

Award No. 10137
Docket No. MW-8823

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned other than Bridge and Building employees to construct a new woven wire fence in the vicinity of Mile Post 30-W.

(2) Bridge and Building employees G. B. Whitenack, E. B. Gritton, Marvin Yocum, C. B. Johnson, W. G. Black, W. R. Gash, E. L. Hackney, Virgil Harmon, Shively Sanders, Russell L. Sanders, Frank Sanders, S. K. Allen, H. Springate and Elmer Yocum each be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by the other forces in performing the work referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On May 20 and 23, 1955 the Carrier assigned its track department employees to perform the usual and customary work of Bridge and Building employees in the construction of approximately one quarter of a mile of new woven wire right-of-way fence in the vicinity of Milepost 30-W on the Carrier's St. Louis-Louisville Division.

Track Department and Bridge and Building employees are separate and distinct classes of employees, holding seniority in separate sub-departments under the Agreements between the parties.

The Bridge and Building employees identified in Part (2) of our Statement of Claim were available, fully qualified and could have performed the above referred to work, had the Carrier so desired.

The agreement violation was protested and a suitable claim filed in behalf of the claimants.

Claim was declined as well as all subsequent appeals.

the Board had no contractual right to the work claimed and were **not** adversely affected in any manner whatsoever.

In these circumstances, the Board cannot, on the record, reach any conclusion other than that the claim should be denied.

Carrier, not having seen the petitioner's submission, reserves the right, after having done so, to present any additional facts and argument which may be appropriate.

All relevant facts and arguments involved in the dispute have been made known to employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: On May 20th and 23rd, 1955, the Carrier's St. Louis-Louisville Division assigned Track Department Employes to erect or repair and rebuild a woven wire right of way fence on a line dividing the Carrier's property from that of Newton Franzier. Eighty-eight man hours were used to construct or repair the fence which was approximately a quarter mile long and was located between Milepost 29.7-W and Milepost 30-W. Track Department Employes are under the same Agreement as Bridge and Building Employes but they do not hold seniority in the B&B Department.

The Organization contends that the work should have been assigned to the Bridge and Building Employes because the work belonged to them inasmuch as it involved the construction of a new fence.

The Carrier, on the other hand, contends that the work involved was not the construction of a new fence but merely repairing and maintaining an existing fence.

The question that must be determined in this case is:

What constitutes a new fence?

To support its position the Organization cites the following letters:

"Shelleyville, K.
July 6, 1955

"Mr. T. W. Danner, G. C.
Box 1422 Charlotte, N. C.

"Dear Mr. Danner:

"This is to advise you that the fence I constructed at MP30W on May 20 & 23, 1955 was entirely new material. I hope this statement is satisfactory.

"Frat. Yours

/s/ W. H. Yocum Foreman"

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"December 31, 1947 p
File 111-401

"Mrs. G. R. Barnes, Genl Chairman
Brotherhood of Maintenance of Way Employes
R 4 Box 684, Broadmoor, Bessemer, Ala.

"Dear Mr. Barnes:

"Yours October 17th:

"It is a fact that the new agreement provides that fence gang foremen shall come from the B&B Department. Whenever we organize any fence gangs in the future we will put B&B foremen in charge. We will also use B&B employes in such gangs, but as most of the work of building fences is ordinary laborer's work, I think that a gang organized for fence building purposes should consist practically altogether of laborers or apprentices.

"We will, no doubt continue to use section forces for making minor repairs to fences.

"Yours very truly,

/s/ G. L. Sitton"

It is our conviction that neither of the above letters supports the position of the Organization.

Mr. Yocum did not state that he built a new fence. He merely stated that "... the fence I constructed ... was entirely new material ...". It is to be expected that new material would be used in repairing a fence. In regard to that point, the Referee believes that the Carrier Member expressed it very well when he stated:

"I haven't heard of second hand fence posts and materials being used on a railroad fence."

Now let us turn to Mr. Sitton's letter to Mr. C. R. Barnes, dated December 31, 1947, which reads in part as follows:

"Whenever we **organize** any fence gangs in the future we will put B&B foremen in charge. We will also use B&B employes in such gangs, but as most of the work of building fences is ordinary laborer's work, I think that a gang **organized** for fence building purposes should consist practically altogether of laborers or apprentices." (Emphasis supplied.)

In the present case, a fence gang was not organized nor was a B&B Foreman assigned to the job as Fence Foreman. Consequently, it is difficult to see how Mr. Sitton's letter supports the Organization's position.

The Carrier admits that new fences built by the Carrier generally have been erected by B&B Employes, but the Carrier maintains that both B&B Employes and Track Department Employes have maintained and repaired fences.

Now let us return to our question, *supra*, namely:

What constitutes a new fence?

A new fence, in the Referee's Opinion, is a fence erected where none heretofore existed. Just as a new house, is a house erected where none heretofore existed.

In the present case, it was not denied or disproved that there was an existing fence on the line dividing the Carrier's property and Frazier's property. Therefore, we are forced to conclude that the work involved rebuilding and repairing an existing fence. Work, that is not, according to the terms of the current Agreement—reserved solely to Employees of the B&B Department.

Accordingly, we must deny this claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1961.