CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 29916
Docket No. MW-29659
93-3-91-3-7

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 the Carrier assigned or otherwise permitted outside forces (Pierce Fence Company) to construct and repair right of way fence between M.P. 873.48 and M.P. 882.28, near Carter, Wyoming beginning July 27, 1989 and continuing through August 21, 1989 (System File S-214/890788).

(2) The Agreement was further violated when the Carrier failed to timely furnish the General Chairman with proper advance written notice of its intention to contract out said work.

(3) As a consequence of the violations in Parts (1) and/or (2) above, Maintenance of Way employes A. Guardiola, D. D. Fernandez, B. H. Bogart, S. Nicholson, D. B. Medina and L. F. Hill shall each be allowed pay at the B&B laborer's rate for an equal proportionate share of eighteen hundred (1800) man-hours expended by the outside forces performing the work in Part (1) above."

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 employe 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.

The Organization has raised a timely objection to evidence offered by the Carrier de novo in its Submission. None of the evidence so offered will be considered by this Board in its deliberations. The Board's findings are based solely upon the record established on the property.

This dispute had its inception in complaints by Wyoming ranchers along Carrier's right of way that Carrier trains were killing cattle because of inadequate right of way fencing. The ranchers' concerns precipitated introduction of House Bill HB-171 during the 50th Legislative Session (1988-89) of the Wyoming State Legislature. That bill, if passed, would have provided for fines or penalties to be imposed upon railroads which failed to comply with state laws concerning maintenance and repair of right of way fencing.

In an attempt to reconcile the matter without passage of disadvantageous state legislation, Carrier began negotiations with the ranchers and sent a memorandum to the State Public Service Commission offering a "1989 Plan for Compliance with Wyoming Fencing Requirements." That memorandum read in pertinent part as follows:

"* * *

I. Financial Commitment

A. Union Pacific commits to spend a total of $500,000 (including labor and materials) on the repair and installation of fences along its right of way in Wyoming during 1989.

B. Union Pacific commits to work with Wyoming elected officials and livestock groups to identify those locations most needing new or repaired fencing. In doing so, Union Pacific will be willing to pursue any of the following three alternatives:
1) Union Pacific provides all material and labor.

2) Union Pacific provides material; labor provided under appropriate agreement by Rancher at Union pacific expense.
3) Union Pacific provides materials; Rancher provides labor under appropriate agreement at Rancher expense.

The amount of fencing which will be installed will depend upon which of the 3 alternatives is selected.

* * * *"

By letter of January 26, 1989, the Organization notified Carrier of what it perceived to be the imminent probable passage of HB-171, and asserted Maintenance of Way Employes' reserved right to any required fencing work that might be precipitated by the bill. In a letter dated February 8, 1989, Carrier contested the Organization's assertion and stated: "A review of Carrier records clearly indicates that such work has been performed by outside forces since at least 1918."

On April 14, 1989, Carrier notified the Organization as follows:

> "As information, individuals (ranchers) will be repairing and constructing fence next to the Carrier's right-of-way between M.P. 854 and M.P. 883 in the State of Wyoming. This property is either leased or other than Railroad property and outside the contract of the Carrier.
>
> Serving of this 'Notice' is not to be construed as an indication that the work described above necessarily falls within the 'scope' of your Agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employes represented by the BMWE."

On April 24, 1989, the Organization responded to Carrier's April 14, 1989 letter. The response read in pertinent part:

> "...As you know we have exchanged several pieces of correspondence and had many discussions in this regard. In evaluating all the information before me at this time, it is

my opinion the Carrier is attempting to circumvent the terms of our existing Agreement. That is, the only purpose for the leasing of the Carrier's property or having the right of way fence work performed on other than railroad property is to avoid having Maintenance of Way employees perform this right of way fence work.

...As for the construction of fence on 'other than Railroad property', I believe this is a product of various tactical meetings held in this regard as referenced in the enclosed correspondence of May 3, 1988 to Vice President-Engineering S. J. McLaughlin, specifically, on page 2 it states:

> 'We looked at the possibility of installing fence six inches or so off our right-of-way. This could probably be arranged through sections where adjacent property is owned by UP Realty or one of the ranchers. I am informed, however, that the fence must be installed on our right-of-way line across Federal lands. In my opinion, we should reconstruct the fence line principally in its present location. The right-of-way width changes at many of the section line intersections, and the old fence was built to minimize the number of corners at section line intersections, to avoid excessively rocky terrain, marshes, etc. While it would be nice to build a fence just off our right-of-way through the entire territory, except for across Federal land, our construction and maintenance costs would be more'" (Underscoring added by the Organization)

