Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36851
Docket No. MW-37442
04-3-02-3-517

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CP Rail System (former Delaware and Hudson
(Railway 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 perform Maintenance of Way work (cut brush) between Mile Posts A 18.2 and A 18.7 on the Colonie Main Line on July 5 and 6, 2001 instead of Messrs. A. Martelle, M. Gorski, B. Kent and E. Pratt (Carrier's File 8-00205 DHR).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance notice of its intention to contract out the aforesaid work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of Maintenance of Way forces as required by Rule 1 and Appendix H.

(3) As a consequence of the violations referred to in Part (1) and/or (2) above, Claimants A. Martelle, M. Gorski, B. Kent and E. Pratt shall now each be compensated for sixteen (16) hours' pay at their respective 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.

The operative facts reveal that sometime in mid to late June 2001, the Carrier was apparently cited by the New York State Department of Transportation (DOT) for overgrown brush along a one-half mile stretch of its track in Mechanicville, New York. The DOT citation was not made part of the record so its specifics are not known. On June 26, the Carrier sent the General Chairman a notice of its intent to contract out the work. The notice was sent by e-mail and regular mail. On June 28, the General Chairman requested a conference and proposed the date of July 5. The General Chairman also referred the Carrier to his Vice General Chairman in the event the Carrier had questions or concerns about his request for a conference. The record does not reflect that the Carrier did anything in response to the conference request except arrange for the contractor to perform the work on July 5 and 6, 2001.

The Organization alleged the Carrier's actions violated Rules 1, 3, as well as Appendix H. Appendix H is the well-known December 11, 1981 Letter of Understanding whereby the Carrier pledged to undertake good-faith efforts ". . . to reduce the incidence of subcontracting and increase the use of their maintenance of way forces to the extent practicable, including the procurement of rental equipment and operation thereof by carrier employees."

The Carrier raised a number of defenses in support of its actions. First, the work is not exclusively reserved to BMWE-represented employees and, accordingly, no notice was required. Second, in the alternative, if the work is reserved, the "emergencies" exception to the notice requirement of Rule 1.3 applies. Third, the work required hand cutting and special skills. Fourth, the proximity of the cutting to the general public made the task too risky to use on-track mechanical cutting equipment. Finally, the Carrier's cutter was broken down and in the shop for repairs.

Careful review of the record developed on the property reveals that the Carrier's defenses lack merit. While it is true that Rule 1 does not explicitly mention "brush cutting," it does encompass ". . . work which, as of the effective date of this Agreement, was being performed by these employees . . . ." The Carrier never refuted the multiple assertions by the Organization that brush cutting had been performed in the past by its Maintenance of Way forces. Indeed, the Carrier never asserted any instances where past brush cutting was performed by other than its Maintenance of Way forces. It did not claim a past practice of contracting such work or even a mixed practice of using outsiders. On this record, the fact has been established that only Maintenance of Way forces have performed brush cutting in the past. This is sufficient to establish scope coverage of the work and require full compliance with the notice and conference provisions of the Agreement unless some exception applies.

While it is true that Rule 1.3 grants an "emergencies" exception to the 15-day notice requirement, the Carrier did give notice. This alone tends to be inconsistent with the existence of a claimed "emergency" situation. Moreover, the work did not actually begin until nine days after the date of the notice. This is also inconsistent with the existence of an "emergency." True emergencies involve two predominant characteristics: First, they appear with a suddenness that allows for little, if any, time for preparations to deal with them. Second, they are events that cannot be detected through due-diligence inspections. Rule 1.3 contains a definition of true emergencies that is consistent with these two characteristics. It says, "'Emergencies' applies to fires, floods, heavy snow and like circumstances."

Brush growth is slow and steady over time and the extent of its growth is readily apparent to the naked eye if one takes the time to look. Such growth does not come on with suddenness, nor is it invisible to due-diligence inspection. Brush growth is not a "like circumstance" within the meaning of the Rule 1.3. Given these realities, the fact that the New York State DOT had to draw the matter to the Carrier's attention does not constitute an emergency with the meaning of the Rule.

The fact that the Carrier's equipment was down for repairs does not excuse its failure to seek rental equipment per Appendix H. Because the Carrier apparently ignored the General Chairman's request for a conference, the Carrier cannot avoid accountability for not exploring this option.

The Organization effectively refuted all of the other defenses raised by the Carrier. It is well settled that the party claiming affirmative defenses shoulders the entire burden of proof to establish those defenses. On this record, the Carrier never offered any evidence in support of its assertions that special skills or equipment were required. Accordingly, those defenses must be rejected as not having been proven.

Given the nature of this record, the claim must be sustained in its entirety. The Carrier never took issue with the number of hours allegedly worked by the contractor forces or claimed by the Claimants.

AWARD

Claim sustained.

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 28th day of January 2004.