Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38007
Docket No. MW-37100
06-3-01-3-677

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 Employes
(
(Burlington Northern Santa Fe (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 58 and 59 on the Zap Subdivision beginning on April 3, 2000 and continuing instead of Messrs. K. J. Kemmet, N. Damschen, S. J. Heskin, J. Schumacher and M. G. Sutheimer (System File T-D-2027-W/11-00-0371-G 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 Parts (1) and/or (2) above, Claimants K. J. Kemmet and M. G. Sutheimer shall now be compensated for one hundred three (103) hours' pay at their respective rates of pay and Claimants N. Damschen, S. J. Heskin and J. Schumacher shall each be compensated for thirty-four and three-tenths (34.3) hours' pay at their respective rates of pay."

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 is a Scope Rule dispute involving the Organization's assertions that the Carrier permitted outside forces to construct a fence on the Carrier's right-of-way. Specific thereto, the Organization asserts that the facts of this case are clear. The work of constructing fence on the Carrier's right-of-way, with respect to both the removal of old fence and the installation of new fence, is work that by Agreement belongs to BMWE-represented employees. Further, under the Note to Rule 55, such work requires advance notice. Because this work was customarily and historically performed by BMWE-represented employees and no advance notice was provided, the claim is proper and should be sustained.

The Carrier asserts that because this work is not reserved to BMWE-represented employees, notice was not required. It further asserts that the facts demonstrate that fencing is not the exclusive right of the employees. Additionally, there is no proof that the work was on the Carrier's right-of-way. Accordingly, the claim must fail because removal and installation of a fence on private land is certainly not work under the control of the Carrier or within the scope of the Agreement.

As in most Scope Rule cases, there is extensive debate, a large number of issues raised, evidence presented and Awards cited. The core issues to our decision are discussed below.

The central elements of the Organization's assertions are that the Carrier ". . . delivered material to the LeRoy Boekel property for replacement of the

fence." Additionally, the Organization argues that the property owner and two helpers not only removed and installed the fence, but also presented a bill to the Carrier for payment.

The Carrier initially contends that the work performed did not fall under the scope of the Agreement because Carrier forces have never "exclusively built fences on Carrier right-of-way." The Carrier further argues that while BMWE-represented employees may have built some fences, such work has also been contracted out in the past. The Carrier stated that "the landowner, whose land was being fenced in for his benefit, apparently performed this work." It argues that this is an excessive claim due to the fact that no employee lost pay. During the final conference on the property, the Carrier added that the fence was not constructed on the Carrier's right-of-way.

The Board studied the issue carefully and fully considered all evidence contained in the on-property. There is ample evidence that the work performed, i.e., "fencing" is work that requires advance written notice. The Board studied Rules 5D and 55Q, as well as Appendices R and Z and finds that even with mixed practice, the Carrier had to give notice. There is substantial evidence presented that there is a pay rate and position for "fence and tile gang laborer." The Organization presented many exhibits during the conference proving that fencing was previously performed by covered employees.

The record indicates that no notice was provided. The Carrier's arguments over "exclusivity" are unfounded. The Note to Rule 55 requires work that is customarily performed and customary performance has been proven in this record, as well as supported by Awards on this property (Public Law Board No. 4768, Award 25; Public Law Board No. 4402, Award 21). As stated in the former Award on this property:

> "The Organization demonstrated on the property that the work of fencing is performed by Maintenance of Way forces, not 'exclusively' but certainly with sufficient frequency to be considered 'customary.'"

The Board studied the Carrier's additional arguments and two assertions of fact must be addressed. First, the Carrier disputes its involvement and states that:

> "Contrary to your contentions, the Carrier did not contract nor pay the property owner to install this fence. This work was done by the landowner on his own.

Second, the Carrier asserted during conference that the fence was not on the Carrier's right-of-way.

As to the first assertion, there is no proof in the record that the "Carrier delivered material to the LeRoy Boekel property for replacement of the fence." Information provided by Roadmaster Yauney indicates that the Carrier was unaware of the construction, or when it began, until the claim was presented. As Yauney stated, of Boekel:

> "He built a fence line out of metal panels because his cattle were continually getting out. There was no BNSF employees and/or material used to construct this fence line. He originally requested that we build it, but he did the work himself and purchased the material himself. . . . They moved the fence line just outside of our right-of-way, it is now on his property - not BNSF owned right-of-way."

We studied the issue regarding the location on the Carrier's right-of-way, with particular attention to the letter of October 19, 2001 from Sectionman Sutheimer, including the track profile and pictures. Sutheimer states that the fence he constructed for the Carrier that was replaced by Boekel was on the Carrier's right-of-way. This evidence is in direct contravention to the Carrier's denial. It is not sufficient proof of location to document the property line was that belonging to the Carrier's right-of-way.

We are not persuaded that this dispute in facts has been proven by the Organization. The evidence is conflicting and it is the burden of the Organization to assure that if a dispute exists, it can provide substantial proof to resolve the dispute. That was not done in this case and the Board cannot resolve the dispute. We find no proof that Boekel provided a bill and was paid for any work done in relation to the fencing, or that the fence constructed was on the Carrier's property (Third Division Award 37221).

As for the failure to provide notice, there is insufficient evidence linking the Carrier to any project on its right-of-way. Such evidence would require the Carrier to provide notice of its intent to contract out fencing, but that is not the facts before the Board. There is no evidence provided by the Organization that Boekel built the fence for the Carrier, with the Carrier's knowledge or help in delivery of materials, or that it was proven with substantial evidence to have been built on the Carrier's right-of-way. Without those key facts, the lack of notice for on-going fence work by Boekel on his own land cannot require notice. The Agreement has not been violated and the claim must be denied.

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 25th day of October 2006.