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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40757
Docket No. MW-41235
10-3-NRAB-00003-100074**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 outside forces (CNL Construction) to perform Maintenance of Way and Structures Department work (fence construction) along the right of way between Mile Posts 440 and 442 on the Sidney Subdivision beginning on August 14, 2008 and continuing through August 29, 2008 (System File D-0852U-217/1510184).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants J. Cannon, R. Hughes, P. Herrera and J. Shepard shall now each be compensated for ninety-six (96) hours at their respective straight time rates of pay.”

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.

By letter dated April 17, 2008, the Carrier advised the Organization as follows:

“This is a 15-day notice of our intent to contract the following work:

Location: Sidney Subdivision, MP 440.00 to 442.00 near Kimball, NE; MP 468.50 to 465.25 near Pine Bluffs, WY; MP 498.00 to 500.00 near Archer, WY.

Specific Work: providing all labor, equipment and 100% domestic materials necessary to remove and dispose of existing fence and rebuild approximately 7.25 miles of 5-strand barbed-wired right-of-way fence.”

The Organization requested a conference by letter dated April 24, 2008. The parties met in conference on May 13, 2008, but were unable to resolve the Organization’s objection to the Carrier’s stated intent to contract the work. The subcontracted work commenced in August 2008.

In Third Division Award 40755, the Board denied a claim raising a similar protest by the Organization to the Carrier subcontracting fence construction work.

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This dispute is no different. For the reasons expressed in Award 40755, supra and Awards cited therein, this claim must also be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40755, DOCKET MW-41233 and AWARD 40757, DOCKET MW-41235
(Referee Benn)

It is transparently clear that the decision of the Majority in Award 40755 was based entirely on prior awards without any regard for the fact that the evidence and argument in the instant case was substantially different than the evidence and argument advanced in the cases decided by those prior awards. Indeed, the Majority simply relied on prior Award 30167 stating: "In 1994, this Referee addressed the Carrier's ability to contract out fence construction work.", then denied this case without any mention, much less a discussion and analysis of the argument and evidence particular to this dispute. This may have been convenient and expedient, but it was inconsistent with the Board's obligation to consider the evidence and argument in each case.

The value of treating like cases alike is well established. However, it is equally well established that arbitration awards are not binding in subsequent cases. Rather, prior awards may provide guidance, but they must be examined not only to determine if their reasoning is sound, but also to determine if they truly involve like cases with similar facts, evidence and argument. Simply put, neither labor arbitrators in general, nor the NRAB in particular, follow the principle of issue preclusion. Indeed, no less an authority than the United States Court of Appeals for the Seventh Circuit has ruled that the principle of issue preclusion does not apply at the NRAB but, rather, each side is permitted to try again with better arguments and evidence:

**** When multiple grievances pending at the same time depend on resolution of a single issue, the parties often designate one of the grievances as a 'lead case' whose resolution controls the others. Such a designation would be unnecessary if the first case to be decided had preclusive effect automatically. 'Lead case' designation informs the parties that they must assemble all of their evidence and make their best arguments in a single forum; the absence of such a designation implies that the parties need not concentrate their artillery but may make investments proportional to the stakes. ***

Because this was not a 'lead case,' the Board permits each side to try again, with better arguments and evidence. It applies not principles of preclusion but an approach very much like the 'law of the case': the Board feels free to disregard an earlier decision that appears 'palpably erroneous' in light of the evidence and arguments in the second arbitration. E.g., *Brotherhood of Maintenance of Way Employees-Burlington Northern, Inc.*, Award No. 22374 (3d Div.-Sickles 1979), at 2. ** (Emphasis in bold added) [*Bhd. of Maint. of Way Employees v. Burlington N. R.R. Co.*, 24 F.3d 937 (7th Cir. 1999)]**

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The Majority erred in Award 40755 by blindly following prior awards even though the evidence and arguments in this case were substantially different than the evidence and arguments presented in the cases decided by those awards. Future Referees should not compound this error by blindly following Award 40755 without carefully analyzing the arguments and evidence in the cases that are before them.

The findings in Award 40755 were blindly applied in Award 40757, so this dissent applies with equal force and effect to that award.

Respectfully submitted,



Timothy W. Kreke
Labor Member