Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36175
Docket No. MW-35738
02-3-99-3-714

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 Experts) to perform Maintenance of Way work (cut trees and brush) from the right of way between Mile Posts 106 and 106.3 in the vicinity of Gray, Tennessee on June 22 and 23, 1998 to the exclusion of T. Peterson and S. Adkins [Carrier's File 12(98-1465) CLR].

(2) As a consequence of the violations referred to in Part (1) above, Claimants T. L. Peterson and S. E. Adkins shall now each be compensated for thirty-two (32) hours' pay at their respective straight time 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.

At issue in this dispute is whether the Carrier violated the scope of the Agreement when it permitted outside forces to cut trees and brush from the Carrier's right-of-way. The Carrier served notice upon the Organization on February 2, 1998 of its intent to contract out:

> ". . .a Slot Machine Ditcher and brush cutting, to clean up right-of-way (ditching and removing trees). . . .
>
> Contracting of the foregoing work is necessitated by the fact that the Carrier does not have adequate equipment or forces available with which the work might be done. This work is in connection with the severe storm which hit CSXT causing extensive damage."

The Organization filed this instant claim by letter dated July 23, 1998. It asserted that on June 22 and 23, 1998 the Carrier utilized an outside contractor in violation of the Agreement to "cut right-of-way" for eight hours each day. The Organization maintained that this was a direct violation of Rule 48, Note 1 which reads, in relevant part, as follows:

> "On September 29, 1958, it was agreed that practice of cutting 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."

The Organization maintained that a long term practice existed on the Clinchfield Railroad that all such work belonged to BMWE-represented employees.

The Carrier denied any violation. On the property, the Carrier argued that: "Cutting brush from the carrier's right-of-way is not work that accrues to a specific craft by agreement," and that "the carrier had notified you . . . of the carrier intention to contract brush cutting. . . ." During the progression of the claim, the Carrier further argued that Rule 48 fails to state that the work accrues exclusively to BMWE-represented employees. It maintained that the 1981 Letter of Understanding gave the

Carrier the right to contract out scope covered work with advance notice which had occurred. It lastly argued that the work was contracted out by the Signal Department and not the Carrier as it was the work of clearing tree limbs from pole lines, which was signal work.

As noted above, the Brotherhood of Railroad Signalmen filed a Third Party Submission. In pertinent part it stated:

> "... At the onset, it is noted that both the Brotherhood of Maintenance of Way (BMWE) and the Carrier seem to agree that the removal of brush and trees that are interfering with the signal wires is reserved to Signalmen. However, it is also noted that Carrier, during the handling of this dispute on the property, made an affirmative defense in this regard and further alleged that the signal department hired the contractor. Carrier's allegation is not supported by any evidence during the record of handling of this dispute, nor in its submission before this Board. Of particular note is Carrier's notice to BMWE specifically stating that the work involved '... clean-up right-of-way.'
>
> We find it interesting to note that the Carrier argued that this work was for the purpose of removing trees and brush from the pole line, however, the Brotherhood of Railroad Signalmen were never advised of Carrier's intention to hire a contractor to perform this work. If Carrier's affirmative defense had any validity at all then why did they advise the BMWE of their desire to have a contractor perform BRS Scope covered signal work? Obviously, the Carrier is grasping for straws."

As a preliminary point, the Board finds within the record at bar numerous issues and arguments in the Organization's Submission that were not a part of the dispute on the property. They are improper and were not considered by the Board. For example, the statement by L. C. Tipton, which was found only in the Organization's Submission was protested at the Board by the Carrier Member. We find no evidence that it was presented appropriately on the property. It is undated and not a part of any correspondence or noted attachment thereto. Accordingly, the Board did not consider its contents.

On merits, the record before the Board indicates that the work actually performed at bar was work stated by Carrier notice of February 2, 1998 as "brush cutting, to clean up right-of-way" without any statement at that time with regard to its contract with Signalmen or with regard to the purpose of removing brush from pole lines. We find both of the Carrier's later arguments that this was an emergency or signal work unpersuasive. The notice was given in February due to a "severe storm," but the work was performed on two dates in late June. Additionally, if this was signal work, that issue was first raised on December 15, 1998 and is wholly unsubstantiated. Even ignoring Tipton's statement, the work performed herein and all the argument in that same December 15, 1998 letter convinces the Board that the dispute is substantially about brush cutting on the Carrier's right-of-way. The Third Party Submission clearly challenges the argument that the Signal Department contracted out this work and that the work was signal work. The lack of a rebuttal by the Organization is not in this instance proof of occurrence. The Carrier raised an affirmative defense which on its face and consistent with the overall evidence from all correspondence lacks proof. The Carrier never offered any proof to its assertions in the way of contractor's records or any evidence. We note also that the Carrier did not respond to the Third Party Submission.

The Board is persuaded that Rule 48 clearly sets out the work herein performed as work that belongs to BMWE-represented employees. The record of evidence submitted is persuasive that the Agreement was violated. There is no need to demonstrate exclusivity when, as here, the issue is contracting out and the Carrier provided no evidence to prove its affirmative defense that this was Signalmen's work, contracted out by the Signal Department, or for an emergency associated with the severe storm early in the year.

Our study of the record and the Awards submitted by both parties reveals that this claim must be sustained. Rule 48 is clear that the Note reserves the right of brush cutting to BMWE-represented employees. The overwhelming conclusion from the record of evidence is that from Mile Post 106 to Mile Post 106.3 in Gray, Tennessee, the Carrier utilized an outside contractor to perform work that belonged to BMWE-represented employees. We conclude that there is a lack of probative evidence to find the signal work argument to be valid, particularly when seen in regard to the Third Party Submission. The Carrier's arguments on exclusivity are misplaced (Third Division Awards 28692, 31777, 32699 and 32701). We find no support for the Carrier's defense

that this was due to an emergency. Therefore, we find the claim has merit and must be sustained.

We note that the Carrier argued on the property that the claim was "exorbitant." We also note the Carrier's argument that the Claimants not only suffered no loss, but "were in fact paid at a higher rate than they would have earned for cutting brush." The Board finds that the Claimants are due compensation for the lost work opportunity (Third Division Awards 31594, 31619, 32435 and 32866). We cannot find reason for the request of the Organization for 32 hours. Our study of the record reveals that the claim was for two days when an outside contractor worked eight hours each day. Therefore, that is all we will sustain; 16 hours at their respective straight time rates of pay.

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 20th day of August 2002.