Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37901
Docket No. MW-37189
06-3-02-3-198

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces to perform Maintenance of Way and Structures Department work (remove and install right of way fence) between Mile Posts 31.9 and 32.9 on the Zap Subdivision beginning on May 22, 2000 and continuing instead of Messrs. K. J. Kemmet, J. A. Schumacher and M. G. Sutheimer (System File T-D-2114-W/11-00-0534 BNR).

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with advance written notice of its plans to contract out said work as required by the Note to Rule 55 and Appendix Y.

(3) As a consequence of the violations referred to in Part (1) and/or (2) above, Claimants K. J. Kemmet, J. A. Schumacher and M. G. Sutheimer shall now be compensated for '...three hundred and four (304) hours pay at their respective rate of pay and that claimants each receive equal and proportionate pay to any monies spent by the outside source if any additional fence is built.'"

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.

This claim alleges that, beginning on May 22, 2000, the landowners of Cross Ranch removed approximately one mile of fencing adjacent to their property and on the Carrier's right-of-way. The landowners then installed a new fence. The work occurred on the Zap Subdivision between Mileposts 31.9 and 32.9 in North Dakota.

The Organization contends that this was scope covered work that has been customarily and traditionally performed by employee forces. Moreover, the Organization submits that the Carrier violated the Note to Rule 55 of the Agreement, which provides in pertinent part:

> ". . . In the event the Company plans to contract out work because of one of the criteria described herein, it shall notify the General Chairman of the Organization in writing as far in advance of the date of the contracting transaction as is practicable and in any event not less than fifteen (15) days prior thereto, except in 'emergency time requirements' cases."

Throughout the handling on the property, the Carrier maintained that there was no contractual arrangement with the landowners to perform the fencing work. According to the Carrier, the landowners replaced the fence at their own expense, on their own initiative, and without notice to the Carrier.

In addition, the Carrier argued that the Organization did not establish that the fence was built on the Carrier's right-of-way, nor was there evidence that the

Carrier had any legal obligations with regard to the Cross Ranch fence. In the absence of such proof, the Carrier asserts that the line of cases exemplified by Third Division Award 35634 is controlling. In that case, the Board held that the Carrier is not governed by the contracting out provisions of the Agreement where the work is unrelated to railroad operations, or where the work is undertaken at the sole expense of the other party and is for the ultimate benefit of others, or where the Carrier has no control over the work for reasons unrelated to having contracted out the work. Also see, Third Division Awards 37221 and 37227.

The Carrier also argued that the Organization failed to meet its burden of establishing that BMWE-represented employees have performed fencing work to the exclusion of others. Finally, the Carrier contended that no monetary damages to the Claimants, who were employed elsewhere at the time, resulted from the unauthorized fencing operation.

Having undertaken a complete review of the record and the precedent Awards cited by the parties, we find at the outset that the Carrier did not violate the notice requirements found in the Note to Rule 55 of the Agreement. As the language in that provision plainly specifies, advance notice is mandated when Carrier "plans" to "contract out work." In this case, there is no evidence that the Carrier planned to contract out the work in question. The Organization's contention that the Carrier knew or reasonably should have known about the fence work is merely speculative and does not support a finding that the Carrier's conduct manifested implied agreement, consent or knowledge of an action that infringed upon the Claimants' contractual rights. Absent here is any proof of an Agreement between the landowner and the Carrier or evidence of advance knowledge by the Carrier that the landowner intended to replace the fence. Because the Carrier did not plan to contract out the work, it was impossible to notify the Organization in advance.

On the merits, however, the Board has enforced a carrier's contracting out obligations even in the absence of a formal subcontracting agreement with a third party. This is based on the recognition that a carrier is ultimately financially responsible for work that is performed on its property. When a stranger to the Agreement performs work reserved by the labor contract to Maintenance of Way personnel – even when it has occurred without a carrier's knowledge or consent - a benefit has been conferred upon the carrier while at the same time a commensurate work opportunity has been removed from the carrier's employees. This form of

"unjust enrichment" has resulted in sustaining Awards. See, Third Division Awards 24621 and 25402 as well as Special Board of Adjustment No. 285, Award 10.

Applying the foregoing principles to the case at bar, the Board finds that the Organization met its evidentiary burden of proof on the issue of its entitlement to perform the fencing work on the Carrier's right-of-way. The Organization produced the track profile depicting the Carrier's right-of-way at the location where the work was performed. It also submitted signed statements from long-time employees attesting to the fact that the Cross Ranch landowners removed the Carrier's fence on the right-of-way and erected a new fence in the same location. This evidence stands unrefuted by the Carrier. Moreover, although the Carrier argued that it has no legal obligation to construct a fence if a landowner has done so, it was established that the Carrier nevertheless has a duty under North Dakota law to provide and maintain its right-of-way fences. See, Section 49-11.24. Thus, the work performed by the landowner clearly inured to the benefit of the Carrier.

