Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35529
Docket No. MW-33339
01-3-96-3-863

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc. (former Monon Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier assigned six (6) employes from its Signal Department to cut brush between Bedford, Indiana and Mitchell, Indiana from January 30, 1995 until February 17, 1995 not including weekends, instead of assigning Louisville Trackmen W. J. Tyson, C. Adkins, S. L. Huddleston, R. D. Miller, C. D. Shirley and W. J. Rubadue [System File 33195.TM/12(95-0711) MNN].

2. As a consequence of the violation referred to in Part (1) above, furloughed Louisville Trackmen W. J. Tyson, C. Adkins, S. L. Huddleston, R. D. Miller, C. D. Shirley and W. J. Rubadue shall each be allowed one hundred sixty (160) hours' pay at the trackman'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 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.

As Third Party in Interest, the Brotherhood of Railroad Signalmen was advised of the pendency of this dispute and chose to file a Submission with the Board.

This is one of many cases currently presented to the Board concerning disputes over the Carrier's assignment of brush cutting functions to Maintenance of Way employees (BMWE), Signal employees (BRS) and outside contractors. While it would have been more expedient to consolidate the cases and designate a lead case or cases and then have the parties apply the result to the remaining cases, the parties have not done so, which made the case handling somewhat more complicated. We will therefore address the disputes on a case-by-case basis.

In the resolution of these disputes and in an effort to give guidance to the Carrier, BMWE and BRS concerning other disputes that may be pending or may arise in the future, we will be guided by the following general principles derived from our review of the arguments and many Awards presented by the parties to these disputes.

First, as in any contract dispute, the burden is on the respective Organization filing the claim to demonstrate a violation of the Agreement based upon probative evidence developed on the property and properly submitted to the Board.

Second, brush cutting in general along the Carrier's right-of-way is BMWE scope covered work. ". . . Maintenance of Way employees have the right to perform the work of cutting and clearing trees and brush on Carrier's right of way. . . ." See Third Division Award 19457 involving the former Norfolk and Western Railway Company (Lake Region). Indeed, some of the BMWE scope clauses in these cases refer to "mowing and cleaning" or "mowing and cleaning the right of way."

Third, if the brush has grown to the point that it interferes with signal or communications lines and related equipment, brush cutting is BRS Scope covered work. See Third Division Award 19418 involving the former Louisville and Nashville Railroad Company where the disputed work assignment was ". . . to cut brush and undergrowth located under Carrier's communication lines which were endangering efficient operation

of communication carried thereon." Therein the Board stated that ". . . Carrier, throughout the handling of the dispute on the property, steadfastly contends that removal of brush, trees and undergrowth under communications lines and around communication boxes is the responsibility of the Telephone and Signal Departments to keep communication lines open from interference created by the undergrowth." See also, Third Division Award 32729 involving the former Chesapeake and Ohio Railway Company ("Thus, the question to be resolved is does the removal of trees and brush growing into the signal lines interfering with power and signal functions constitute 'maintenance' of the signal system? We are of the opinion that it does as it is absolutely necessary to proper operation of the signal system to assure safe operation of trains"). This conclusion is also consistent with statements made by the Carrier during the handling of some of these claims. See, e.g., Third Division Awards 35548 involving a dispute between BRS and the former Baltimore and Ohio Railway Company (where, on the property, the Director Employee Relations stated "... clearing brush from beneath pole line, which is interfering with signals, is work which accrues to BRS employees . . .") and 35533 involving a BMWE dispute on the former Clinchfield Railroad (where, although stating that contractors have performed the work, on the property the Director Employee Relations also stated "... the practice on this property is that cutting brush away from signal lines has regularly been performed by signal department employees ..."). That conclusion is also consistent with how the work is treated on other Carriers. See Third Division Award 30645 involving a BRS dispute on Conrail wherein the Board noted that "... [I]n Third Division Award 26676, the Carrier cited the ... Scope Rule [which specifically provided for '[r]emoval of brush or trees that impair the operation of the signal system'] in taking the position that brush removal impacting the signal system accrued to the employees in the Signal Department."

