Award No. 10937

Docket No. MW-10304

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Donald F. McMahon, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned the work of constructing seventy-two (72) rods of right-of-way fence on the territory comprehended with the territorial limits of the Ottumwa Yard Section to an individual contractor who holds no seniority rights under the provisions of this Agreement.

(2) Section Laborers Don Cox and M. L. Shilling who were in furloughed status, each be allowed pay at his respective straight time rate of pay for an equal proportionate share of the total man-hours consumed by the contractor in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On this property, the work of constructing, maintaining and repairing right-of-way fences has been assigned to and performed by the Carrier's Track Sub-department employes.

Nonetheless, the Carrier entered into a contract with Mr. James Haines, who holds no seniority rights under the provisions of this Agreement to construct 72 rods of right-of-way fence at a cost of $1.25 per rod on the territory comprehended within the territorial limits of the Ottumwa Yard Section. All material used in the construction thereof was furnished and delivered by the Carrier, the work beginning on or about January 25, 1957 and completed on or about February 5, 1957.

The claimants, who have established and hold seniority as section laborers on the Ottumwa Yard Section, but who were laid off in force reduction during the above referred to period, were available, fully qualified and could have efficiently and expediently performed the above referred to fence construction work, had the Carrier been so inclined.

include construction work in the scope of the agreement, immediately following the issuance of Award 7600, is proof positive that Petitioner agrees such work is not now included therein.

In the light of the record, there can be no decision other than denial of the claim in its entirety.

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The Carrier affirmatively asserts that all data herein and herewith submitted have been previously submitted to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization alleges here that Carrier has violated the effective Agreement between the parties, when by its action, entered into a contract with one James Haines, for the construction of 72 rods of right-of-way fence, at a stipulated price within the territorial limits of the Ottumwa Yard Section. That such work here performed was work which has been assigned to and performed by Carrier's Track Sub-department. That Employes in the Track Sub-department, had been laid off in force reduction during the period January 25, 1957 to February 5, 1957, but that said Employes were available, fully qualified and could have performed such work efficiently and economically, had the Carrier been so inclined. As a result of such action by Carrier in contracting out the work, the Organization makes on behalf of Section Laborers, Cox and Shilling, for pay at the straight time rate to be shared equally by the named Claimants, for the total man hours consumed by the Contractor in constructing the described fence. Reliance is made upon the provisions of the Scope Rule 1, and Rule 2 — and 2 (a) to support the claims as alleged, and further that work of constructing, maintaining and repair of roadway fences was reserved to be performed by Track Sub-department Employes, and by the seniority provisions in the Agreement.

Carrier, denies the Employes have the exclusive right to the work performed here, and takes the position that such work does not exclusively come within the provisions of the Agreement as alleged, but is a continuation of a practice for over a period of thirty-six (36) years, which has been customary, and in effect during the period of six separate negotiated Agreements between Carrier and the Organization, during which time Carrier by its custom and practice of contracting with independent parties for construction of fences, as herein alleged, Carrier further contends that during the period of thirty-six years, no claims have been presented by the Organization on behalf of the Employes for time claims resulting from the construction of right-of-way fences, as claimed here, Carrier strongly relies on Award No. 7600, this Division, and on the same Carrier's property as here involved.

This Division has ruled upon the principles involved here in many cases, and particularly — reference to the Scope Rule, as to whether or not Carrier may employ outside contractors to do construction work, build right-of-way fences. It appears from a review of many of the cases cited by the parties here, that this Division is well settled on the principle that a Carrier may be prohibited from contracting out work which is prohibited by provisions of the Agreement between the parties. But it

is noted that a review of all the facts should be considered in each case, in order to arrive at a proper determination. As here, the facts of record show that since the Carrier and the Organization entered into labor Agreements in 1922, six succeeding Agreements have been negotiated up to and including the current Agreement of September 1949. That during that entire period, Carrier has contracted out the major portion of construction of right-of-way fence, and during that period no claims have been progressed against the Carrier by Employes of the Maintenance of Way Department. This is evidence that such contracting out of fence construction work, was recognized as proper by the Organization. When the Agreement of 1938 was negotiated the previous Scope Rule, was revised and the reference to building repairs and reconstruction work was omitted by negotiation, from the Scope Rule, and the rule has remained unchanged to the time the present Agreement became effective.

After a thorough review of the record before us, the citations submitted by the parties many of them are not pertinent here, we are of the opinion that the record here does not support a sustaining award. The award made in Docket No. MW-7328, Award No. 7600, covers in principle such as we have here, that it has been the practice, usage and custom, without objection by the Organization to contracting out the construction and work required in building right-of-way fences, and we are unable to find any provision in the Agreement, that gives the Employes the exclusive right to perform such work. The Scope Rule does not prohibit the Carrier as claimed, and from a review of the cases cited by the parties, we reaffirm the principles as set out in Award No. 7600.

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 Carrier did not violate the provisions of 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 5th day of December 1962.