NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 29723
Docket No. MW-29260
93-3-90-3-145

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Grand Trunk Western Railroad Company (formerly
(The Detroit and Toledo Shore Line Railroad
(Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned two (2) brush cutter operators who are covered under the Scope of the Grand Trunk Western Railroad Agreement to perform brush cutting work on territory covered by the Scope of The Detroit and Toledo Shore Line Agreement on December 28, 1988 and January 4, 5, 6, 9 and 10, 1989 (System File 8365-1-260 DTS).

(2) As a consequence of the aforesaid violation, Detroit and Toledo Shore Line Agreement employes E. S. Burt and W. England shall each be allowed forty-eight (48) hours of pay at the brush cutter operator's rate."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The Carrier consists of three former separate carriers; the Grand Trunk Western; the Detroit, Toledo and Ironton; and the Detroit & Toledo Shore Line (D&TSL). The Brotherhood of Maintenance of Way Employes retain separate collective bargaining agreements for each of the former carriers, and in the case of the D&TSL, this consists of a single seniority district.

This dispute concerns brush cutting work performed on D&TSL lines but assigned to two employees of the Grand Trunk Maintenance of Way Department and using Grand Trunk brush cutting equipment. The Organization contends that the two Claimants, holding seniority as D&TSL Machine Operators, were improperly deprived of the work. The two Claimants were otherwise fully assigned at the times the brush cutting work occurred.

What is involved here is the conflict of two separate theories of the dispute. The Organization relies on the well established position that work belonging to employees under one seniority roster or district may not generally be assigned to employees in another seniority roster or district. The Organization cites Third Division Award 21678 on this point, as follows:

> "In the absence of proven emergency or specific rules to the contrary we have ordinarily found violations of general Seniority Rules where Carrier turns over work of employes holding seniority on one District and/or Group Seniority Roster to those holding seniority on another, even though the employes are covered by the same Agreement."

The difficulty here is that, while the employees utilized for the brush cutting were in the Carrier's employment, the Organization takes pains to point out the Maintenance of Way forces of the three previously separate Carriers each retain their own Agreements with the Carrier. As a result, the use of Grand Trunk employees on D&TSL work is technically the use of "outside" forces, not simply employees of another seniority district under the same Agreement.

On the other hand, the Carrier argues that the work assignment here is covered under Article 52 (m), covering contracting and reading as follows:

> "(m) Although it is not the intention of the company to contract construction or maintenance work when company forces and equipment are adequate and available, it is recognized that, under certain

> circumstances, contracting of such work may be necessary. When such circumstances arise the Chief Engineer and the General Chairman will confer and reach an understanding....
>
> The company will contract for construction and maintenance work for which company forces and equipment are neither adequate nor available, but shall in each instance give the General Chairman advance notice of the specific work to be thus performed, and on request will confer with the General Chairman in respect thereto."

The Carrier argues that D&TSL employees were "neither adequate nor available" for the brush cutting work, since all employees were fully assigned to other work. The Carrier contends that it complied with Article 51 (m), second paragraph, by notifying the General Chairman that it would "contract" the work to Grand Trunk employees.

Before examining whether a Carrier can "contract" to its own employees, discussion is required as to the meaning of "available" and "adequate". Awards generally have found that, in instances where contracting is being considered, a Carrier cannot support the view that employees are not "available" simply because they are fully engaged in other work. The theory here is that the Carrier has it within its power to assign employees and to make them available as required. "Adequate", however, is a term used here and not in general application elsewhere. It must be given some meaning distinct from "available", else it would not have been included in the provision.

Here, the Board is constrained to look at the particular facts. The Carrier states without contradiction that its D&TSL Maintenance of Way forces were otherwise fully occupied and, for good measure, the brush cutting machine is not assigned to the D&TSL. There was justification given as to why the brush cutting work was required at that particular time. While it is a close call, the Board finds it within reason to conclude that D&TSL forces were not "adequate" at that time.

Returning to the question of contracting, the Carrier here did utilize employees under its own control (although governed by a different Agreement). This is clearly not "contracting" in the usually accepted sense. However, Rule 52 (m) provides that, in instances were forces are not "adequate", contracting is permitted.

If such is the case (that is, the Carrier could have gone to totally outside forces), how can it be found to be improper to use its own forces outside the D&TSL Agreement?

Following such reasoning, the Organization contends that the Carrier could just allow the D&TSL force to "wither" and then to substitute Grand Trunk employees to do the work. While this fear is understandable, it is entirely speculative. In the instance before the Board, there is no evidence of such purpose or intent.

The Board cannot fully support the view that the use of Carrier forces outside the applicable Agreement is "contracting". However, where contracting would otherwise be permitted (as here), the use of such forces is not more detrimental to the Organization's rights under the Agreement than if the work had been contracted to non-Carrier outside forces.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever
Nancy J. Dever - Secretary to the Board

Dated at Chicago, Illinois, this 12th day of August 1993.