By letter of May 3, 1989 the Carrier disputed the Organization's letter of April 24, 1989. In particular:

> "As stated previously, when we leased the property along the right-of-way in Wyoming to ranchers in the area, as part of the deal,

> they accepted the obligation for the construction of fencing. We followed this course of action because if was the least cost most efficient way of handling the business and it did not violate any provision of the BMWE Labor Contract. We are obligated by the ICC to conduct our business in the most efficient manner possible for the benefit of our shippers, and nothing in the BMWE Agreement prohibits the Company from leasing land. Moreover, nothing in the BMWE Agreement gives employes represented by the BMWE any right to claim work performed on leased land. In fact, in the final analysis, nothing in the BMWE Agreement confers exclusive rights to construct right-of-way fencing on the BMWE Bargaining Unit. In summary, there was no 'ruse' involved in the Company's actions in this case. This was a straightforward matter of taking care of business in the best way available."

In a letter dated April 18, 1989, the Carrier also notified the Organization as follows:

> "The Company is anticipating the establishment of a fencing gang to operate in the State of Wyoming. The gang will perform various fencing projects.
>
> However, the current B&B roster is depleted and the Company wishes to utilize Extra Gang Laborers to perform this work. This gang would be an on-line service gang with per diem as set forth in Rule 39 of the current Agreement.
>
> This handling would be without prejudice and would not be considered a precedent nor cited in the future. To express you concurrence in the foregoing, please affix your signature in the space provided below, returning the original for my file."

By letter dated April 26, 1989, the Organization responded to Carrier's letter of April 18, 1989. In that letter, the Organization raised the following issue:

> "With respect to the B&B roster being exhausted at this time, the Track Subdepartment rosters for the Wyoming Division are not exhausted. Enclosed is a copy of each letter we received from various Track Subdepartment employees (115) who are available and able to perform the fence repair work on a B&B Fence Repair Gang immediately. Provided the Carrier gives me adequate advance notice on any Monday of a week the positions will be bulletined, I will advise the individuals who supplied these letters to make their availability known for the assignments through the telephonic bulletining system. In this way the Carrier will have a B&B Fence Repair Gang ready to accomplish fence repair work in a matter of days."

An outside contractor, the Pierce Fence Company, began work on the fences on July 27, 1989, and completed the work on August 21, 1989. By letter of August 24, 1989, the Organization submitted a claim on behalf of Wyoming Division Maintenance of Way Employees. In that letter, the Organization maintained that Carrier had violated the Agreement in allowing an outside contractor, the Pierce Fence Company, to construct and repair fence between M.P. 873.48 and M.P. 882.28. That claim was denied by Carrier in a letter dated October 17, 1989. In its denial, Carrier disputed that repair and/or construction of right-of-way fence had ever "been exclusively assigned to or the responsibility of the Maintenance of Way department." In addition, Carrier asserted that "[r]ecords show that contracting of fence repair and/or construction has exsisted (sic) for many years in the past." The claim was subsequently appealed up to and including the highest Carrier officer authorized to handle such matters.

At the crux of this matter are Agreement Rules 1, 8, 9, 13, and 52, reading in pertinent part as follows:

"RULE 1. SCOPE

> This agreement will govern the wages and working conditions of employes in the Maintenance of Way and Structures Department listed in Rule 4 represented by the Brotherhood of Maintenance of Way Employes Organization."

"RULE 8. BRIDGE AND BUILDING SUBDEPARTMENT

The work of construction, maintenance and repair of building, bridges, tunnels, wharves, docks, non-portable car buildings, and other structures, turntables, platforms, walks, snow and sand fences, signs and similar structures as well as all appurtenances thereto, and other work generally so recognized shall be performed by employes in the Bridge and Building Subdepartment.

* * *"

"RULE 9. TRACK SUBDEPARTMENT

"Construction and maintenance of roadway and track, such as rail laying, tie renewals, ballasting, surfacing and lining track, fabrication of track panels, maintaining and renewing frogs, switches, railroad crossing, etc., repairing existing right of way fences, construction of new fences up to one continuous mile, ordinary individual repair or replacement of signs, mowing and cleaning right of way, loading, unloading and handling of track material and other work incidental thereto shall be performed by forces in the Track Department."

