

**\*\*CORRECTED\*\***

**Form 1                      NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35565  
Docket No. MW-32774  
01-3-96-3-80**

**The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employes**  
**(Consolidated Rail Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1)    The Agreement was violated when the Carrier assigned outside forces (Pittsburgh Fence Company) to perform Bridge and Building Subdepartment work (erected 500' of cyclone fence on the north side of the Main Line and 1050' on the south side) at Greensburg, Pennsylvania on June 27 through 30 and July 20 through 26, 1994 (System Docket MW-3643).**
- (2)    The Carrier further violated the Agreement when it failed to provide advance written notice of its intention to contract out the Maintenance of Way work described in Part (1) hereof.**
- (3)    As a consequence of the violations referred to in Parts (1) and/or (2) above, B&B Foreman Mechanic R. Cesarino and B&B Mechanic J. McGrath shall each be allowed ninety (90) hours' pay, B&B Mechanic J. Meehan shall be allowed forty (40) hours' pay, B&B Mechanic R. Eshenbaugh shall be allowed thirty (30) hours' pay and B&B Mechanic B. M. Putze shall be allowed ten (10) hours' pay at their respective rates with proper credit for benefits and vacation purposes.”**

**FINDINGS:**

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

In this claim, the Organization asserts that the Carrier violated the Scope Rule, including advance notice requirements and the work reservation language of the so-called "Swert Letter" of April 24, 1989, when it subcontracted without notice and retained an outside contractor (Pittsburgh Fence Company) to erect some 1,500 feet of chain link right-of-way fencing adjacent to the Main Line at Greensburg, Pennsylvania. It is not disputed that the outside contractor erected 500 feet of cyclone (chain link) fence on the north side of the Main Line and 1,050 feet of cyclone fence on the south side of the Main Line.

The Carrier denied the claims on grounds that proper notification was allegedly provided to the General Chairman by a letter from Labor Relations Manager Finnegan dated April 28, 1994, which asserts that the work in question was "not considered routine nor of the magnitude performed by Conrail employees in the past." The Organization contests the format and receipt of the referenced notice letter dated April 28, 1994. Even if the letter is assumed, *arguendo*, to be authentic and valid notice of the contracting out decision and leaving aside the Carrier's protests that the Scope Rule is "general," the Organization made out an essentially unrefuted showing that the Carrier violated specific work reservation language contained in the Letter of Understanding known as the "Swert Letter" (named for its author, the Carrier's former Vice-President of Labor Relations) that reads in governing part as follows:

\* \* \*

**"Fencing**

1. **Perform routine fencing work with employees represented by the BMWE. This includes but is not limited to fencing which is associated with razor wire installation. It is recognized that the actual razor wire (but not the fencing) may be installed by a contractor. Routine fencing is fencing work of the scope and magnitude which has been performed by B&B Department employees in the past.**
2. **Other than routine fencing projects will be handled by serving a notice under the Scope Rule of the Agreement.**

**Nothing in the foregoing would require the hiring of new employees for the sole purpose of performing brush cutting or fence installation. It should also be understood that nothing in the foregoing alters the Company's right to contract such work in emergency situations without prior notice."**

**The Carrier's unsupported assertions that the work performed in installing the 1,500 feet of right-of-way chain link fencing by Pittsburgh Fence Company was not "fencing work of the scope and magnitude which has been performed by B&B Department employees in the past" was trumped by the following unrefuted evidence, including job specifications and photographs, submitted by the Organization in response to the Manager of Labor Relations denial of the claim:**

**"The carrier states that the fencing work was of such magnitude that its workers could not perform the work, the carrier must have forgotten the work that its forces performed when it installed the 700 feet of fence at Bloomfield, Pa. See enclosed pictures. The carrier had a major derailment at Bloomfield in 1987 and the derailment dislocated and removed 700 feet of mesh fence. Conrail B&B forces re-installed the mesh fence which was the same magnitude as the fence in the original claim. The work of re-installing the fence was the same as installing a new fence because the Bloomfield fence was completely removed and all of the supports and mesh fence was removed before re-installing."**

We find that the fencing work at issue is reserved to BMW-AGREEMENT covered employees by the Swert Letter and the Carrier failed to persuasively support its assertion that to assign the work to those employees would have required the hiring of new employees for the sole purpose of performing brush cutting or fence installation. Finally, notwithstanding the fact that the Claimants may have been otherwise regularly assigned on claim dates, precedent on this property supports an award of damages regardless of the Claimants' so-called "fully employed" status. Third Division Awards 26593, 30181, 31521, 31752, 31754, 32190, 32335, 32344, 32505, 32508, 32858; Public Law Board No. 3781, Award 7 and Special Board of Adjustment No. 1016, Awards 34 and 41.