In addition, the Carrier's exclusivity defense is not persuasive under the particular facts adduced on this record. Significantly, such argument has been rejected in two relatively recent fencing subcontracting disputes on this property. See, Public Law Board No. 4768, Award 25 and Public Law Board No. 4402, Award 21. Equally significant, there was considerable evidence offered by the Organization to show that BMWE-represented employees have performed this work within the scope of their Agreement. If the work was contracted out in the past, then the Carrier was obligated to provide such evidence during the on-property handling so that the Board could determine the extent and nature of the work performed. It did not do so. As the record stands, the only evidence properly before the Board is the Organization's, which sets out in considerable detail the right-of-way fencing responsibilities consistently performed by maintenance-of-way personnel.

In view of the foregoing, it is concluded that the prima facie case in support of Paragraph (1) of the Statement of Claim has not been rebutted by the Carrier and that this portion of the claim is meritorious. With regard to compensation, prior authorities have held that an award of compensation is appropriate for lost work opportunities notwithstanding that the particular claimants may have been under pay at the time of the violation. See Third Division Awards 26125, 34216, 35169, 36015 and Public Law Board No. 4768, Award 25. The claim will therefore be sustained and each Claimant shall be compensated at his respective pro rata rate of

pay for an equal proportionate share of the total hours worked by or on behalf of the Cross Ranch landowners in connection with the fence at issue on the claim dates. We note that the actual number of hours expended was not definitively verified from the record. Accordingly, the number of actual hours expended on this project is to be verified, and thereafter the Claimants shall promptly be made whole in accordance with the foregoing discussion.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of August 2006.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 37901, DOCKET MW-37189 (Referee Kenis)

The Board properly held that a rancher unilaterally built a right-of-way fence without the Carrier's knowledge. It rejected the Organization's assertions, "...that there could be no doubt that the Carrier knew Cross Ranch was replacing fence on the right of way and permitted it to do so...." The Board said, "The Organization's contention that the Carrier knew or reasonably should have known about the fence work is merely speculative and does not support a finding that the Carrier's conduct manifested implied agreement, consent or knowledge of an action that infringed upon the Claimants' contractual rights." A proper fence existed prior to this gratuitous act but the rancher decided unilaterally to tear it down and build a new one on his own property.

The case should have ended there, "Claim denied", but the Board went on to find the Carrier received "unjust enrichment" from the actions of the rancher who built a redundant fence. This required the same or greater speculation than the Board properly rejected in the previous paragraph. Nowhere is there evidence that the preexisting fence did not meet the Carrier's alleged obligations to fence out the cattle. There is no evidence about the condition of the old fence. In the absence of contrary evidence, we should be able to assume the old fence would have existed to a ripe old age. The Board has no basis to assume the old fence had existed beyond its useful life. The Board skipped over all of this and somehow concluded that the "unjust enrichment" came from state law. Obviously, the state's failure to require the construction of a new fence speaks for itself. This Board has jurisdiction to interpret the Agreement – not state law. In the real world, of course, the purpose of the fence is to save cattle, which benefits the rancher, not the Carrier. The Board accepted flimsy assertions the fence was built on Carrier property, which the Carrier denied.

The three Awards the Board relies upon for its "unjust enrichment" theory are wrong and obscure (decided in 1959, 1984 and 1985 and never followed again). The Board concluded erroneously from these obscure decisions that, "...a carrier is ultimately financially responsible for work that is performed [without its knowledge] on its property." The Organization never argued such either on the property or before the Board. It argued the Carrier had prior knowledge [which the Board rejected] and benefited from the fence, which the Carrier denied. None of the Awards use the pejorative term, "unjust enrichment." Third Division Award 24612 held the Carrier knew of the improper work in time to prevent it from being performed. Third Division Award 25402 held, "Eventually it would have utilized Claimant's services to weed-mow the two miles...." The Carrier is not a beneficiary in this case. Fences are far more maintenance free than vegetation. The Agreement does not provide that the Carrier is held liable for work that is performed for another's benefit with or without the Carrier's knowledge. As we stated in our dissent to Award 25402 (1985), the last time an Arbitrator suggested the Carrier is a guarantor, "The railroad is a transportation carrier, not an insurance carrier." In 1999, Referee Eischen said in Third Division Award 33469 that Award 25402 "blazed" a "novel path":

> Award 25402 is distinguishable from the present matter by its articulated assumption that the Carrier in that case "eventually . . . would have utilized" the Agreement-covered employees to perform the work; whereas neither evidence nor

assumption support that conclusion in the record of this case. Moreover, in all of the facts and circumstances we are not persuaded to follow Award 25402 down the novel path it has blazed in finding strict liability under a theory of an affirmative duty in [of] an Employer to stand as absolute guarantor of the Scope Rule rights of its employees under a Collective Bargaining Agreement against unauthorized and unsolicited encroachment by strangers to the Agreement. Quixotically, Award 25402 held the Carrier liable despite finding that the work on leased property had been performed without the Carrier's knowledge, inducement or authorization and despite good faith efforts by Carrier to prevent such an occurrence from happening. We must decline to follow that kind of reasoning and find greater wisdom in the overwhelming majority of Awards which have declined to hold a carrier liable in such circumstances.

The result today is that the Claimants received "unjust enrichment". We dissent.

John P. Lange

Martin W. Fingerhut

Bjarne R. Henderson

Michael C. Lesnik