Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32701
Docket No. MW-31803
98-3-94-3-72

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 Chesapeake and
(Ohio Railway)

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 and Structures Department work (cutting brush) at various Huntington Division locations on the former C&O properties on various dates beginning August 3, 1992 and continuing |System Files C-TC-5410/12(92-1318), C-TC-5404/12(92-1312), C-TC-5089/12(92-1316), C-TC-5090/12(92-1315), C-TC-5080/12(92-1306), C-TC-5097/12(92-1313), C-TC-5087/12 (92-1308), C-TC-5057/12(92-1309), C-TC-5065/12(92-1307), C-TC-5071/12(92-1310), C-TC-5408/12(92-1317), C-TC-5085/12(92-1314) and C-TC-5056/12(92-1311) COS).

(2) As a consequence of the violation referred to in Part (1) above, the Maintenance of Way employes* listed below shall each be allowed pay at their applicable straight time and/or overtime rates of pay as stipulated within the initial claim letters**:

*B. Sexton
M. Meadows
W. J. McKnight
W. R. Childs
W. R. Nicely
T. E. Plecker
C. Brown
D. Johnson
G. Johnson
A. Baird
C. B. Reynolds
E. K. Dean

E. M. Oyler
W. Carper
D. L. Forbes
D. Stinespring
R. Powers
E. Capps
J. Lee
D. M. Hanna
J. Browning
R. L. Adkins
D. Clark
W. C. Kincaid
D. Lane
R. Toney"

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.

By letter dated July 28, 1992, the Carrier notified the Organization:

"This is to advise you, as information and so that you will be aware of the contractors in the area, of our intention to contract to have brush and trees cut which are fouling the signal systems on the Huntington Division. The contractor will only cut brush within three feet of the pole or line, which work normally is performed by either signal or maintenance of way employees.

Attached is a list of locations where the contractor or contractors will be utilized.

The work will be performed as soon as possible as this is an emergency situation which is causing false clears.

There are no furloughed MofW employees on this territory at this time."

By letter dated July 30, 1992, the Organization notified the Carrier that:

". . . Please be advised that there are numerous furloughed Maintenance of Way employees across the several seniority districts that make up the Huntington Division. Work such as this has typically been performed by Regional Gangs.

* * *

Please be advise|d| that should any contractors cut brush or trees, which is clearly Maintenance of Way work, such action will be met with appropriate time claims, account the Carrier's violation of Rule 83 of the current Agreement which clearly states that you will not contract out work when you can recall the necessary employees to perform it."

Commencing in August 1992, outside forces began brush cutting. These 13 claims followed.

In a letter dated October 21, 1992, the Division Engineer asserted that:

". . . |B|efore a contract was signed with Asplundh Tree Contractor, it was agreed by Management of CSX to call back and establish forces to cut brush with a number of employees comparable to the contract gangs. This as I understand was also agreed to by |the| General Chairman."

The General Chairman disagreed with that assertion. In a letter dated November 3, 1992, the Organization took "violent exception" to the Division Engineer's assertion and called his position "a total fabrication." In a letter dated July 29, 1993, the General Chairman stated that following a telephone conversation with the Chief Engineer and the Assistant Vice President of Engineering he:

". . . received a commitment from the Carrier to put on an equal number of employees that the contractor had working. However, the intent of this was that the employees would be put on each of the seniority districts where contractors were working. This did not take place. The Carrier put

out Maintenance of Way forces to cut brush on the B&O Railroad. The contractors were working on the C&O Railroad. One has nothing to do with the other and this did not fulfill the Carrier's commitment to bring back a like number of Maintenance of Way employees to match the number of employees and man hours that the contractor was working."

By letter dated August 31, 1993, the Carrier took the position that several of the individual claims were untimely; asserted that the work has not been exclusively performed by Maintenance of Way employees; and the Carrier lived up to its commitment to return furloughed employees to work.

A sustaining award is in order in this case.

First, brush cutting is scope covered work. Rule 66(b) covers "mowing and cleaning right-of-way." Statements from employees show that for years Maintenance of Way employees have performed this kind of work. See also, Third Division Award 26436 between the parties (involving the contracting out of brush cutting). Indeed, in its July 28, 1992 notice, the Carrier recognized that this was ". . . work normally . . . performed by either signal or maintenance of way employees."

Second, Rule 83 states:

"RULE 83 - CONTRACT WORK

* * *

(b) It is understood and agreed that maintenance work coming under the provisions of this agreement and which has heretofore customarily been performed by employees of the railway company, will not be let to contract if the railway company has available the necessary employees to do the work at the time the project is started, or can secure the necessary employees for doing the work by recalling cut-off employees holding seniority under this agreement."

The record shows that there were employees in furloughed status during the time of contracting. A violation of Rule 83(b) has been shown.

Third, the Carrier's argument that the employees did not perform the work on an exclusive basis is not persuasive. While exclusivity of performance of work is a necessary element for an assignment dispute between crafts or groups of employees under a general Scope Rule, in contracting out disputes the Organization need not demonstrate that employees have performed the work on an exclusive basis. See e.g., Third Division Award 32699 between the parties citing Third Division Award 31777 - also between the parties. ("The Carrier's reference to the Organization's need to prove its 'exclusive' right to the work has been repeatedly found inappropriate in reference to contracting claims.") Indeed, under this Agreement, if exclusivity had to be shown, once the Carrier legitimately contracted work under Rule 83 because of lack of available employees, the Organization could never again claim protection under that Rule because a contractor once legitimately performed the work and the employees could not thereafter claim performance of the work on an "exclusive" basis. The result of such an interpretation would write Rule 83 out of the Agreement.

