Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37287
Docket No. MW-37431
04-3-02-3-488

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 or otherwise permitted outside forces (Asplundh) to perform Maintenance of Way work (cut brush) between Delanson and Voorheesville, New York after normal work hours beginning on June 21 through July 2, 2000, instead of Mr. D. Jordan (Carrier's File 8-00169 DHR).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with proper advance written 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 Parts (1) and/or (2) above, Claimant D. Jordan shall be now be compensated for all the hours expended by the outside forces after normal work hours beginning on June 21 through July 2, 2000 at his respective time and one-half 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.

This claim involves the Carrier's decision to utilize a contractor, along with the Claimant, to cut brush from the right-of-way and area surrounding the south end of the Voorheesville Runner in an effort to get it back in service as a result of a line closure due to the condemnation of a railroad bridge which closed the rail connection between Voorheesville and Delanson, New York, on June 11, 2000. However, it is not really a contracting case as often appears in the railroad industry. Rather, the Carrier served notice to the Organization on June 14 of the "emergent need" to reopen the rail line and the vast problem with brush growth and poison ivy which it felt required a contractor with expertise in dealing with it so as not to put its own employees at direct risk and the need to have this accomplished before it could evaluate the feasibility of getting the Runner back in service. A conference was held and the Organization apparently agreed that because the brush cutting problem was vast, the Carrier's equipment could be used with employees working along with the contractor. This appeal focuses on the fact that on the claim dates the Carrier permitted contractor forces to continue working overtime after the regular shift, but did not permit the Claimant to remain after his normal working hours.

The Organization argues that it recognized that the Carrier was under a time constraint so it permitted the use of contractors along with BMWE-represented employees, which it notes regularly deal with poison ivy in the normal course of their brush cutting duties which are reserved to employees under the Agreement. The Organization asserts that the Carrier obviously did not feel the "emergent situation" was severe enough to have its own employees remain working when contractor forces did, and queries why the Claimant would be sent home if there

was such immediacy to the Carrier's need to complete the work, all of which undermines the Carrier's affirmative defense of an emergency. The Organization contends that if the Claimant was capable of performing the work safely, despite the poison ivy, on straight time, he was also able to do so on overtime. The Organization argues that the Carrier violated Rules 1, 11 and Appendix H by utilizing the contractor in this way, citing Third Division Awards 14321, 21222, 21224, 30971, and 36851.

The Carrier contends that becuase the Organization did not deny that an emergency existed, it can be taken as fact without additional proof. The Carrier notes that once an emergency is established, the Board gives it a lot of latitude in dealing with the situation and assigning work, and urges us not to be Monday-morning quarterbacks in second guessing why it acted as it did, citing Third Division Awards 12299, 13858, 28743, and 31676. The Carrier also argues that the claimed damages are excessive, because the Organization is requesting pay for the overtime worked by five contractor employees, and asserts that the Board has substantial discretion to formulate remedies, citing Third Division Award 35841. It asserts that if the Board should find a violation, the highest amount of overtime worked by a senior equipment operator on a particular day that the Claimant was available for overtime would be the appropriate remedy, with the parties in the best position to know about the Claimant's availability and the actual hours worked by contractor forces, citing Third Division Awards 3383, 23034, 33324, 35181, 35823, and 36175.

A careful review of the record convinces the Board that the Carrier has not factually substantiated its affirmative defense of an emergency permitting it the deference in work assignments it argues that it must be accorded. See Third Division Award 36015. While there appears to be no dispute between the parties that "time was of the essence" in clearing the brush which contained much poison ivy, the "emergent need" the Carrier asserted on the property was to get the rail line reopened. If that was the nature of the emergency, and the Organization accepted the use of a contractor alongside BMWE-represented employees to accomplish this goal, the Carrier's actions were not consistent with its asserted reason for the use of a contractor. The line was closed on June 11 and the work of the contractor did not commence until June 21. One need not be a Monday-morning quarterback to understand that if more than regular hours are needed on the job to speed things along, it makes no sense to send your senior equipment operator home after working only eight hours while retaining only contractor forces

to work overtime. It is that decision that is being protested by this claim. While the Carrier is allowed much latitude in a true case of an emergency, the facts do not support that this is such a case. Therefore, the brush cutting work assignment herein violates the alleged Rules of the Agreement. See Third Division Award 36851.

However, we are in agreement with the Carrier that the remedy requested is far in excess of the traditional make whole remedy, and that the Board has substantial discretion in formulating appropriate remedies. See Third Division Awards 35823 and 35841. Accordingly, we find that the Claimant is entitled to be paid overtime on each claim date that he was available for work in the amount equal to the greatest amount of overtime worked by the contractor's senior equipment operator on site. The case is remanded to the parties to determine both the dates of the Claimant's availability and the number of hours of overtime to which he is entitled.

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 17th day of November 2004.