Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36281
Docket No. MW-35494
02-3-99-3-402

The Third Division consisted of the regular members and in addition Referee Richard Mittenthal when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former St. Louis-San Francisco 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 (Robert Norris) to perform Maintenance of Way work (clearing trees and repairing washout) between Mile Post 863 and Mile Post 900 in the vicinity of Atmore, Alabama beginning February 17, 1997 through March 7, 1997 (System File B-2534-4/MWC 97-06-03AA SLF).

(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 said work.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. E. Johnson, C. Madison, M. G. Roser, A. Q. Reeves and B. R. Walker shall each be compensated for one hundred twenty (120) hours' pay at their respective 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.

A portion of the Pensacola subdivision, between mile post 863 near Atmore, Alabama, and mile post 900 near Cantonment, Florida, was severed in 1991 because of an out-of-service bridge near Atmore. Train service to Pensacola was permanently rerouted around this out-of-service bridge via another railroad's tracks. Thereafter, vegetation grew along this severed portion of the Carrier's tracks. And trees blown down by a 1995 hurricane obstructed the right-of-way alongside the tracks. The Carrier made no effort for several years to control this vegetation or remove these trees. It decided in December 1996, however, to use this out-of-service portion of its track to store rail equipment. To accomplish that, it was necessary to clear all such tracks and right-of-way of these obstructions.

The Carrier assigned Foreman Johnson and his gang to this work. According to Roadmaster Burdick, he was told by Johnson after the gang had been on the job for several days that "obstructions on curve 894C [were] too great for the equipment available to do the job efficiently or safely." Johnson subsequently insists "he has never suggested the use of contractors for any work that BMWE [Carrier] employees are entitled to." However, he did not deny making the statement attributed to him by Burdick. In any event, Burdick removed Johnson's gang from the job and engaged a contractor, Spike Construction, to cut and remove trees from the right-of-way and otherwise clear the area. Two contractor employees worked on the job from February 24 through 27, 1997, ten hours a day, including the operation of a backhoe. They spent a total of 80 man-hours on the project. The Carrier gave no notice to the General Chairman of its desire to contract out this work.

The Organization grieved, alleging a violation of Rules 2, 3, 4, 5, 31, 32, 33, 42, and 99 of the August 1975 Agreement and requested pay for the Carrier employees who would, absent a contractor, have performed this work.

The Carrier insists that the Organization's case is "procedurally flawed" with respect to its reliance on the Carrier's failure to provide notice of its intent to contract out. It asserts that the "initial claim presented during the on-property handling of the dispute" did not refer to a lack of notice and did not say the Carrier was obliged to give notice. It contends it did not become fully aware of that portion of the Organization's argument until the present claim was conferenced between the parties on February 23, 1999. It stresses a well-established Board precedent that "claims presented to the Board that vary from the dispute handled on the property are subject to dismissal."

This argument is not convincing. To begin with, the original claim referred to Rule 99 which spells out in detail the Carrier's notice responsibility when it "plans to contract out work within the scope of the applicable schedule agreement." It may well be, as the Carrier emphasizes, that the Organization "did not [then] indicate how [it] believed the Rule had been violated." But surely the Carrier must be well aware of its responsibilities under Rule 99. The Organization's original failure to spell out why it was relying on Rule 99 can hardly be construed as a waiver of its right to raise Rule 99 when it appeared before the Board.

Moreover, the Carrier was aware of the notice portion of the Organization's claim long before February 1999. The initial claim was dated April 14, 1997; the Carrier's denial was on May 29, 1997; the Organization appealed on June 3, 1997; and the Carrier's response was dated July 21, 1997. In that July 1997 response, the Carrier stated that "the Organization contends that the notice requirement stands independent of whether or not the work actually belongs to them." Thus, the Carrier clearly knew what the Organization's argument was with respect to Rule 99 by July 1997, if not earlier. This was long before the present claim was conferenced on February 23, 1999. Hence, this particular notice claim before the Board does not vary from the dispute handled on the property. The Organization's case is not "procedurally flawed."

Next, the Carrier contends that Rule 99 says it must provide the necessary notice only where the "work" it plans to contract out is "within the scope of the applicable schedule agreement." Its position is that cutting trees and clearing a right-of-way are not "within the scope of the applicable schedule agreement" and that therefore no notice obligation existed.

