

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY

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

(1) The Agreement was violated when the work of erecting a right-of-way fence on the east side of the track between Mile Post 103 and Mile Post 105 was assigned to and performed by outside forces who hold no seniority under the effective Agreement;

(2) Bridge and Building Foreman J. O. Stapp and the following Bridge and Building employees: R. H. Stapp, J. H. Little, C. G. Edwards, W. R. Stafford, H. F. Studdard, C. L. Mills, H. A. Edwards, E. W. Richey, Roy Arthur, and H. J. Stapp, each be allowed pay at their respective straight-time rates of pay for an equal proportionate share of the total man hours consumed by the outside forces in performing the work referred to in part (1) of this claim;

(3) Agreement was violated when the work of erecting a right-of-way fence on the east side of Carrier's tracks at Mile Post 98 was assigned to and performed by outside forces who hold no seniority in the effective Agreement;

(4) Bridge and Building Foreman J. O. Stapp and the following Bridge and Building employees: H. J. Stapp, R. H. Stapp, J. H. Little, C. G. Edward, H. F. Studdard, W. B. Stafford, C. L. Mills, E. W. Richey, C. D. Gifford each be allowed 35 hours pay at their respective straight time rates account of the violation referred to in part (3) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Carrier entered into an agreement with Mr. J. W. Washburn and Mr. W. P. Simmons, whose properties adjoin the right-of-way at Mile Post 98 and between Mile Post 103 and 105, wherein the Carrier would furnish, supply, and deliver all necessary fencing materials for the erection of approximately one mile and two miles of fence respectively, with both landowners agreeing to supply all necessary labor for the erection of the fences in question. The fencing materials furnished and delivered by the Carrier included all necessary woven wire, barbed wire, line posts, stretcher posts, corner posts, gate posts, gates, concrete and etc.

Following delivery of the aforementioned fencing materials, the right-of-way fence between Mile Posts 103 and 105 was erected by Mr. Simmons'

time, including some overtime during the periods involved, except some of them were on vacation or laid off, as follows:

H. R. Edwards—10 days in September 1952
C. G. Edwards— 5 days in September 1952
H. F. Studdard— 2 days in September 1952
E. W. Richey — 5 days in September 1952
H. F. Studdard— 2 days in October 1952
H. F. Studdard laid off for one day, October 15, and
C. L. Mills laid off for one day, October 3, 1952.

CONCLUSION.

It is evident that the effective Maintenance of Way Agreements were not violated; that the Carrier has not negotiated away its right to enter into agreements with adjoining landowners whereby fences are erected and maintained on a joint basis, or solely by property owners; that the fences were erected in accordance with past practices under the effective Agreements here in evidence; that the work constituted new construction, as distinguished from maintenance or repair work; that none of the claimants were adversely affected in any manner whatsoever; that the claim has no merit and is not supported by any provision of the Agreements here in evidence; and that, in these circumstances, the Board should make a denial award.

All relevant facts and arguments involved in the dispute have heretofore been made known to employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: These claims arise by reason of Carrier's entering into agreements with two land owners whose properties adjoined the right of way each at a different location. The agreements provided that the Carrier was to furnish all the necessary fencing materials including woven wire fencing, barbed wire, line posts, stretcher posts, corner posts, gate posts, gate and concrete and the adjacent land owners were to erect the fences.

With respect to claim (1) the Carrier contends for the first time in its submission, received by the Board on March 18, 1955, that no fences were built between mile posts 103 and 105 because due to the death of the landowner the agreement providing for their erection was never carried out. There is no question that in handling this claim on the properties it was progressed on the basis of a fence erected "two miles north of Springville, Alabama" up to the highest authorized Carrier official. In his denial of the claim on June 21, 1953, he stated:

"The claim is grounded on the contention that the Carrier was prohibited by the terms of the effective MofW Agreement from permitting the landowner to build a right-of-way fence on each side of the railroad's property between Mile Posts 103 and 105.

"It is significant that you have not cited any provision of the agreement on which you rely in support of your position in this case; also that none of the claimants were adversely affected because of the landowner having constructed the fences.

"My investigation discloses that certain fencing material, such as woven wire fencing, barbed wire, line posts, stretcher posts, corner posts, gate posts, gate, and concrete, was turned over to Mr. W. P. Simmons who erected the fences where his property joins that of Carrier."

In view of the fact that Carrier's personnel officer stated that his investigation indicated the erection of the fences between Mile Posts 103 and 105 by

the adjacent land owner the parties simply accepted the description of the location in appealing the claim to the Board.