Based on all of the foregoing, we sustain the claims for the named Claimants on the dates listed, with the exception of the one date for Claimant Meehan when the Carrier persuasively demonstrated that he was on vacation.

**AWARD**

Claim sustained in accordance with the Findings.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

Dated at Chicago, Illinois, this 24th day of July, 2001.

**Carrier Members' Dissent  
to Award 35565 (Docket MW-32774)  
Referee Eischen**

The "Swert" letter provided for the Organization to perform routine fencing. It did not reserve any and all fence work to the Organization as contractually reserved. That this is so is evident from the quotation, at page 2 of the Award, of the Carrier's denial that the work in question was:

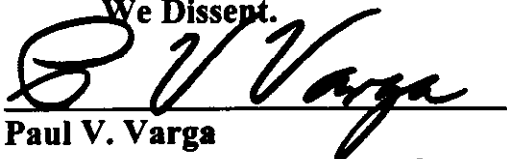
**"...not considered routine nor of the magnitude performed  
by Conrail employees in the past."**

It was therefore incumbent on the Organization to present sufficient evidence on the property that it had performed this work with sufficient regularity to be considered routine. However, while the Organization asserted on the property that such fence work was ordinarily and customarily performed, the singular example of such performance was a 1987 incident. In fact this lone example precedes the "Swert" letter by about 2 years. Obviously, this solitary example, which the Majority finds "trumped" the Carrier's defense at page 3 of the Award, does not equate to the ordinary and customarily performed standard. In Third Division Award 31017, involving these same parties the Board noted:

**"...the 'historically and customarily' standard requires  
sufficient evidence to convince the Board that repair by  
Carrier forces was the usual and ordinary course of action."**

Since, this work was not customarily performed and therefore was not routine, it was covered under item 2 of the "Swert" letter. The Majority's failure to hold the Organization to its burden of proof warrants our Dissent.

**We Dissent.**

  
Paul V. Varga

  
Martin W. Fingerhut

  
Michael C. Lesnik

LABOR MEMBER'S RESPONSE  
TO  
CARRIER MEMBERS' DISSENT  
TO  
AWARD 35565, DOCKET MW-32774  
(Referee Eischen)

According to the Carrier Members' Dissent, the Majority apparently rendered its decision based solely on the "Swert" letter and attempted to divine what constitutes "routine" fencing. The problem with the Carrier's Dissent is that it completely ignores the glaring fact that fencing work is clearly outlined in the Scope Rule as work that is reserved to the employees covered by the Agreement. The Dissent spends too much time attempting to reconcile the "Swert" letter with the facts in this case. Fencing work, routine or otherwise, is clearly spelled out in the Scope Rule as reserved to the employees covered thereby. Apparently, the Dissenters believe that the "Swert" letter operates as a limitation of the Scope Rule. Such is not the case. The record of this case reveals that the Organization presented evidence of performance by the Maintenance of Way employees of such work, of this magnitude, in the past. Hence, Scope coverage was established. Moreover, Third Division Award 32190, Awards 97, 104 and more recently 146 of Special Board of Adjustment No. 1016 between these parties have held that fencing work is reserved to the employees covered by the Agreement.

Because the Carrier was unable to place plain and ordinary meanings of the Agreement language and comply with same, the Board properly sustained the claim in this case. The Dissent

Labor Member's Response  
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is nothing more than a thinly veiled attempt to shroud the Carrier's blatant violation of the Agreement. The Award is correct in every respect and I Concur with the findings.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Roy C/Robinson  
Labor Member