"RULE 13. USE AND ASSIGNMENT

SECTION I. BRIDGE AND BUILDING SUBDEPARTMENT

* * *

(c) The construction of new fences or out-of face renewal or relocation of same including cattle guards, etc., along right of way shall be delegated to Bridge and Building fence gang forces. Repairs to existing fence, ordinary relocation, and new construction not exceeding one mile, may be performed by track forces."

"RULE 52. CONTRACTING

(a) By agreement between the Company and the General Chairman work customarily performed by employes covered under this Agreement may be let to contractors and be performed by contractors' forces. However, such work may only be contracted provided that special skills not possessed by the Company's employes, 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. In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases. 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 but if no understanding is reached the Company may nevertheless proceed with said contracting, and the Organization may file and progress claims in connection therewith.

(b) 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.

* * *

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

This is not a case of first impression. The issues before the Board in the present case have been addressed previously by numerous Awards on this Board, many of which involve the Parties to this dispute. The language of Rule 52 is clear and unambiguous. Under that rule, Carrier must give the Organization timely notice of its intent to contract out work formerly performed by Organization employes. It appears at first blush that Carrier did, in fact, supply the Organization with the required notice. However, correspondence between the parties following the Organization's initial claim demonstrates that the alleged notice was seriously misleading with respect to misrepresentations made to the Organization concerning the circumstances of the proposed subcontracting.

By letter of March 5, 1990, during the course of its appeal of this claim, the Organization questioned the existence of the "leases" referred to in Carrier's original notice of its intent to contract out the fence work. In response to that letter, Carrier supplied the Organization with an unsigned (unexecuted) lease dated August 9, 1989 -- fourteen days after the contractor had begun the work at issue. Carrier has presented no probative evidence that any of the land in question actually had been leased prior to the issuance of Carrier's April 14, 1989 "notice" to the Organization. Thus the fence work subcontracted was performed on Carrier's property and was under Carrier's full control. Such blatant misrepresentation flies in the face of the intent of Rule 52. (See, for example, Third Division Award 29121). Accordingly, the Board finds that the alleged notice is void ab initio. Carrier has failed to meet its contractual obligation under Rule 52(a) and 52(b), and the second part of the claim must be sustained.

With respect to the issue of whether the Carrier has also violated the Scope Rule, Carrier maintains that the Scope Rule at issue is general in nature, and therefore, the work at issue cannot be said to be reserved exclusively to employes represented by the Organization. The Organization maintains, however, that Rules 8, 9 and 13 (cited above) clearly reserve the work at issue to its

members. In Third Division Award 14061, involving the present Parties, the Board held as follows:

> "We are not confronted with interpretation and application of a Scope Rule general in nature. The Claim is founded on an alleged breach of the Agreement effective May 1, 1958. Rule 3 of the Agreement specifically grants work of the nature here involved, as follows:
>
> > Note 9: Classification of Work - Bridge and Building Department: The work of...maintenance and repair of buildings...shall be performed by employes in the Bridge and Building Department.
>
> Usual defenses to failure to comply with such a grant are: (1) emergency; (2) lack of skills; (3) lack of special tools and equipment; (4) size of the project not within the contemplation of the parties at the time of execution of the Agreement; and (5) lack of manpower. Of these, only the last one is a probable defense in this case....
>
> In Award No. 8184 we were confronted with interpretation and application of a Scope Rule, general in nature. Not so here, for in the 1958 Agreement a specific grant of the work here involved was agreed to in Rule 3, Note 9, supra. This specific grant prevails over the Scope Rule...."

Award 14061 was issued on December 22, 1965. Through subsequent contract negotiations the controlling rules have remained essentially unaltered (although renumbered). Rule 8 of the January 1, 1973 Agreement is nearly identical to Rule 3, Note 9 of the May 1, 1958 Agreement upon which the Board based its holding. As the Organization has noted, it is a firmly established principle that when rules are carried forward essentially unchanged into subsequent agreements, so too is their interpretation. (See also, Third Division Award 28572).

