Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28558
THIRD DIVISION Docket No. MW-28579
90-3-88-3-408

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

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

(1) The Agreement was violated when outside forces were used to remove the existing fence and install new fence between Mile Post 882.5 and Mile Post 890.5 near Bridger, Wyoming beginning September 3, 1987 (System File 5F-52-4/870784).

(2) The Agreement was further violated when the Carrier did not afford the General Chairman a meeting to discuss the work referred to in Part (1) as contemplated by Rule 52(a).

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman D. J. Herrera and B&B Carpenters D. W. Hilton, R. L. Longmire, G. B. Roper, P. J. Kern, S. K. Maximenko and J. W. Lamons shall each be allowed pay at their respective rates for an equal proportionate share of the man-hours expended by the outside forces performing the afore-described work beginning September 3, 1987 and continuing."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

On August 3, 1987, the Carrier served notice upon the Organization that it intended to contract out the reconstruction of 24 miles of right-of-way fence near Bridger, Wyoming. The notice explained there were no furloughed B&B (Bridge and Building) forces, and it was essential this work be completed prior to the cold weather season. By letter dated August 11, 1987, the General Chairman took exception to the Carrier's intention to contract out

the work, asserting that none of the six conditions specified in Rule 52 was present. After advising the Carrier he could not agree to allow it to contract out the work, the General Chairman requested that a conference be held prior to the commencement of the work to discuss matters related to the transaction. The General Chairman listed ten items for discussion, such as the number of man-hours to be consumed on the project and the reason why the Carrier was not recalling its own employees to perform the work.

The contractor began working on September 3, 1987. The Organization filed a protest on September 28, 1987, asserting the General Chairman's request for a conference was never honored. The instant Claim was subsequently filed on October 1, 1987.

The Organization primarily asserts the construction of right-of-way fences is work that is exclusively reserved to B&B forces under the Agreement. This position is based upon the Organization's interpretation of Rules 1, 2, 3, 4, 8, and 13, which define the scope of the Agreement and delineate the work of B&B employees in general and fence gangs in particular. The Organization also asserts that B&B forces have customarily, historically, and traditionally been assigned to perform this work and has submitted documentation to support this assertion.

Next, the Organization argues that work customarily performed by covered employees may be let to contractors only under limited circumstances. These conditions, which are set out in Rule 52, are present when:

> "... special skills not possessed by the Company's employees, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces."

The Organization avers that skills, equipment, and material were available. It further argues the Carrier cannot create an emergency through its failure to plan ahead. The Organization submits the Carrier was, or should have been, aware of the need to reconstruct the fences earlier and should have recalled the Claimants from furlough earlier than it did to perform this work.

Finally, the Organization argues the Carrier violated the Agreement when it failed to honor the General Chairman's request for a conference prior to the commencement of the work by the contractor. The Claim should be sustained, it argues, because the failure to discuss the contracting constituted bad faith on the part of the Carrier, contradictory to the provision in Rule 52 which reads as follows:

> "If the General Chairman, or his representative, requests a meeting to discuss matters relating to the said contracting transaction, the designated representative of the Company shall promptly meet with him for that purpose. Said Company and Organization representative shall make a good faith attempt to reach an understanding concerning said contracting...."

The Carrier denies the construction of fences is reserved to the employees under the Agreement. It argues the Scope Rule is general in nature and the other Rules cited by the Organization are Classification of Work Rules which merely establish which employees perform the work if it is performed by covered employees. The Carrier further asserts the documentation proffered by the Organization fails to rise to the level of proof that covered employees have customarily, historically, and traditionally been assigned to perform this work. The Carrier then relies upon Rule 52(d), which reads as follows:

> "Nothing contained in this rule shall impair the Company's right to assign work not customarily performed by employees covered by this Agreement to outside contractors."

The Carrier next argues it is privileged to continue to contract out work which was contracted out prior to the adoption of Rule 52. It submits this right was reserved in Rule 52(b), which reads as follows:

> "Nothing contained in this rule shall affect prior and existing rights and practices of either party in connection with contracting out. Its purpose is to require the Carrier to give advance notice and if requested, to meet with the General Chairman or his representative to discuss and if possible reach an understanding in connection therewith."

The Carrier asserts it had a prior practice of contracting out the construction of fences and has submitted a summary of a representative sample of 46 such contracts for a period covering 1918 through 1985. The Carrier notes Rule 52(b) differs from Article IV of the May 17, 1968, National Agreement because of the inclusion of the reference to prior rights and practices.

Finally, the Carrier denies the Organization's assertion this matter was not discussed in conference with the General Chairman prior to the commencement of the work. It proffers the denial letter dated November 24, 1987, in which it stated the matter was discussed in conference with the General Chairman on August 3, 1987. Because the Organization never refuted this statement, the Carrier argues it must be accepted as fact.

We cannot conclude the Carrier failed to discuss the contract in conference. As noted above, the Carrier asserts a conference was held on August 3, 1987, the date it notified the Organization of its intent to contract out the work. Despite the fact the Organization wrote at least two letters subsequent to the Carrier's letter of November 24, 1987, it did not refute the Carrier's statement. We also note none of the three letters appealing this Claim makes reference to this issue. Accordingly, we must reject this as a basis for the Claim.

We need not address the issue of whether or not the work is covered by the Scope Rule or practice. Rather, we are compelled to follow the principles in Third Division Awards 27010 and 27011, which both involve these parties. In each case, the Carrier established a history of contracting out work (construction of side tracks in Award 27010 and grading in Award 27011). In the first case, the Board held that "... while the work involved is arguably covered by the Scope Rule, Carrier had the right to contract the work under Rule 52..." because of the history of contracting. In Award 27011, the Board held:

> "While the Board believes that the work in question is covered by the Scope Rule for the purpose of advance notice, we are also of the view that the remedy requested would, under the unique circumstances of this case, be inappropriate. The Board takes note that the work at issue has apparently been contracted out for over 35 years and therefore falls within the provision of the Agreement which states that 'nothing contained in this rule shall effect (sic) prior and existing rights and practices of either party in connection with contracting out.' Thus, the claim would have to be denied on the merits and it is only on the notice violation that the Organization could prevail."

We find these Awards directly on point. In this case, Carrier has also established a long history of contracting out the construction of right-of-way fences. This work, therefore, is subject to the exception provided in Rule 52(b) without regard to whether or not it is reserved exclusively to covered employees. The Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1990.