

Award No. 14908

Docket No. MW-14674

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE WESTERN PACIFIC RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it assigned or otherwise permitted other than B&B department employes to install a chain link fence at the Oakland Mole, Oakland, California. (Carrier's File — Case No. 7115-1962-BMWE Local Case No. 6925 Western Division.)

(2) B&B employes C. W. Bridges, S. W. Johnson, S. J. Davis, Clement J. Reilly, Sam S. Gibson, Sam Dietz and Ervie Schronen each be allowed pay at his respective straight time rate 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: On October 8, 9, 10, 11, 15, 16 and 17, 1962, the Carrier, without concurrence of or negotiation with the employes' authorized representatives, assigned or otherwise permitted employes of the Cyclone Fence Company, who do not hold any seniority under the provisions of this Agreement, to construct 1380 lineal feet of chain link fence at the Oakland Mole, Oakland, California. The fence was constructed for the purpose of preventing trespassing on the Carrier's property. The work consisted mainly of digging post holes, setting steel posts in concrete footings, attaching chain link fencing to said posts and installing four gates.

The work was of the nature and character that has heretofore been historically and traditionally assigned to and performed by employes holding seniority rights in the Bridge and Building Department.

The Claimants were available, fully qualified and could have efficiently and expediently performed the subject work had the Carrier so desired.

The outside forces consumed a total of one hundred sixty eight (168) man hours in the performance of the subject work.

Under date of October 22, 1962, claim was presented from the seven employes of Bridge and Building Gang No. 6 for 56 hours each account contractor's forces working on seven working days during the period from October 8 to 17, 1962, both dates inclusive, and copy of claim is attached as Carrier's Exhibit A.

This claim was declined by the Division Engineer, Mr. C. E. Forseth, under date of November 14, 1962, and copy of his declination is attached as Carrier's Exhibit B.

Carrier's Exhibit C is a copy of a letter from Division Chairman Nash, dated November 7, 1962, in which he submitted this claim to the Division Superintendent, Mr. L. D. Michelson.

Carrier's Exhibit D is copy of Mr. Michelson's declination of the claim, dated December 4, 1962, and addressed to Division Chairman Nash.

Carrier's Exhibit E is copy of General Chairman Ashley's appeal of the claim, dated January 15, 1963, and addressed to Carrier's highest officer designated to handle such disputes.

The claim was discussed in conference on March 13, 1963, and attached as Carrier's Exhibit F is copy of letter dated March 14, 1963, wherein Carrier's highest designated officer denied the claim.

There is an Agreement between the parties bearing an effective date of November 1, 1929 (Reprinted October 20, 1955), a copy of which is on file at your Board and hereby made a part of this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue here is whether Carrier violated the Agreement by contracting out certain work in October 1962. The facts may be summarized as follows: Following a series of small fires, and in order to protect its docking facilities at Oakland, California and prevent access by unauthorized persons, Carrier decided to have erected a chain link, unclimbable steel fence. The Carrier purchased such a fence, in place, from Cyclone Fence Company. This fence was eight feet high, about 1200 feet long, had three barbed wires on top and four gates. The cost: \$4,305.00, which sum included all necessary permits (obtained by the seller). Erection was in accordance with Oakland City ordinance specifications. Employes of the Fence Company worked on this job on October 8-11, and October 15-17, 1962. During this period members of Carrier's B&B Gang No. 6 were engaged in making repairs to various facilities in Oakland and San Francisco. No B&B employes were on furlough at the time and none of the B&B Gang No. 6 Claimants worked fewer hours than his regular assignment required.

In a situation of this kind, where the Scope Rule of the Agreement does not delineate the work covered, the right to perform certain work exclusively must be established by reference to custom, practice and tradition. Petitioner, in the case at hand, alleges that construction and maintenance of fences is work of the nature and character that has been customarily and traditionally performed by B&B Department employes. This is denied by the Carrier.

In presenting the claim on the property, Petitioner's Division Chairman H. L. Nash stated, in his November 7, 1962 Appeal, that fence-building work

"has in the past many years been assigned to and performed by employees holding seniority rights . . ." He did not refer to any specific instances. In a December 4, 1962 reply, Superintendent L. D. Michelson noted: "I have completed my investigation and, contrary to your statement, to my knowledge the work of erecting fences has never been reserved to employees under your agreement, much less employees in the B&B Department. The several 'Cyclone' fences on the property have been erected by employees of the Cyclone Fence people, not by our own employees." In appealing the December 4 denial (on January 15, 1963), Petitioner's General Chairman C. L. Ashley noted but did not comment on Mr. Michelson's statement about cyclone fences. In his final March 14, 1963 denial, Mr. W. A. Tussey, Carrier's Assistant to General Manager, stated that "Cyclone fence installations have been made in the past at several locations and the work has been performed by forces of the Cyclone Fence Company. . . . The work of building such fences on this property has never been performed, to my knowledge, by employees under your agreement." This statement was never denied on the property.

It seems apparent from the above recital that Petitioner, while presenting its claims on the property, did not produce any evidence to substantiate its allegations concerning past practice, nor did it make any effort to refute Carrier's contrary assertions. Consequently, were we to base our decision solely on the record established on the property (which would constitute correct procedure), the grievance would have to be denied for lack of proof.

However, both sides introduced some factual evidence in their Ex Parte submissions. Petitioner, for example, quoted an undated letter from six members of B&B Gang No. 6 stating that B&B forces had, at unspecified dates in the past, constructed and repaired cyclone fences (1) around the Sacramento Shops, (2) along a balloon track and road by Old Yard Office and C L Yard; (3) at Hayward Signal Maintenance Facilities; and (4) at San Jose Rip track tool and Storage Yard. (Carrier acknowledged, in response, that a second-hand fence had been erected at Hayward Ave., another fence at San Jose to enclose an area 20 ft. by 20 ft. It had no record of a fence at the Old Yard Office, and pointed out that the posts for the Sacramento Shops fence had been made from locomotive boiler tubes and clamps.)

Carrier, in turn, listed five fences in its Ex Parte Submission which, it said, had been erected by Contractors during the period 1941-1961. Three of these were at Oakland (23rd Avenue, Coach Yard, and Magnolia Street), one at San Francisco (Army Street), and one at Oroville (Marshalling Yard). The cost of these fences ranged from \$125.68 to \$11,180.05. (Petitioner did not deny the correctness of this listing, but argued that the information had not been submitted in a timely manner.)

In its Rebuttal Statement Carrier added that, in reviewing Petitioner's list of fences, it had discovered seven more installations where, between 1947 and 1952, a contractor had erected or repaired fences, four at Oakland (Diesel Zephyr Yard), and three at San Francisco (22nd & Texas Sts., 19th & Arkansas Sts., and 16th & DeHaro Sts.) The cost of these contracts ranged from \$60.00 to \$4,814.20.

Disregarding the question whether any of this factual information, submitted for the first time in Ex Parte or Rebuttal Statements, should be considered, it is apparent that the information itself fails to support Petitioner's allegation that fence construction work such as that contracted out in Octo-

ber 1962 has traditionally and customarily been performed exclusively by B&B Department forces. The claim cannot be sustained.

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

That the parties waived oral hearing;

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 evidence fails to support the allegations that the Agreement was violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of October 1966.