Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35530
Docket No. MW-33395
01-3-96-3-917

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 Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Emery Tree Service, Inc.) to perform the work of cutting brush on the Kanawha Subdivision on July 27 through August 31, 1995 [System File C-TC-6110/12(95-1232) COS].

(2) The Agreement was violated when the Carrier assigned outside forces (Emery Tree Service, Inc.) to perform the work of cutting brush from Mile Post 494.0 to Mile Post 498.0 on the Kanawha Subdivision on July 24 through August 18, 1995 [System File C-TC-6108/12(95-1230)].

(3) The Agreement was further violated when the Carrier failed to give the General Chairman advance written notice of its intent to contract out the work described in Parts (1) and/or (2) above or discuss the matter in conference in good faith prior to contracting out said work as required by Rule 83 and the October 24, 1957 Letter of Agreement (Appendix B).

(4) As a consequence of the violations referred to in Parts (1) and/or (3) above, Messrs. B. Sexton, D. Spurlock and S. Minter shall each be allowed two hundred twenty (220) hours' pay at their respective straight time rates.

(5) As a consequence of the violations referred to in Parts (2) and/or (3) above, Messrs. J. Cupp and P. Dodson shall each be allowed one hundred sixty (160) hours' pay at the Class A Operator's straight time 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.

The general principles governing resolution of the brush cutting disputes currently under consideration by the Board are set forth in detail in Third Division Award 35529. In sum, (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.

In this case, without prior notice to the BMWE, the Carrier contracted brush cutting on various dates at locations set forth in the claim. On the property, the Carrier asserted that the brush was cut under the signal lines or along the pole line. The Carrier further took the position on the property that ". . . this was [an] emergency. . . ."

First, brush cutting is BMWE scope covered work. Rule 66(b) covers ". . . mowing and cleaning right of way (except such cleaning of snow, ice, sand and other materials as signal employees may do in connection with signal and interlocker facilities). . . ." There is also no dispute that BMWE forces have performed mowing and cleaning functions in the past.

Second, Rule 83(b) provides:

> "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."

There is no evidence what steps, if any, the Carrier took to meet its obligations under this Rule - particularly, whether there were employees whose schedules could have been adjusted so as to make them ". . . available . . . to do the work at the time the project is started. . . ."

Third, the Carrier claimed the existence of an emergency. But see the principles governing this case as set forth in Third Division Award 35529:

> "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.' 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')."

The Carrier only claimed the existence of an emergency. It did not meet its burden to demonstrate that condition.

Fourth, to the extent the Carrier now defends on the basis that the contractor provided specialized equipment that it did not possess - an argument the Carrier did not raise on the property - the record does not show what kind of specialized equipment the contractor had that the Carrier did not possess. But, in any event, even assuming the Carrier did not have the necessary equipment for this type of project, the Carrier did not explain what efforts, if any, it undertook to obtain that equipment before contracting out the work. See Third Division Award 35532:

"The Carrier's responses in this case ignore the requirements of the December 11, 1981 Letter of Agreement. In that letter it was agreed that '[t]he carriers assure you that they will assert 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.' While that letter has been the subject of wide and varied interpretations over the years, there is still a clear obligation on the Carrier's part imposed by that letter to at least explain its attempts to procure rental equipment or give reasons why rental equipment could not be obtained. The Carrier did not do so in

this case. All the Carrier argued was that the contractor provided equipment that the Carrier did not have. Under the circumstances, that is not enough. To rule otherwise would totally ignore the requirements of the December 11, 1981 letter. We are unwilling to do so."

In accord with the principles set forth in these cases, 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 by the contractor 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.