In further support of its position the Organization has cited several Carrier letters and memoranda in which Carrier acknowledges that Rules 8 and 9 of the Agreement are work reservation rules. Among those communications is the following March 1986 memorandum

from Carrier's Assistant Vice President, Engineering Services to his subordinates:

> "For your information, Messrs. T. R. Green and E. R. Myers of the Labor Relations Department and I met with BMWE General Chairman A. M. Johnson on March 6, 1986, and a major portion of the discussion was devoted to the subject [of] contracting out of work which Mr. Johnson feels is work belonging to his constituency pursuant to Rules 8 and 9 of the contract between the Company and the Brotherhood.... [Cites Rules 8 and 9]
>
> ...I suggest your subordinates who are responsible for planning and scheduling work and those who are responsible for directing the work force become reacquainted with the rules cited above, as well as the Shop Craft's subcontracting agreement of September 25, 1964, as amended December 4, 1975, to insure the Company is not needlessly exposed to undefendable instances of contracting out and the accompanying liability...." (emphasis added)

Thus, it is apparent from Carrier's own internal correspondence that as of 1986, Carrier acknowledged, in what might be termed an admission against interest in the instant case, that Rules 8 and 9 do in fact reserve work to members of the Organization.

The only remaining matters at issue, therefore, are whether the particular work in this case falls under the specific provisions of Rules 8 and 9, and if so, whether there has been a compelling past practice of subcontracting such work out. As the Board held in Third Division Award 28789, the language of Rule 8 does not expressly reserve construction of fences other than "snow or sand" fencing to the Bridge and Building Subdepartment. It is apparent from the evidence on this record that the fence at issue was not of that type.

Rule 9, however, does reserve to the Track Subdepartment the "repairing [of] existing right of way fences, [and] construction of new fences up to one continuous mile...." Further, Rule 13 confirms that "[r]epairs to existing fence, ordinary relocation, and new construction not exceeding one mile, may be performed by track forces." Accordingly, absent a showing by the Carrier that the "repairing and constructing" of fences referred to in its April

14, 1989 "notice" comprised construction of "new" fence sections greater than one mile in length, the work at issue is expressly reserved by Rules 9 and 13 to employees represented by the Organization.

Notwithstanding, Carrier maintains that it has a long-standing past practice of contracting out such fence repair and construction work. As evidence of that contention, Carrier has provided the Board with voluminous records of fencing work previously contracted out over a period of approximately 20 years. The Board notes, however, that all of those projects but two predate the 1986 letter from Vice President McLaughlin acknowledging that Rule 8 and Rule 9 reserve such work to employees of the Organization. The record contains insufficient information to explain the two fencing projects contracted out in 1987, but the following comments by the Organization remain unrebutted and persuasive:

> "...[Neither] of the incidents cited by the Carrier indicates whether or not an exception listed under Rule 52 was applicable and validly justified the transaction. The exceptions...are:
>
> A. Special skills are not possessed by the Company's employees.
>
> B. Special equipment is not owned by the Company.
>
> C. Special material not possessed by the Company is only available when applied or installed by the supplier.
>
> D. The work in question is such that the Company is not adequately equipped to handle it.
>
> E. Emergency time requirement situations exist which present undertakings not contemplated by the Agreement and is beyond the capacity of the Company's forces."

Moreover, the Organization offered unrefuted evidence that it had protested subcontracting of work, including fence work, in eleven letters to Carrier dated from June 1988 forward. Accordingly, Carrier must be presumed to have been on notice that the Organization intended to insist upon strict application of the work reservation provisions of Rules 8 and 9.

Based upon the foregoing the Board finds that the work at issue did constitute work reserved by the Agreement to employes it represents. We also find that Carrier was on notice that the Organization would insist upon its contractual rights to the work reserved to it, notwithstanding what appears to be a "mixed" practice of contracting it out prior to 1986. (See Third Division Award 29432). Accordingly, Part 1 of the instant claim is sustained.

With respect to Part 3 of the claim, the record before us is ambiguous regarding the actual hours of subcontracted work at issue. It is the Board's intention that Claimants should be made whole for wages lost, but should not enjoy a "windfall." Carrier has protested in correspondence on the property, and in its Submission to the Board, that the figure of 1800 hours cited in Part 3 of the Organization's claim constitutes only a "best-guess" estimate of the actual hours worked. However, neither in handling of this matter on the property nor in its Submission to the Board, did Carrier present contrary data, presumably in its possession, which would have clarified the number of hours actually expended by subcontracted forces performing the work at issue. In the absence of such evidence, Part 3 of the claim is sustained as presented. Claimants' outside earnings during the dates in question shall be deducted from the monies awarded.

Finally, in view of the peculiarly convoluted fact pattern and unique evidentiary problems presented in this case, the Board's Findings and Award are restricted to the instant case.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin sh
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 9th day of November 1993.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 29916, DOCKET MW-29659
(Referee Wesman)

The Majority's rationale in this case bears no resemblance to the rationale uniformly adopted by 14 other Referees who have decided approximately 50 other disputes involving the same parties to this dispute, the same Agreement, and the same issues.