We recognize there is authority that permits BMWE, BRS or contractors to perform this specific work. But, given the statement in Third Division Award 19418, supra, and the positions taken on the property by the Carrier, and in an effort to limit these kinds of disputes for the future with guidance to the parties, we are satisfied that if the brush interferes with signal or communications lines and related equipment, the brush cutting is Scope covered BRS work. In simple terms, that conclusion makes sense. BRS employees are generally charged with maintaining signal and communications lines and related equipment. If brush grows into those lines, that maintenance function leads to the conclusion that BRS employees should clear that growth.

Fourth, in terms of distinguishing between BRS and BMWE work, there is a blurred area - specifically, the cutting of brush beneath the pole line where the brush has not grown to the point that it interferes with signal or communications lines and related equipment. There is authority on this property that can be read to have determined that such work is BRS work. See Third Division Award 32730 involving a BRS dispute on the former Georgia Railroad wherein the Board noted ". . . [T]he work of clearing the right-of-way under the pole line is preventative maintenance of the signal system and belongs to Signalmen and Assistant Signalmen" - an Award with which the Carrier strongly disagrees. There is also authority that can be read to the contrary. See Third Division Award 32763 involving a BRS dispute on the former Louisville and Nashville Railroad Company wherein the Board noted that ". . . this work has been historically accomplished not only by Signal Department employees and Maintenance of Way employees, but outside contractors as well." Given this conflict, we cannot find that the cutting of brush growing beneath the pole line that does not interfere with signal or communications lines and related equipment is also BRS work. We do find, however, that such work can be performed by BMWE employees as generally falling under BMWE Scope Rules (which, as earlier noted, in some cases make reference to "mowing and cleaning" with sometimes further reference to such work on the Carrier's "right of way"). In terms of analyzing these cases that is important because a number of these cases that were brought by BMWE involve contracting out and, as now discussed, if the work is scope covered, the Carrier's argument that BMWE must show exclusive performance of that work will not, by itself, defeat BMWE's argument that the Carrier improperly contracted out the brush cutting work.

Fifth, with respect to circumstances when the Carrier utilizes outside forces to perform brush cutting (as opposed to assigning the work to another craft), the relevant contract provisions governing the use of such forces will be applied. When contractors are used to perform disputed work, assertions by the Carrier that the claiming Organization must demonstrate exclusive performance of the work will not suffice to defeat a claim for work otherwise falling within the scope of that Organization's Agreement. See Third Division Award 32701 involving a BMWE dispute on the former Chesapeake and Ohio Railway Company wherein the Board held:

> ". . . 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."

Sixth, with respect to emergencies, ". . . it is well-established that in emergency situations the Carrier has latitude to use its discretion in the assignment of forces." Third Division Award 32420 and Awards cited therein. However, when the Carrier claims the existence of an emergency, it ". . . 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." See, Third Division Award 32419. That burden is for the Carrier to demonstrate the existence of ". . . an unforeseen combination of circumstances that calls for immediate action." Id. An emergency does not exist where "[o]rdinary track maintenance could have prevented the situation." See Third Division Award 32701 citing Third Division Award 32435, both of which involved BMWE disputes on the former Chesapeake and Ohio Railway Company ("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'"). See also, Third Division Award 32763 involving a BRS dispute on the former Louisville and Nashville Railroad Company wherein the Board held that ("The trees did not spring up full grown overnight and there is no evidence to support the defense that this was anything other than routine tree pruning and removal").

Seventh, with respect to remedies for demonstrated violations, adversely affected employees shall be made whole at the appropriate contract rate in order to compensate those employees for lost work opportunities.

We considered arguments by the Carrier supported by prior Awards of this Board that for demonstrated violations monetary relief is not warranted if employees affected by the improper work assignment were working. See, e.g., Third Division Award 32729 (BRS vs. C&O) citing Third Division Award 18305 ("In regard to damages, we adhere to the principle that damages shall be limited to the Claimants' actual monetary loss arising out of the Agreement violation"). See also, Third Division Awards 30166 (". . . because Claimants were working (or were on paid vacation) on the dates set forth in the claim, no affirmative relief shall be granted"); 30756 (". . . because there has been no convincing showing that any of the Claimants suffered a proven monetary loss, no penalty damages will be awarded"); 30841 ("[Claimants] are entitled to pay for time lost for those days they were on furlough that the contractor worked"); 30844 (". . . no monetary damages are appropriate in view of the fact all the Claimants were fully employed . . .").

