

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 34148  
Docket No. MW-32550  
00-3-95-3-461**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Burlington Northern and Santa Fe Railway Company  
( former The Colorado and Southern Railway Company)

**STATEMENT OF CLAIM:**

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

- (1) The Agreement was violated when the Carrier assigned or otherwise allowed outside forces (employees of the Mock Ranch) to perform Maintenance of Way work (fence repairs) between Mile Posts 250.5 and 251 near Trinchere, Colorado on July 20 and 21, 1994 (System File CS-94-09/MWD 94-11-02AA CSR).**
- (2) The Agreement was further violated when the Carrier failed to give the General Chairman fifteen (15) days’ advance written notice of its intent to contract out the work in Part (1) above as required by Article IV of the May 17, 1968 National Agreement.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. A. A. Aragon, E. T. Torres and E. J. Mondragon shall each be allowed sixteen (16) hours’ pay at their respective straight time rates.”**

**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 Organization argues the Carrier violation of C & S Rule 3, Article IV of the 1968 National Agreement and the 1981 Letter of Understanding, wherein the Carrier contracted out fence repair without prior notification to the General Chairman. There is no dispute on the fact that the Carrier supplied fence material to the Mock Ranch and that Mock Ranch employees repaired the right-of-way fence between Mile Post 250.5 and 251 on July 20 and 21, 1994, near Trinchere, Colorado. The Organization maintains that the repair and maintenance of "right-of-way fence has always historically and customarily been performed by Claimants." It seeks compensation for Carrier's violation of the Agreement.

The Board followed the Organization's assertions throughout the on-property record, but finds no prima facie claim before us. It is the Organization's burden to establish by evidence that a violation exists. There is no record of evidence whatsoever to support assertions denied on the property. The Board carefully reviewed all Awards on point including Public Law Board No. 4402, Award 21. Each dispute stands on its own record. In Award 21, the Organization supplied numerous statements that "without exception section forces and fencing gangs have always mended right-of-way fences . . ." and ". . . it has always been our responsibility to . . . maintain right-of-way fence. . . ." There are no statements in this record of any past practice. Unlike Award 21, there is no history supported of sharing said work. Nor do the Rules coincide, as Award 21 referred to Rule 5, the Note to Rule 55, and included a seniority roster, not herein present.

In fact, the only presented evidence of record was supplied by the Carrier showing by contracts and statements that the customary assignment of said work was as herein performed. Statements indicated that "since 1972 it has always been the practice to furnish fencing material to landowners . . ." and "that the great majority of landowners would then repair or build their own fences." Additionally, the location of

the work in this dispute does not coincide, nor can it be identified as being in a similar location. A study of all contracts and letters show work performed from Mile Post 103 to Mile Post 240.7, not near Mile Post 737 as in Award 21. The Board cannot find any conditions of Public Law Board No. 4402, Award 21 that would provide support for precedent, or that the on-property record herein is supported by other Awards argued by the Organization (Third Division Awards 30976, 29547, 19899).

Accordingly, because it is the Organization's burden to first establish that it has "customarily performed" the disputed work or that it is Scope protected, before the notice to the General Chairman is required, the claim must be denied. Although Colorado State Statute requires the Carrier to protect adjoining enclosed land, there is no record of proof that Maintenance of Way employees have for years customarily performed this work. Nor does the Board find evidence that notice has ever been given over the type of fence repair disputed herein. Without such foundation, we must deny the claim for lack of proof.

**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 19th day of June, 2000.