to render the track completely safe. Given our discretion to formulate remedies, we believe that it is fair and reasonable to conclude that the emergency conditions lasted for three days after January 11, 1996. As a result of the Carrier's use of a contractor commencing January 15, 1996 without giving the required notice to the Organization and thereby violating Rule 48, the Claimants lost overtime

Rule 48 requires notice to the Organization "[i]n the event a carrier plans to contract out work within the scope of the applicable schedule agreement. . . ." We are satisfied that the Carrier's failure to give the Organization notice of its use of a contractor violated Rule 48.

First, there is no real dispute that the kind of work involved in this case (removal of trees and brush, i.e., basic right-of-way clearing work) is " . . . work within the scope of the . . . agreement."

Second, the assertion by the Carrier that this kind of work has not been exclusively performed by covered employees is not a defense in a contracting out dispute. See Third Division Award 35835:

> "The Organization's failure to demonstrate that covered employees exclusively perform the work is not a defense to contracting out claims. See Third Division Award 31752, supra ('The Carrier incorrectly argued that the exclusivity doctrine is applicable to the Scope Rule')."

Third, if the Carrier can show that an emergency existed, the Carrier has the right to contract the work out to meet those emergency conditions. See Third Division Award 32419:

> "The Carrier bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees. . . . An emergency is an unforeseen combination of circumstances that calls for immediate action."

We are satisfied that the Carrier has shown that there was an emergency therefore allowing the Carrier to bring in a contractor without regard to the terms of the Agreement. A storm dropped 18 inches of snow causing trees and brush to foul the track and stopping traffic. Clearly, that is "an unforeseen combination of circumstances that calls for immediate action." However, the Carrier effectively contends that the emergency conditions lasted the entire time that the contractor performed the work, i.e., from January 11 through 31, 1996. That is a long time for "emergency" conditions to exist. Because the Carrier has the burden to demonstrate the existence of the emergency and because the record shows that traffic was operating after one day, while we find that an emergency existed at the beginning of the Carrier's utilization of the contractor's

opportunities commencing January 15, 1996. The Claimants shall be made whole for those lost opportunities for the period January 15 through 31, 1996.

The fact the Claimants were working during the period the contractor performed services does not defeat the Claimants' entitlement to monetary relief. See Third Division Awards 31594 (" . . . the fact that Claimants were 'fully employed' . . . does not negate liability for the proven violation. . . .") and 32435 (" . . . monetary damages are in order to compensate Claimants for the lost work opportunity and to stimulate compliance with the subcontracting notification and Scope provisions of the Agreement").

However, and again turning to our discretion to formulate remedies, the Claimants shall not be entitled to compensation for any days they may have taken off during the period January 15 through 31, 1996. Further, overtime earned by the Claimants during the period January 15 through 31, 1996 shall be deducted from their entitlements under this Award.

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 18th day of December, 2001.