

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41159  
Docket No. MW-41502  
11-3-NRAB-00003-110085**

**The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(National Railroad Passenger Corporation (Amtrak)**

**STATEMENT OF CLAIM:**

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

- (1) The Carrier violated the Agreement when it assigned outside forces to perform Maintenance of Way Department work (remove and replace fencing) at the Maintenance of Way compound at Wayne Street in Niles, Michigan beginning on September 11, 2009 and continuing (Carrier’s File BMWE-558 NRP).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper advance notice of its intent to contract the aforesaid work or make a good-faith effort to reach an understanding concerning said contracting as required by Rule 24.**
- (3) As a consequence of the violation referred to in Parts (1) and or (2) above, Claimant J. Turtle, F. Tuka and J. Hurd shall now be paid at their respective and applicable rates of pay for an equal and proportionate share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning September 11, 2009 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 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.**

**The claim, dated November 3, 2009, involves the Carrier's decision to use outside forces to remove and replace fencing at the Wayne Street compound in Niles, Michigan, commencing September 11, 2009 and continuing until the project was completed.**

**According to the Organization, such work has been ordinarily and customarily performed by BMW-E-represented employees since 1975 and the Claimants were available to perform the work. By not assigning the work to the Claimants, the Carrier violated the Scope Rule. Furthermore, the Carrier violated Rule 24 when it did not provide advance notice of its intention to contract out the work.**

**In response the Carrier asserts that BMW-E forces on this property never have performed work of this magnitude and complexity - installing 1,590 feet of seven foot security fencing and ten fence gates including removal of existing fencing – on either an exclusive or ordinary basis. The Carrier asserts it provided notice of its intent to contract out and met with BMW-E so it complied with Rule 24.**

**The progression of the claim on the property shows it was processed in the usual and customary manner, including placement before the highest officer of the Carrier designated to handle it. Following a conference discussion on May 21, 2010 the claim is now properly before the Board for adjudication.**

**Regarding Rule 24 and whether there is a notice violation, in a letter dated July 6, 2009 the Carrier notified the Organization of its intent to contract out the work**

because maintenance forces were fully engaged in performing their regular duties. Although forces would be assigned inspection and protection of contractors as needed, they could not complete this project within a reasonable amount of time. Finally, the contract work would not result in the furlough of forces.

On July 27, 2009 the Carrier met with the Organization in conference, but the parties were unable to reach agreement. Following this conference, the Carrier notified the Organization that it would proceed with the project using outside forces.

Based on the above-cited letters and conference, the record contains substantial evidence showing that the Carrier complied with Rule 24, so there is no violation.

The principle is well-established that the burden of proof is on the Organization to establish that the disputed work is scope covered. The Carrier contends that the Organization must prove that BMW forces exclusively perform this type of work. The Board disagrees. Rather, “exclusivity” applies to jurisdictional disputes between classes and crafts of the Carrier’s employees and not to contracting out.

For this situation (contracting out) the Organization must establish that its members have customarily and ordinarily performed the work (fence installation) falling within the scope of the Agreement. The Carrier acknowledges that its employees perform maintenance, repair and replacement work, but it asserts that they have not performed fence installation work – especially installation of this magnitude and complexity.

Although Engineering Daily Activity Reports confirm that Maintenance of Way forces customarily and ordinarily repair and replace existing fencing, they do not support a finding that BMW forces install new fencing and/or security gates. The Engineering Daily Activity Reports also do not establish that BMW-represented employees have ordinarily and customarily performed work of this magnitude and complexity - length of new security fence (1,590 feet) height of new fence (seven feet) installation of ten security gates.

Although the Organization asserts that BMW-represented forces installed the existing fence in 1975, there are no corroborating statements or documents to support this assertion in the record. There is, however, the Carrier’s letter issued in 1996 to the Organization stating that the Carrier had no record of fence installation being performed by its forces on the Michigan District.

The burden of proof rests with the Organization to establish that BMW-represented forces ordinarily and customarily handle the installation of new fencing and security gates. The lack of support for its assertion about installing the existing fence in 1975, the Carrier's 1996 letter concerning the record of fence installation by Carrier forces on the Michigan District and the absence of corroborative new-fence work in Engineering Daily Activity Reports or a document similar thereto, compels the Board to conclude that the Organization failed to establish that new fence and gate installation is work ordinarily and customarily performed by BMW-represented employees.

In short, the Organization did not establish by substantial evidence that forces on the Michigan District customarily and ordinarily perform the work of installing new fence and security gates. In the absence of substantial evidence to support its position, this claim must 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 21st day of November 2011.**