The principles of res judicata and stare decisis are but two that have been ignored. There is not a single point relied upon by the Referee which has not been uniformly rejected in prior Awards between these parties.

To say that this Award will not have precedential effect is to state the obvious. At the very least, the odds against it are approximately 50-1.

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

P. V. Varga

J. E. Yost

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 29916, DOCKET MW-29659
(Referee Wesman)

This dissent is nonsense! It clearly suggests that the authors did not bother reading the award or if they did, they must feel that the Carrier is not required to act in good faith when dealing with the Organization. Moreover, to assert that "*** There is not a single point relied upon by the Referee which has not been uniformly rejected in prior Awards between these parties." (Underscoring in original) clearly ignores numerous awards to the contrary.

One issue is timely notice prior to contracting. In this award it was pointed out that:

> "By letter of March 5, 1990, during the course of its appeal of this claim, the Organization questioned the existence of the 'leases' referred to in Carrier's original notice of its intent to contract out the fence work. In response to that letter, Carrier supplied the Organization with an unsigned (unexecuted) lease dated August 9, 1989 -- fourteen days after the contractor had begun the work at issue. Carrier has presented no probative evidence that any of the land in question actually had been leased prior to the issuance of Carrier's April 14, 1989 'notice' to the Organization. Thus the fence work subcontracted was performed on Carrier's property and was under Carrier's full control. Such blatant misrepresentation flies in the face of the intent of Rule 52. (See, for example, Third Division Award 29121). Accordingly, the Board finds that the alleged notice is void ab initio. Carrier has failed to meet its contractual obligation under Rule 52(a) and 52(b), and the second part of the claim must be sustained." (Underscoring in original)

It is readily apparent that one award was referenced and when consideration is given to the fact that at least twenty-three (23) awards on this property have been sustained or sustained in part on the notice issue, we have at least one point that has not been "uniformly rejected". In addition, there are approximately thirty (30) dockets now in Referee hands which deal with the notice issue and approximately sixty (60) dockets awaiting Referee assignment on the notice issue.

Another issue deals with Rules 8, 9 and 13 of the Agreement. In this award, it was pointed out that:

> "Thus, it is apparent from Carrier's own internal correspondence that as of 1986, Carrier acknowledged, in what might be termed an admission against interest in the instant case, that Rules 8 and 9 do in fact reserve work to members of the Organization.
>
> The only remaining matters at issue, therefore, are whether the particular work in this case falls under the specific provisions of Rules 8 and 9, and if so, whether there has been a compelling past practice of subcontracting such work out. As the Board held in Third Division Award 28789, the language of Rule 8 does not expressly reserve construction of fences other than 'snow or sand' fencing to the Bridge and Building Subdepartment. It is apparent from the evidence on this record that the fence at issue was not of that type.
>
> Rule 9, however, does reserve to the Track Subdepartment the 'repairing [of] existing right of way fences, [and] construction of new fences up to one continuous mile....' Further, Rule 13 confirms that '[r]epairs to existing fence, ordinary relocation, and new construction not exceeding one mile, may be performed by track forces.' Accordingly, absent a showing by the Carrier that the 'repairing and constructing' of fences

> "referred to in its April 14, 1989 'notice' comprised construction of 'new' fence sections greater that one mile in length, the work at issue is expressly reserved by Rules 9 and 13 to employees represented by the Organization."

Third Division Award 14061 held to the same effect and was cited in this award. Awards 28572, 28590 and 28817 also held that the work performed in those cases was covered by the rules of the Agreement. Another point not "uniformly rejected".

The dissent attempted to portray this award as something unusual or unique. Nothing could be farther from the truth. The Majority merely interpreted the language of the Agreement as written and followed well-reasoned precedent from this property.

Simply stated, this award was correct when the Majority pointed out that "Based upon the foregoing the Board finds that the work at issue did constitute work reserved by the Agreement to employes it represents. We also find that Carrier was on notice that the Organization would insist upon its contractual rights to the work reserved to it, notwithstanding what appears to be a 'mixed' practice of contracting it out prior to 1986. (See Third Division Award 29432). ***"

As an aside, it does not appear that the odds are quite what the Minority perceives. It is not yet time to bet "the farm".

The award is correct and of precedential value.

Respectfully submitted,

D. D. Bartholomay
Labor Member