There is no question that a fence was built on the east side of Carrier's track for about 1 mile beginning from a point about 2 miles north of Springville. It was erected on a line dividing the landowner's property from that of the Carrier. From this record it is clear that the fence two miles north of Springville, Alabama, was the only one discussed on the property. We cannot hold that its description in the submission of the organization is fatal to our considering it here. The Carrier cannot show any prejudice to its rights, or that it was misinformed in the premises or that petitioner attempted to deceive. Both parties were aware of which fence was being discussed on the property and Carrier well knew it to be the only fence at the location in question at approximately the time set forth by the petitioner. In its submission that Carrier, in referring to the fence 2 miles north of Springville, said:

"It is assumed the above referred to fence is the one the Employees intended complaining about, rather than the fence which was never constructed and referred to in Part (1) of claim."

Under the circumstances of this case we will consider the claim as handled on the property as the one before us for determination in (1). We will not permit what appears to be an innocent error stemming from an equally excusable mistake on the part of the Carrier to prevent our proceeding to a determination of the merits.

The pertinent portion of Rules 1 and 3 of the Agreement effective August 1, 1947 read as follows:

"ARTICLE I.

Scope—Rule 1:

These rules govern the hours of service and working conditions of the following employees in the Maintenance of Way and Structures Department and employees specifically named herein in other departments as represented by the Brotherhood of Maintenance of Way Employees:

- Bridge and Building Sub-department Foremen
- Track Sub-department Foremen
- Bridge and Building and Track Sub-department Assistant Foremen
- Track Apprentices
- Bridge and Building Sub-department Mechanics
- Bridge and Building Sub-department Helpers.
- Apprentices in Bridge and Building forces who are fitted for promotions to supervisory positions."

"ARTICLE II—Seniority

Seniority Datum—Rule 3:

(h) The sub-departments and ranks therein shall be:
B & B Sub-departments:

- B-1 Foremen (including Fence Gang Foremen)
- B-2 Assistant Foremen
- B-3 Mechanics
- B-4 Helpers (including Helpers used as operators of Copra Machine, Chalmette Slip, New Orleans, Louisiana)
- B-4 Air Compressor Operators
- B-5 B & B Apprentices"

The employees maintain that it is and has been for 30 years the work of B & B forces to build all right-of-way fences on this property and that such work is a part of the usual and customary work of employees holding seniority in the B & B sub-department. That the Carrier by agreeing to permit the work to be performed by other than covered employees violated the Scope Rule. They call particular attention to the inclusion in Rule 3 (h) as set forth above which refers to "B-1 Foremen (including Fence Gang Foremen)".

The Carrier maintains that the Agreement was not violated; that state laws govern the erection of right-of-way fences; that work was performed according to past practices and that the work in question was new construction as distinguished from maintenance or repair work.

The past practice to which Carrier refers in its submission is set forth as follows:

"While at some locations the railway erects and maintains fences, at other locations fences are erected and maintained by adjoining landowners; and at still other locations fences are jointly erected and maintained by the railway company and adjoining landowners."

With respect to Alabama law, while the railroad is liable for damages for livestock killed on its right of way under certain conditions, it is not required to build fences along its right of way unless requested by the Public Service Commission. The Carrier admits however that in the building of such fences it does derive a benefit by lessening the danger of its trains killing livestock.

The Carrier points out that work of the nature discussed here was being performed at the time of negotiation of the Agreement and that Rules 61, of the Foremen's Agreement 53 of the Laborers' Agreement were specifically designed to bring about a continuation of a practice not in conflict with the Agreement. With that statement we are in accord.

As a general principle this Board has held that, when as here, there is no so called classification of work rule the work that is reserved to the employees covered is that which is historically and customarily performed by that group.

In the instant case the employees maintain that they have met this test and the Carrier counters by submitting a list of some 82 fences constructed on a joint carrier-landowner basis. Significantly not one of these locations is on the trackage of the Alabama Great Southern. The exhibit submitted by the Carrier does not refute the petitioners showing that its B & B employees erected fences on the property of the carrier by whom they were employed. The Carrier maintains that practices obtaining on other railroads of a system control practices on each and every railroad of the system even if it had a history of different practices. In our opinion interpretation of the Agreement rules may be uniform but that practices on one railroad cannot be ascribed to the employees of another railroad.

We find that under the facts of this case B & B employees of the Alabama Great Southern established the fact that they were entitled to the work the Carrier permitted other than covered employees to perform and a sustaining award is indicated.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 9th day of May, 1957.