However, the Carrier in this case has also consistently been put on notice in the past that work assignments that violate negotiated Agreements will be remedied by requiring compensation for employees based on making employees whole for lost work opportunities - even if the affected employees were working. See Third Division Award 32701 involving a BMWE dispute on the former Chesapeake and Ohio Railway Company wherein the Board held:

> ". . . [t]he 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."

See also, involving the former C&O, Third Division Awards 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"); 32125 (former B&O) ("The fact that Claimants were employed at the time the contractor performed the work in this case does not extinguish their right to relief. Claimants lost work opportunities as a result of the Carrier's violation of the Agreement"); 31762 (former C&O) (". . . this is not the first time that this particular Carrier failed to comply with the prenotification requirement . . . [g]iven the previous past violations of this Carrier and this Division's findings that contracting out violations

may qualify for penalty payments without proof of actual damages if the Organization can establish repeated violations, which it has done here, we will sustain this claim as presented"); 31755 (former B&O) (". . . 'fully employed' claimants can be, in certain circumstances, compensated when the Carrier impermissibly contracts out Scope Rule work"); 31619 (former L&N) ("Although other . . . [Claimants] were employed, the record contains no evidence that they could not have performed the work in question, for example by adjusting their schedules or on an overtime basis"); 30970 (former SSR) ("With respect to the question of damages for allegedly 'fully employed' Claimants, there is conflicting precedent . . . [t]o reward the blatant disregard of the Rule 2 notice requirements which this record demonstrates with impunity would render that Agreement provision a nullity. We shall sustain both Part 1 and Part 2 of the claim"); 30912 (former SSR) (". . . the remaining issue is one which has been reviewed countless times by the Board - whether, in sustaining Awards involving contracting, there should be payment to Claimants for hours during which they were otherwise compensated . . . the Board here concludes that payment should be made."). Compare, Third Division Award 35078 (former L&N) ("As the Board has stated in many previous Awards, the Claimants cannot be allowed the punitive rate as a penalty when it is clear that they were performing work and getting paid at the time of the violation. Consequently, the Board orders that each of the Claimants shall be paid 40 hours at the straight-time rate.").

We therefore appreciate the Carrier's argument that to impose full make whole relief on the basis of lost work opportunities for demonstrated violations of the Agreement may be contrary to messages previously sent by the Board. We recognize that the messages sent by the Board in this regard have been "mixed." However, given the prior Awards in the industry - and in particular in cases involving this Carrier - that demonstrated contract violations for improper assignments are subject to full make whole relief on the basis of lost work opportunities even if the affected employees were working, the Carrier has been put on clear notice that if further violations in this regard persist, such relief has been, and may well again be, within the remedial discretion of the Board.

Many of the above cited cases involving the Carrier where such full relief was fashioned preceded the disputes in these cases. Yet, the demonstrated violations continue. Under the circumstances, and in the exercise of our remedial discretion, where violations are demonstrated, we shall require full make whole relief even if affected Claimants are working for some or all of the time periods involved in a particular

dispute now under consideration. As a result of demonstrated violations in the present cases where such violations have been found, the affected Claimants lost work opportunities. In those cases, we will apply the doctrine that the function of a remedy is to make the adversely affected employees whole for demonstrated lost work opportunities. To do otherwise will write the work assignment provisions out of the respective Agreements and will further encourage the Carrier to carefully consider the negotiated work assignment provisions of the Agreement before making these kinds of assignments. That full make whole relief will require compensation based on the provisions of the Agreement taking into account the number of hours of lost work opportunities.

Eighth, in cases where demonstrated violations have been shown, the disputes will be remanded to the parties for determination of the amount of hours of improperly assigned work consistent with the Award.

