Award No. 7216
Docket No. MW-7258

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned the work of installing a chain link fence on O. H. Bridge 14.73 to a contractor whose employes hold no seniority under the effective Agreement;

(2) Each of the Bridge and Building Carpenters holding seniority on the Terminal Division be allowed pay at their respective straight-time rates for an equal proportionate share of the total man-hours consumed by the contractor's forces in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On December 11, 15, and 16, 1952, an existing wooden fence on Carrier's O. H. Bridge 14.73 at Silver Hill, Massachusetts, was removed and approximately two hundred (200) feet of chain link fence was installed as a replacement thereof.

The work of removing the wooden fence was assigned to and performed by the Carrier's Bridge and Building forces.

The work of installing the chain link fence was assigned to and performed by employes of the Security Fence Company of Somerville, Massachusetts.

Flag protection for and against the Carrier's trains operating over O. H. Bridge 14.73 while the contractor's forces were installing the chain link fence was provided by Carrier's Bridge and Building forces.

Prior to December 11, 1952, chain link fences had been installed by Carrier's Bridge and Building forces, notably at Union Square, Somerville, Massachusetts, and at Tufts Street, Somerville, Massachusetts.

The Agreement in effect between the two parties to this dispute dated May 15, 1942, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The scope rule of the Agreement reads as follows:

It is a known fact that the installation of a chain-link fence involves considerable skill.

The installation of this particular fence was made by the Security Fence Company, Somerville, Massachusetts. They were the successful bidders among others in the awarding of the contract for the installation and the materials for this fence. It has always been the practice on this Railroad in the installation of chain-link fences to contract for the materials and the installation thereof.

In prior Awards of the Third Division, it has been held that it is a well established rule that a Carrier may or may not let out to others the performance of work which can be done by its own employes **provided that facilities and equipment are available and men are skilled sufficiently to perform the work.** However, in cases where Carrier does not have the necessary materials or sufficiently skilled employes, to perform the installation, it certainly has been held by your Honorable Board that it is permissive to contract the work. The above is supported by Third Division Award No. 2338, Referee Edward F. Carter participating. There is no question but that the B&B crews on this property were not equipped or sufficiently experienced to do the special type of installation in the erection of this chain-link fence.

Furthermore, the Carrier is prepared to support the fact that past experience of the Fence Companies, including the one which made the installation in this particular case, has been that seldom do they sell materials for the erection of a chain-link fence. Why? Because unless the necessary skill has been acquired by the person who is to install the fence, it would result in excessive expenditure and probable improper installation thereof.

Furthermore, this is not something that occurs every day or even every month, but occasionally.

It should be evident that the Carrier did not have qualified men with sufficient skill necessary to perform this installation. Therefore, the contracting of the work by the Carrier cannot be said to constitute a violation of the agreement in this case.

The claim should be denied.

All data and arguments herein contained have been presented to the Organization in conference and/or correspondence.

(Exhibits not reproduced).

OPINION OF BOARD: In December, 1952, Carrier contracted for the materials and installation of a chain link fence on a bridge over the Carrier's tracks. The fence was installed by three employes of the private contracting company which furnished the materials. The claim is that the work of erecting the fence belonged to employes of the Carrier covered by the scope rule of the Maintenance of Way agreement, and asks that these employes be paid a proportionate share of the total man-hours consumed by the Contractor's employes in doing the job.

The question is whether the kind of work performed by the outside contractor belongs exclusively to the maintenance of way employes under the scope rule of their agreement. The scope rule in question is very broad and does not contain any description of the kind of work intended to be covered. This type of question has been before this Board on many occasions and the applicable principles have been stated in numerous awards. In short, where, as here, the scope rule is completely ambiguous as to the kind of work covered, it is interpreted to reserve all work usually and traditionally performed by the class of employes who are parties to the Agreement. There then remains to be decided in each case whether the particular type of work involved has been "usually and traditionally performed" by the Claimants.

There can be no gainsaying that the erection of fences has been usually and traditionally performed by maintenance of way employes on this Carrier.

In fact, the record shows that the wooden fence which was here replaced by a chain link fence had been installed, maintained and removed as necessary by these employes. However, Carrier asserts that the installation of chain link fences is a different matter from the installation of other types of fences and that the maintenance of way employes lack the necessary skills and equipment to do a proper job. Further, Carrier shows that during the period from 1943 until 1952, sixteen chain link fences were installed or repaired by outside contractors, nine of the jobs being done by the same contractor involved here, without protest by the Organization.

Without reciting the conflicting evidence in the record, we find after considering it in full that the employes of the Carrier did not lack the necessary skills and equipment to install this fence. We rely in part upon the fact that these employes have erected salvaged chain link fence for the Carrier in the past, and in part on the lack of any specific evidence as to the special equipment and skills needed for this job. There remains the question of whether the past instances of installation and repair of chain link fences on the property by outside contractors indicate an intention by the parties that the scope rule was not to include this type of work. We are not convinced that such is the case. The Organization denies that it had knowledge of these past instances and states that it has never acquiesced in the practice of contracting out this work. Although in some Awards it has been held that knowledge of the work done on the Carrier's property may be imputed to the Organization even though such knowledge is denied, we do not think that the facts of this case support the application of that doctrine. From the brief description of the work contracted for over the years preceding 1952, it does not appear that any of the projects were large ones; further, it appears that some of the installations were in areas where they would not necessarily come to the attention of the maintenance of way forces, such as in a baggage room or machine shop. A chain link fence cannot be equated to a building (as in Award 6299) or other large project which would almost surely be noticed by the employes. In Award 6251, cited by Carrier, the Organization did not deny knowledge of the practice there involved.

Since we have found that installing and maintaining fences is work usually and traditionally performed by Carrier's maintenance of way employes, and that the particular fence installation here did not require special skills and equipment beyond those possessed by these employes, we hold that the Carrier violated the scope rule of Agreement in having the work done by an outside contractor.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 24th day of January, 1956.