Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35532
Docket No. MW-35030
01-3-98-3-757

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 Louisville and
(Nashville Railroad 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) to perform Track Subdepartment work (brush cutting) between Mile Posts OCV-203.0 and WB-224.5 on the CV Seniority District from July 22 through August 1, 1997 [System File 13(13)(97)/12(97-2701) LNR].

(2) As a consequence of the aforesaid violation, Messrs. J. M. Smith and B. R. Philpot shall each be allowed seventy-two (72) hours' pay at their respective straight time rates and twenty-one and one-half (21.5) hours at their respective time and one-half rates 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.

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, with notice to the Organization, the Carrier contracted out brush cutting between MP OCV-203.0 and WB-224.5 on the CV Seniority District. At the time, there were no BMWE employees on furlough.

Brush cutting is BMWE scope covered work. Rule 2(e) provides an exception to the Scope Rule to permit contracting out:

"The railroad company may contract work when it does not have adequate equipment laid up and forces laid off, sufficient both in number and skill, with which the work may be done."

According to the Carrier on the property "... the brush cutting work performed by Emery Tree Service was hand work (Trackmen's work). . . ." However, on the property, the Carrier subsequently stated that the reason it subcontracted the work was because of "... Carrier's lack of equipment provided by the subcontractor to accomplish the work in a safe and efficient manner. Carrier is not precluded from letting a contract which requires equipment it does not have."

The Organization asserts these statements are contradictory - i.e., if the work is "hand work," equipment was not needed. The Carrier points out that notwithstanding those statements, the contractor provided equipment the Carrier did not have - specifically, a hi-rail equipped bucket truck and chipper.

Giving the Carrier the benefit of the doubt that its statement that the brush cutting was "hand work" and its subsequent assertion that a reason it contracted out the work was because of a "lack of equipment" are not contradictory and that, in fact, it lacked equipment to perform the work, we will nevertheless sustain the claim.

The Carrier's responses in this case ignore the requirements of the December 11, 1981 Letter of Understanding. 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.

Third Division Awards 15011 and 16629 (both of which involve BMWE disputes on the former Louisville and Nashville Railroad Company) were cited by the Carrier for the proposition that under the language in Rule 2(e), all the Carrier needs to do is

demonstrate that it either "does not have adequate equipment laid up" or "forces laid off, sufficient both in number and skill, with which the work may be done" - even though the language says "and" and not "or." Those Awards do not change the result because they long predated the December 11, 1981 Letter of Understanding. In any event, this case is decided on the Carrier's failure to meet its obligations under the December 11, 1981 letter - specifically, to explain its attempts to procure rental equipment or give reasons why rental equipment could not be obtained.

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 work performed by Emery Tree Service on this project. 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.