Fourth, nor are we persuaded that the conditions caused by the brush growth constituted an "emergency" allowing the Carrier to bypass any requirement that it use its employees. Ordinary track maintenance could have prevented the situation. See Third Division Award 32435. ("Nor are we persuaded that the gradual unchecked growth of vegetation in the absence of routine cutting and pruning rises to the level of unanticipated unavoidable urgency normally associated with an 'emergency.'") Moreover, the record reveals that there were employees in furloughed status who were available for such routine work. There is no evidence that the Carrier was placed in a situation that it could not contact or use those employees to relieve the conditions caused by brush growth. Further, the record shows that this project was widespread in scope and time. The immediacy of action called for in an emergency has not been demonstrated in this case. The Carrier's argument that the Organization never disputed the emergency conditions on the property is also not persuasive. From the outset, after receiving notice the Organization protested the use of a contractor to perform this work. The scope of that protest encompassed an objection to any defense the Carrier may have had (including "emergency") for using outside forces.

Fifth, the Carrier asserts there was a resolution between the parties concerning the recall of furloughed employees and that it complied with that resolution and should not now be found have improperly contracted work. According to the Carrier, the resolution was "to call back and establish forces to cut brush with a number of employees comparable to the contract gangs." The Organization took "violent

exception" to the resolution as described by the Carrier, but acknowledged that there was a ". . . commitment from the Carrier to put on an equal number of employees that the contractor had working." The difference in perception concerning the resolution was that the Organization described "the intent of this was that the employees would be put on each of the seniority districts where contractor's forces were working" and the recalled employees were put on B&O territory, but not on C&O territory where the contractor's forces were working.

In Third Division Award 27664, the parties therein disagreed on whether the carrier could use a contractor, but the Local Chairman and the carrier reached an accord that the contractor could work if a covered employee worked along with the contractor. The Board denied a claim that the use of the contractor was improper, finding that the parties had reached a resolution and the organization would be held to the terms of that resolution - in essence, estopped from claiming a violation of the contracting provisions. The Carrier relies upon Award 27664. The fundamental difference between that Award and the facts in this case is that in Award 27664 there was no dispute concerning the nature of the resolution - the parties agreed that a contractor could be used if an employee worked along with the contractor. Here, there is a dispute concerning the resolution reached. The Carrier asserts that the Organization agreed "to call back and establish forces to cut brush with a number of employees comparable to the contract gangs." The Organization asserts that the recall agreement was to cover the same territory where the contractors were working, which did not take place. Award 27664 is therefore not dispositive.

The asserted resolution between the parties is a defense raised by the Carrier against the Organization's claims. Because the resolution is an affirmative defense by the Carrier, the burden is therefore on the Carrier to establish the nature of the resolution and to show that there was a meeting of the minds as to the scope of that resolution. That has not been done. The record establishes that the parties were simply on different wavelengths - two ships passing in the night, so to speak - concerning the nature of the recall resolution. The Carrier felt that its obligations were met under the resolution by recalling employees for brush cutting work. The Organization felt that the Carrier agreed that the recall would be on the same territory where the contractor's forces were working - which did not occur. While the fact that furloughed employees were recalled has an impact on the scope of the remedy in this case (see discussion below), the recall of certain employees to perform brush cutting work on B&O territory rather than on C&O territory where the contractor was working is not a complete

defense to the claim. The Carrier simply has not shown that there was a meeting of the minds on the scope of the resolution between the parties.

Sixth, the function of a remedy is to make whole those employees who have suffered losses as a result of a contract violation. The use of outside forces in violation of the Agreement deprived covered employees of work opportunities. Those adversely affected employees should therefore be made whole commensurate with the number of hours improperly worked by outside forces.

But the record reveals that as a result of the Carrier's interpretation of the resolution reached between it and the Organization some employees were recalled from furlough to perform brush cutting work on B&O territory. Although that interpretation has not been shown to be what the Organization understood the resolution to be (i.e., to perform work on C&O territory where the contractor's forces were working), nevertheless, as a result of the Carrier's actions consistent with its interpretation concerning the nature of the resolution, furloughed employees were recalled and given work opportunities. The record does not reveal that those furloughed employees (as opposed to non-furloughed employees) would have been given those work opportunities were it not for the Carrier's interpretation of the resolution reached between it and the Organization. Those furloughed employees therefore benefited from the Carrier's actions. Therefore, those hours worked by recalled furloughed employees on B&O territory performing brush cutting during the time covered by the claims must be offset against the total number of hours worked by the contractor's forces on C&O territory. The affected employees shall be compensated accordingly.

Seventh, the Carrier asserts that a number of the individually filed claims were untimely. We view these consolidated claims as a single continuing dispute affecting a number of Claimants. However, under Rule 21(g), the Organization has the obligation to file claims within "sixty (60) days of the date of occurrence." In claims which are continuing in nature but which are initiated outside of a specified filing period, a customary remedy is to toll the Carrier's liability for any demonstrated violations which are not covered by a timely filed claim. That type of limitation on the remedy is appropriate in this case. Taking the claims in toto, the Carrier shall not be responsible for any violation which occurred 60 days prior to the filing of the first claim. The parties are directed to determine the extent of that offset, if any.

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 19th day of August 1998.