Award No. 16734
Docket No. MW-17606

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David H. Brown, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY
(Texas and Louisiana Lines)

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

(1) The Agreement was violated when the work of building a chain link fence around the East Yards at San Antonio, Texas, was assigned to forces outside the scope of the Agreement (System File MW-67-20).

(2) B&B Foreman A. F. Harvey, B&B Mechanics E. E. Kocian, M. A. Murphree, A. J. Gavranovic, B&B Helper Alfonso Valerio, Welder A. C. Brown, Welder Helper C. A. Wornat and Machine Operator R. H. Nolte each be allowed 140 hours' pay at their respective pro rata rates because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimants are regularly assigned within their respective classes with an assigned work week extending from Monday through Friday (Saturdays and Sundays are rest days).

On November 7, 1966, the Carrier assigned the work of building a chain link fence to Cyclone Fence Company of Houston, Texas, whose employes hold no seniority within the scope of the Agreement. The outside forces built approximately 10,560 feet of fence around the Carrier's East Yards in San Antonio, Texas, consuming 1,120 man hours in doing so.

The Carrier owns and had equipment available that is identical to that used by the contractor's forces. The claimants were qualified, available and would have willingly performed this work if the Carrier had so desired.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated May 1, 1963, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The Carrier contracted with the Cyclone Fence Company, of Houston, Texas, to install approximately 10,560 feet of Cyclone fence in the area of its East Yards, San Antonio, Texas. The contractor commenced work on the fence on or about October 31, 1966, and completed work on or about December 30, 1966. The Carrier was not furnished any record of the number of man hours spent in the installation, as the contract price included all labor and material.

Claim was filed on February 3, 1967, by B&B Foreman R. F. Harvey, B&B Mechanics E. E. Kocian, M. A. Murphree, and A. J. Gavranovic, B&B Helper Alfonso Valerio, Welder A. C. Brown, Welder Helper C. A. Wornat, and Roadway Machine Operator R. H. Nolte, each claiming 140 hours at pro rata rate account not being permitted to install the fence. The claim was declined by the San Antonio Division, Division Engineer on February 27, 1967. The claim was then appealed to the Division Superintendent on April 1, 1967, and was declined April 6, 1967. Claim was then appealed to Carrier's Manager of Personnel on May 3, 1967 and was declined on June 26, 1967. The case was discussed in conference on August 21, 1967, and the Carrier's decision of June 26, 1967, was reaffirmed. Copies of all correspondence in connection with the handling of the case on the property is attached as Carrier's Exhibit A.

(Exhibits not reproduced.)

OPINION OF BOARD: The Scope Rule involved herein is general in nature; it does not vest in the Brotherhood the exclusive and unequivocal right to perform the work (building a chain link fence) over which this dispute arose. To prevail under such circumstances, Petitioner must prove that work of such nature has been traditionally and exclusively reserved to its craft. This is a question of fact which we must determine solely from the record made on the property, ignoring exhibits and contentions offered for the first time in the submissions to this Board.

Unquestionably there are occasions when this rule becomes a vehicle of injustice. Valid claims may be denied because essential elements are not established in the exchange that takes place between the parties on the property. Conversely, claims of little merit may emerge triumphant where Carrier representatives fail to present valid defenses during such exchanges. But the rule is bottomed on reasons of superior importance. It is designed to insure maximum ventilation of grievances at the place where the basis for grievance can best be ameliorated; it is designed to develop all facts that shed light on the problem at the place where such facts can best be developed.

What then was established through the dialogue on the property herein?

First, did Employes sustain their burden of proof requiring a showing of exclusive past practice of assigning fence building to MW personnel? Throughout the exchange of correspondence on the property the Organization stoutly maintained that the work involved was properly that of its craft. Carrier's challenge of any claim of exclusive right was first asserted in a letter from D. S. Gibson, Division Engineer, to District Chairman Ira W. Wells which letter offered two defenses to the claim: (1) "I have several cases on record where I have contracted fence previously without any objection from the Organization" and (2) ". . . on a job of the magnitude of the one in question, our forces do not have the necessary equipment and are not proficient in this type of construction."

Mr. Gibson, while alluding to "several cases on record" gave no specific evidence to support his assertion. We next find a somewhat oblique attack on Gibson's position in Wells' letter of appeal to Mr. J. D. Ramsey, Superintendent: ". . . the contracting of this work was done without prior consultation with this organization or any effort made to reach an agreement on the handling of this matter with the organization before it was contracted out."

This latter contention might have little significance had Mr. Ramsey responded with a reiteration of Carrier's original position and a further statement to Wells to the effect that no prior consultation was necessary. Instead, Ramsey chose to avoid the issue of past practice and asserted only two defenses: (1) "the job of the magnitude of the one in question could not be performed by our forces because of not having the necessary equipment" and (2) ". . . and not being proficient in this type of construction."

The correspondence then moved into its final phase with a letter from M. Burrough, General Chairman, to J. D. Davis, Manager of Personnel and reply thereto and rebuttal by Burrough.

Burrough repeats the complaint that the Carrier failed to consult with the Organization prior to contracting the work. Davis counters with the assertion such prior consultation is not required by the agreement. Burrough thereupon flatly asserts that at no time had fence work been contracted out except after consultation and negotiation with the Brotherhood. "We further believe the record will show that B&B forces have built the cyclone fences in all instances except possibly where we agreed to the contracting of this work for specific reasons such as stated above." There the correspondence ends.

We deem it most significant that Carrier at no time on the property claimed any prior contracting of work without prior consultation with, and approval by, the Organization. Given the barren and general Scope Rule with no history of practice, the Organization could not successfully argue that it had a right to demand consultation prior to the contracting of work. But given an unchallenged history of the work being exclusively reserved to the Organization except where the Organization consents to such contracting, we must conclude the Organization's claim is as strong as though no contracting had ever been done.

We believe Petitioner has sustained its burden of proof and that the record sufficiently establishes past practice reserving such work to the Brotherhood of Maintenance of Way Employes provided no valid reasons exist for assigning the work to persons outside the scope of the agreement. Carrier gave two reasons for contracting the work.

The first reason was that "the job of the magnitude of the one in question could not be performed by our forces because of not having the necessary equipment . . ." This contention is refuted in Chairman Burrough's letter to Mr. Davis dated May 3, 1967 wherein he cites specific examples of availability and use of equipment suitable for use on the disputed work. In Mr. Davis' reply he nowhere disputes Burrough's contention regarding availability of equipment. We must conclude that equipment was available.

The second and final defense asserted by Carrier was that "our forces . . . not being proficient in this type of construction." This contention is utterly without support in the record. The Organization cites examples of substantial

fence building done by MW personnel and furnishes pictures of connecting sections built by its forces and outside personnel, respectively. We do not believe the construction of chain link fences is so esoteric to the MW craft as to require the hiring of outside specialists.

Finding that the Agreement was violated, we turn to the issue of damages.

The record reflects that Messrs. Brown and Wornat have withdrawn their respective claims. The claim of the remaining individual Petitioners asks for 140 hours' pay at respective pro rata rates. We think such claim is unreasonable in view of the fact all of the Claimants were working throughout the period during which the work was done. We will award each of the remaining Claimants 40 hours at their respective pro rata rates.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 to the extent outlined in our Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1968.

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