Award No. 13317
Docket No. MW-13189

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Don Hamilton, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it assigned to outside forces the work of erecting a cyclone-type fence around the parking lot at the Ravenswood Office building at Chicago, Ill.

(2) B&B Foremen Omer Hillesheim, Casimir Perciach, Sylvester Tiesling, Petro Szczerbutyi and Frank Frohne, Assistant B&B Foreman William A. Schwelew, Carpenter-Truck Drivers Arthur Schwelew and Fred E. Hopp and B&B Mechanics Herman Schwelew, Charles A. Rehwer, George Miller, Michael Shea, Andrew Wieciech, Wasyl Wyszywenick, Vernon O. Lind, Russell Meyers, Nicholas Linden, Stanley Lofquist and Thomas H. Manneback each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by outside forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The work of constructing a cyclone type fence around the Carrier's parking lot at its Ravenswood Office Building at Chicago, Illinois was assigned to outside forces without benefit of negotiation and agreement with the Employes.

The Carrier's highest appellate officer has described the subject work as:

> "Information available to me indicates that the company did purchase in place 485 feet of 7 foot high steel mesh cyclone-type fence, including two 20 foot gates and one 3 foot gate. Steel posts set in concrete were a part of the fence."

The work of constructing this fence was performed in January, 1960, and apparently 436 man hours were consumed by the contractor's forces in completing this project.

The Claimants were available and fully qualified to construct this fence and have constructed many fences of this kind in the past.

The Agreement in effect between the two parties to this dispute dated

ber 7, 1959, between railroads represented by the Eastern, Western and Southeastern Carriers Conference Committee and the Maintenance of Way in Mediation Case No. A-5987."

The Mediation Agreement of October 7, 1959 specifically provides that:

"This Article does not contain penalty provisions and it does not require that agreements must be reached as the right of the carrier to make changes in work methods or to continue existing practices subject to compliance with the collective agreement is not questioned."

As pointed out above, it is the carrier's position that the contracting of the work in question was done in accordance with the existing practices on this carrier. However, even if this had not been the practice, the contracting of this work would be a change in work method within the contemplation of Article I. Since Article I of the agreement of October 7, 1959 specifically recognizes the right of the carrier to make changes in work methods, it specifically permits the contracting of the work in question even if it had not been a continuation of the existing practices.

In the negotiations of the Mediation Agreement of October 7, 1959, particularly Article I thereof, it was definitely recognized by all concerned that "a material change in work methods" included among other things the contracting of work even if the work so contracted had previously been performed by employes of the carrier.

In this case, however, there can be no question but that it has been the practice on this property to contract similar if not identical work.

The claims in this case are not supported by the provisions of the schedule agreement between the Chicago and North Western Railway Company and the Brotherhood of Maintenance of Way Employes. In any event, even could such claims be considered to have been valid prior to the agreement of October 7, 1959, under that agreement the organization specifically recognized the right of the carrier to contract work even if that were not in accordance with the existing practices.

The claims are without merit and should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: In this case, Carrier contracted out the erection of a cyclone-type fence around the parking lot at the Ravenswood Office Building at Chicago, Illinois.

The Organization claims that the installation of this fence should have been assigned to Bridge and Building Department employes. The claim is for compensation for the total number of man hours consumed in performing the installation work.

The Carrier argues that the Scope Rule does not reserve this type of work to these employes and that they have failed to prove a past practice which grants them the exclusive right to the work. In fact, they urge that during the ten years previous to this claim, the past practice record was eight to two against the Organization. Carrier further contends that the Claimants were fully employed, and therefore not entitled to a so-called "penalty payment".

In addition to the arguments presented, we are confronted with two matters of public policy. The first of these is illustrated in Award 7060:

"The Carrier asserts that the scope rule does not and was never intended to cover work when the facility was purchased in place. We cannot agree with this assertion. If such were the interpretation to be placed on the scope rule, the Agreement could be rendered negatory by contracting in place for every building, bridge, culvert, or other installation. No such result was intended. Rule 40 specifically covers the work involved in the claim."

We are in agreement with the language used to express this theory. Where, as in Award 7060, work is specifically covered by a rule, it would be wrong to allow the Carrier to defeat that rule, by "purchasing in place".

In the instant case, we do not have a specific rule which grants to the employes concerned, the exclusive right to perform this work. Having determined that this general Scope Rule does not vest the exclusive right to this work in these employes, the accepted practice is to then look at custom, tradition, etc. The record before us does not establish a custom or tradition to support the claim of the employes. If anything positive is shown on this point, it actually appears adverse to the Claimant's position.

The Organization also alleges that the Carrier was obligated to negotiate with the Organization prior to contracting out the work. We find nothing in the Agreement which requires such action. See Awards 11581 and 12132.

The second matter of public policy which is involved, is the duty of the Carrier to operate the railroad efficiently. This is discussed in Award 10588.

Where there appears to be no restriction on the Carrier to act otherwise, we subscribe to this theory. In the present case, we feel that the Carrier had the prerogative to act as it did, and consequently we find no violation of the Agreement.

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 Employes involved in this dispute are respectively Carrier and Employes 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1965.