Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35533
Docket No. MW-35081
01-3-98-3-828

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 Clinchfield
( 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 (Asplundh Tree Expert Company) to clear the right of way (cut brush, trees, etc.) at various locations on September 29 through October 27, 1997 and continuing [Carrier's File 12(98-0031) CLR].

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with advance written notice of its intent to contract out the work described in Part (1) above or make a "good faith" effort to reduce the incidence of contracting out scope covered work and increase the use of its Maintenance of Way forces as required by Rule 48 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. R. L. Bennett, G. L. Hannon, J. D. Harber, J. L. Hensley and B. L. Williams shall each be compensated for two hundred thirty-five (235) hours' pay at the machine operator's straight time rate and '. . . also that they be paid for each day the contractor works on the property after October 27, 1997,' until the violation ceases."

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.

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 BMWE, the Carrier contracted brush cutting under the pole line on various dates at locations set forth in the claim.

Rule 48 states that "[i]n the event a carrier plans to contract out work within the scope of the applicable schedule agreement, the carrier shall notify the General Chairman of the organization involved in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than 15 days prior thereto." The question in this case is whether brush cutting is " . . . work within the scope of the applicable schedule agreement. . . ." If it is, then the Carrier was obligated to ("shall") "notify the General Chairman" in advance of the contracting transaction.

We find that brush cutting is "within the scope" of the Agreement and advance notice of subcontracting by the Carrier was required.

First, Rule 1 provides that "[o]n September 29, 1958, it was agreed that practice of cutting of trees on the right-of-way would be discontinued and that cutting of trees on the right-of-way would not thereafter be contracted out." That is a recognition by the Carrier that such work is " . . . work within the scope . . ." of the Agreement.

Second, employee statements show that they have performed brush cutting work before. We must assume that the work was assigned to them by the Carrier as work they were entitled to perform under the Agreement. That is also recognition by the Carrier that such work is " . . . work within the scope . . ." of the Agreement.

Third, on the property, the Carrier responded to the employee statements that they cut brush in the past by asserting "[t]he statements you have provided only prove that Claimants have cut brush before . . . [t]he work does not accrue with regularity to Claimants. . . ." That is further recognition by the Carrier that such work is " . . . work within the scope . . ." of the Agreement.

Fourth, the fact that the brush cutting was not performed <u>exclusively</u> by BMWE - represented employees does not change the result. The parties did not specify in the notice provisions of Rule 48 that notice must be given only in cases where the work is "exclusively" performed by BMWE - represented employees. Rather, the parties specified that notice must be given ("shall") if the work is " . . . work <u>within</u> the scope of the applicable schedule agreement. . . ." [Emphasis added]. Had the sophisticated negotiators who put this language together intended notice of contracting

only in circumstances where the work is exclusively performed by BMWE - represented employees, they could have easily said so. Their failure to so specify such a restriction is taken as a clear indication that such was not their intent.

In terms of a remedy, a condition precedent to the Carrier's right to subcontract BMWE scope covered work is that the Carrier give BMWE the required advance notice. As found, that condition precedent was not met in this case. As a result of the Carrier's failure to give the required notice, the process set up in Rule 48 for conference and discussion was frustrated. It is not the function of the Board to compel either side to agree to a proposal concerning a specific contracting situation. However, it is the function of the Board to require that the parties adhere to their negotiated language concerning procedures for that process.

The purpose of a remedy is to make whole employees who have been adversely affected by a demonstrated contract violation. Had the Carrier given the required notice, the parties may have been able to agree upon a resolution that would have afforded the Claimants increased work opportunities. Then again, perhaps they would not have done so. But to not grant affirmative monetary relief in this case would, in effect, permit the Carrier to benefit from its demonstrated contract violation. In these circumstances, as to who should bear the loss, we believe it should be the party who violated the Agreement - i.e., the Carrier.

In accord with the principles set forth in these cases, the claim has merit. The Claimants were deprived of potential 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.