The Rules do not describe the specific work assignments of the Carrier's employees. But it is apparent from the statement of Foreman Johnson that Carrier

employees have cut down trees and cleared obstructions from a right-of-way on many occasions. The Carrier asserts, on the other hand, that contractors have been called upon to do this work for years because of the specialized equipment available to them. There is no necessary conflict between these statements. In all likelihood, both contractors and Carrier employees have done this work. And one cannot ignore the fact that the Carrier here initially assigned the work in question to Johnson and his gang. That work was "within the scope of the applicable schedule agreement."

This does not mean the Carrier may not contract out this kind of work. The record made by the parties fails to demonstrate the exclusive reservation of this work for BMWE-represented employees. But even if there was no contractual bar to engaging a contractor, the Carrier still had an obligation under Rule 99 to provide the General Chairman with notice of its intent to contract out. It failed to do so.

The Carrier further argues that its Rule 99 obligation does not apply to contracting out work "on non-operating trackage," that is, "trackage that is not in common carrier service." True, the track and right-of-way being cleared in this case was "non-operating trackage." But nothing in Rule 99, expressly or by implication, supports this proposed limitation. The Carrier's employees work on the Carrier's tracks and the Carrier's rights-of-way. Indeed, they were assigned to the clearing work in dispute "on non-operating trackage." Third Division Award 30911, on which the Carrier places special reliance, involved cleaning up "an old dump area near the so-called 'B' line . . . a non-operating property." In the present case, the clearing was done on the track and the adjoining right-of-way, the very areas in which the Carrier employees typically work. The Carrier offered no compelling argument for restricting the scope of Rule 99 in this case.

Because the Carrier failed to honor its Rule 99 notice obligation, the Organization never had a chance to persuade it to retain BMWE-represented employees on the disputed work. The Carrier obviously thought they were capable of doing the work when it initially assigned them to this job. That suggests the Organization, given the opportunity, could well have persuaded the Carrier to change its mind, to lease the backhoe it says it lacked, and to continue Johnson's gang on the job. What Johnson and Burdick said to one another about the requirements of the job is not entirely clear and cannot, in any event, be a controlling consideration in disposing of the Organization's claim.

The Claimants were at work when the contractor did the disputed work. But there is no proof that the clearing could not have been performed by the Claimants by reassigning their scheduled work or by placing them on overtime. They lost a work opportunity because of a Rule 99 violation. They are entitled to share in a total of 80 hours' pay at the straight time rate.

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 28th day of October 2002.

Carrier Members' Dissent and Concurrence
to Award 36281 (Docket MW-35494)
(Referee Mittenthal)

We concur in the Majority's disposition that the Organization's inflated claim was reduced to the amount of time actually expended by the contractor. But the Majority should not have gotten to that point.

It is not disputed that Claimant Johnson and his crew were assigned the clearing work and that they ceased because the obstructions were too great. At that point the contractor was employed.

The Majority has concluded that, " . . . Carrier failed to honor its Rule 99 notice obligation, the Organization never had a chance to persuade it to retain BMWE - represented employees on the disputed work." Such ignores the fact that the Organization's members already knew the work required and had indicated their inability to perform it. There was no need to advise the Organization because it was already known. That Claimant Johnson subsequently noted that he did not suggest the use of a contractor ignores the fact that the same crew was unable to continue clearing the vegetation. That the same employees who had indicated their inability to perform the work are the Claimants here obviates any presumption that the matter was unknown to the Organization. Rather than that the Organization was not advised, the Claimants were the cause for the need of the Carrier to secure a contractor. Much of the Majority's exposition on the purpose of Rule 99 ignores this central fact of record.

Unlike other contracting out disputes where the issue devolves on evidence of the Organization's ability and "customary" performance of the work in question, here, the first fact given in this record was that the Claimants, BMWE members, were unable to do the job. There was no need to give notice because the Organization was well aware of the work and why the Carrier needed the use of a contractor.

Further, that the Organization did not raise an issue of the lack of notice in its initial and subsequent handling of this claim supports the fact that the Organization was well aware of the situation and the rationale for the Carrier's action. As is noted at the bottom of page 2 of Award 36281, the Organization's claim referred to a laundry list of alleged contract provisions violated. This coupled with the contention that "clearing of trees" was performed by covered employees is the entirety of the Organization's evidence. Not until the Organization filed its Notice of Intent to this Board on May 27, 1999 was the issue stated in paragraph (b) of the claim, of an issue of notice. While the Carrier is well aware of its responsibilities under Rule 99, Organization's late assertion of this matter was other than as handled on the property

and was a proper basis to dismiss the claim as procedurally flawed, see First Division Award 24321, Third Division Awards 29354, 29862, 33897, 35965.

We Dissent.

Paul V. Varga

Martin W. Fingerhut

Michael C. Lesnik