

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30004
Docket No. MW-29504
94-3-90-3-436

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(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 or otherwise permitted outside forces (Buck Rhoads and Sons) to construct and repair right of way fence between Mile Posts 679.50 and Mile Post 680.95, near Rawlins, Wyoming beginning April 17, 1989 and continuing (System File S-193/890663).
- (2) The Agreement was further violated when the Carrier failed to timely furnish the General Chairman with advance written notice of its intention to contract out said work.
- (3) As a consequence of the violations in Parts (1) and/or (2) above, Maintenance of Way employes N. H. Trujillo, J. Medina, A. Guardiola and D. D. Fernandez shall each be allowed pay at the B&B laborer's rate for an equal proportionate share of the total number of man-hours expended by the outside forces performing the work in Part (1) above."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

Under date of April 3, 1989, the Carrier notified the General Chairman as follows:

"As information, individuals (ranchers) will be repairing and constructing fence along the Carrier's right-of-way at various locations in the State of Wyoming. This property is leased to various individuals and outside the control of the Carrier. The work in question will be between M.P. 623 to M.P. 623.5; M.P. 679.25 to M.P. 680.75; M.P. 690 to 740; and 709.50 to 710.50.

Serving of this 'Notice' is not [to] be construed as an indication that the work described above necessarily falls with the 'scope' of your Agreement, nor as an indication that such work is necessarily reserved, as a matter of practice, to those employes represented by the BMWE."

This letter was typical of others sent at about the same time, concerning other locations where fencing work was to be performed. The work proceeded as indicated, leading to the initiation of this Claim. Among the Carrier's defenses was that the work was performed on land leased to ranchers and that the work was thus not under the Carrier's control. In its Submission, the Organization contends that the Carrier failed to provide copies of the leases allegedly supporting the Carrier's position. The Organization's Submission states:

"We submit that the Carrier's failure to present into the record a copy of the lease agreement, as requested by the General Chairman, goes to the very heart of the Carrier's defense and requires that this claim be sustained based upon the Carrier failure to prove its affirmative defense."

If the sole basis for resolution were the question of the content and nature of the lease, the Board would necessarily be required to examine this aspect in depth. More basic, however, is the question whether there are contractual restrictions on the type of work involved here, even if -- for the sake of argument -- such work was effectively under the Carrier's control.

Recent Third Division Award 28558 (where notice was given) and Third Division Award 28789 (where no notice was given), involving the same parties, are denial Awards involving the same contracting issue. As stated in Award 28558:

"In this case, Carrier has also established a long history of contracting out the construction of right-of-way fences. This work, therefore, is subject to the exception provided in Rule 52(b) [regarding prior and existing rights and practices] without regard to whether or not it is reserved exclusively to the covered employees. The Agreement was not violated."

The Board finds no basis here to conclude otherwise. The Board also notes the Organization's contention that the letter provided by the Carrier did not provide the required 15-day notice. In view of the more fundamental consideration of prior practice, the Board here, as in Award 28789, does not find this of determinative significance.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 21st day of January 1994.