There is a practical problem here. For the most part, the cases presently before us involve the Carrier's use of contractors to perform brush cutting work. From a practical standpoint, the contractor did not distinguish between work allocated to BMWE and BRS - the contractor simply moved down the right-of-way and cut brush. Thus, to award monetary relief to BRS employees where the contractor performed cutting of brush which, while interfering with signal or communications lines and related equipment, also involved other brush cutting along the right-of-way to which BRS employees have no legitimate claim, would amount to a windfall to those employees. To make a similar monetary award to BMWE employees for work over which they have no legitimate claim would have the same effect.

Therefore, for those cases where remands are directed for determination of the appropriate amount of hours, the parties are directed to sort out the hours attributable to their particular work - i.e., for BRS employees, cutting of brush interfering with signal or communications lines and related equipment; and for BMWE employees, all other brush cutting along the right-of-way.

Because of the number of claims and the similarity of some of the claims to each other, in such remands the parties are charged with determining whether the claims are duplicates so as to avoid the payment of duplicate claims.

The Board will retain jurisdiction to resolve disputes, if any, which may arise under any formulated remedy involved in these cases.

In sum then, in general and as a guide to the parties, in resolving these disputes, we will apply the following principles: (1) the Organization filing the claim has the burden to demonstrate a violation of the Agreement; (2) brush cutting in general along the Carrier's right-of-way is BMWE scope covered work; (3) the cutting of brush that interferes with signal or communications lines and related equipment is BRS scope covered work; (4) the cutting of brush under the pole line that does not interfere with signal or communications lines and related equipment falls under BMWE Scope Rules; (5) where outside forces are used, the relevant contract provisions governing the use of such forces will be applied and assertions of the need to show exclusive performance of the work will not defeat an Organization's claim; (6) with respect to asserted emergencies, the Carrier has the burden to demonstrate the existence of an emergency, which requires it to show the existence of an unforeseen combination of circumstances that calls for immediate action, but where ordinary track maintenance could have prevented the situation, no emergency exists; (7) where Agreement violations have been demonstrated, adversely affected employees will be made whole at the appropriate contract rate on the basis of lost work opportunities and irrespective of whether the employees were working on the dates of the demonstrated violations; and (8) where violations have been demonstrated, the disputes will be remanded to the parties for determination of the number of hours attributable to the improperly assigned work taking into account the specific type of work involved, with the Board retaining jurisdiction to resolve disputes over remedies.

Turning to the facts of this particular dispute, on the dates set forth in the claim the Carrier assigned Signal forces to cut brush under the pole line to clear FRA defects. The claim was filed by BMWE on behalf of the Claimants who were in furloughed status at the time. The Carrier defended on the grounds that in the past the work was performed by Signal Department employees ". . . particularly when cleaning up emergency conditions, such as FRA defects."

While the Carrier asserts that BMWE employees did not exclusively perform the work, in this case we need not address that argument. As discussed above, in ordinary circumstances exclusivity is a relevant consideration in disputes over assignments between crafts (but not in contracting out disputes). But, the main thrust of the Carrier's position in this case is that the work was not assigned to BMWE employees

because there was an emergency. Stated differently, given that the Carrier argues that it made the assignment to BRS employees because it concluded that an emergency existed, it is fair to conclude that had no emergency existed the Carrier would not have made that assignment but, instead, would have assigned the work to BMWE employees. However, the Carrier has not met its burden to demonstrate the existence of an emergency by showing the existence of an unforeseen combination of circumstances that calls for immediate action. The Carrier has also not shown that ordinary track maintenance could not have prevented the situation. As the Carrier recognizes, no emergency existed. The exclusivity argument is therefore irrelevant in this case.

In accord with the principles set forth in this case, the claim has merit. The Claimants were deprived of work opportunities and will accordingly be made whole for those lost opportunities at the appropriate contract rate. The matter is remanded to the parties to determine the number of hours of attributable work performed exclusive of hours of brush cutting where the brush interfered with signal or communications lines and related equipment. The Claimants will be compensated based on those hours.

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 24th day of July, 2001.