Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40497
Docket No. MW-39634
10-3-NRAB-00003-060439
(06-3-439)

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(
(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 work (rebuild right of way fence) between Mile Posts 272.09 and 272.9 in the vicinity of Verona, Missouri on the Springfield Division on February 20, 21, 25, 28, March 3, 4, 5 and 6, 2003 instead of Messrs. G. Jackson and E. Fisher [System File B-1495-2/12-03-0059(MW) SLF].

(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out said work, or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces as required by Rule 99 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Jackson and E. Fisher shall now each be compensated for sixty-four (64) hours at their respective straight time 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.

The Organization contends that the Carrier violated the Agreement when it assigned rebuilding right-of-way fence between Mile Posts 272.09 and 272.9 in the vicinity of Verona, Missouri, on the Springfield Division on February 20, 21, 25, 28, March 3, 4, 5 and 6, 2003 to non-bargaining unit employees, resulting in a loss of employment opportunity for a total of 128 hours.

The Carrier contends that it gave adequate notice to the General Chairman on January 10, 2003 by specifying that:

> "As information, the Carrier forces will remove the existing right-of-way fence on the Cherokee Sub-division between Mile Post 271 and 273. The Land Owner at this location will replace the fence. It is anticipated that this work may begin as soon as February 1, 2003. The contracting of work here involved is consistent with Carrier policy and the historical practice of contracting out such work. Moreover, Carrier forces do not have the training, skills or equipment required to perform this work."

The Organization contends that there has been no historical practice of assigning fencing work to outside forces, and maintains that bargaining unit Track Sub-Department employees possessed all the training and skills to erect the fence using readily available Carrier equipment.

The basic facts underlying the instant case are largely undisputed. The Carrier used a bulldozer to clear old fencing on the right-of-way and supplied the adjacent landowner with all the posts, fencing and other material necessary to rebuild the fence. On February 20, 21, 25, 28 and March 3, 4, 5 and 6, 2003, the landowner employed two people unrelated to the bargaining unit to rebuild the fence between Mile Posts 272.09 and 272.9 where it crossed his property near Verona, Missouri. According to unrefuted evidence, the landowner's employees each expended a total of 64 hours performing the work, which the Organization contends falls squarely within the scope of work reserved for and customarily performed by bargaining unit employees.

The Organization cited a settlement letter from the Chief Engineer and the General Chairman on the St. Louis-San Francisco Railway in support of its contention that the Carrier promised not to use non-bargaining unit employees to perform this type of work. The Carrier cited Third Division Award 20640, which held that erection of fencing is not work reserved exclusively to the bargaining unit.

Applicable Missouri law requires the Carrier to fence off the right-of-way to prevent animals or persons from entering the right-of-way. The Carrier has in the past provided fencing materials to adjacent landowners so that they can reap the benefit of having the fence on their property. The equipment used by the landowners' employees to install the fencing material provided by the Carrier was readily available to bargaining unit employees, who also have the skill and ability necessary to perform the disputed work. At issue in the instant case is whether the customary performance, if not exclusive performance, of such duties is sufficient to preclude the Carrier from providing materials to landowners who then use non-bargaining unit employees to perform work within the scope of skill, ability and historic utilization of bargaining unit employees.

The Organization cited several Awards, including Public Law Board No. 4768, Award 25 and Public Law Board No. 4402, Award 27 that compel a finding in its favor. The Organization also cited an April 16, 1967 letter to the General Chairman which stated that all construction of fences should be done by Frisco forces and by the BMWE. This represents an understanding between the Organization and the Carrier that fences will be built by bargaining unit employees and that the Carrier will not provide materials to other entities, including adjacent landowners , in order to circumvent this reservation of work to the bargaining unit.

Moreover, the Carrier did not refute the Organization's contention when the matter was presented on the property. Although the Carrier contends that other railroad management did not have the power to bind the Carrier on this district, the Awards cited by the Organization are sufficient to establish a long-standing agreement between the parties that work customarily performed by the bargaining unit will be reserved to the bargaining unit unless an emergency exists or other prerequisites for contracting out described in the Note to Rule 55 and elsewhere in documents submitted in evidence have been satisfied.

The evidentiary record in the instant case established persuasively that the Carrier owned or readily could rent the equipment necessary to perform the disputed work and bargaining unit employees had the skill and ability to perform it. Simply saving money is not a justification under the Agreements in effect between the parties for assigning bargaining unit work to non-bargaining unit employees, even indirectly by donating material to landowners as an incentive for them to perform the work themselves, or to hire others to complete the work. Although it can be argued that the donation of such materials benefits both the landowner and the Carrier, and that the Carrier has not paid others to perform work that should have been done by the bargaining unit, the liability for failure to fence the right-of-way rests squarely with the Carrier. Therefore, the Carrier has the responsibility to assure that proper fencing is installed and maintained.

Carrier forces, particularly bargaining unit employees, have the first right to perform such work unless they are fully assigned elsewhere and there is an urgency in replacing missing fence in order to avert immediate liability for the Carrier. None of these prerequisite circumstances has been established in the instant case. The disputed work is of the type regularly and customarily performed by bargaining unit employees. The Organization need not demonstrate exclusivity of jurisdiction over this work. Therefore, the instant claim must be sustained. Claimants G. Jackson and E. Fisher shall each be compensated for 64 hours at their respective straight-time rates of pay.

AWARD

Claim sustained.

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 15th day of June 2010.

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 40497, DOCKET MW-39634
(Referee Brent)

The Carrier Members' Dissent is not worth the paper it is printed on nor the postage to send it out. This is true for a myriad of reasons, not the least of which is the fact that this dissent comes nearly three (3) years from the adoption of the award by the Division. Because of that alone the Carrier Members' Dissent clearly qualifies as untimely.

To understand just how wrongheaded and disingenuous is the Carrier Members' Dissent, it is helpful to review the history of the handling of this dispute. The undisputed facts are that beginning on February 20, 2003, the Carrier assigned outside forces to rebuild right of way fence between Mile Posts 272.09 and 272.9 in the vicinity of Verona, MO on the Springfield Division of the former St. Louis - San Francisco (Frisco) Railway. Said contracting was performed without having notified the General Chairman in writing in advance of the contracting transaction as required under Rule 99 of the Collective Bargaining Agreement in effect on the former St. Louis-San Francisco Railway Company property. In response to the performance of the fence work, the Organization filed the subject claim. The claim was handled in the usual manner up to and including the highest designated officer and, failing to adjust the dispute, by letter dated August 30, 2006, the Organization notified the NRAB of its intent to file an ex parte Submission. Said Notice of Intent clearly stated:

> "This is to advise that the Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference intends to file with the Third Division of the National Railroad Adjustment Board an ex parte submission in a dispute between said Brotherhood and the BNSF Railway Company (**former St. Louis-San Francisco Railway Company**), involving the unadjusted 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 work (rebuild right of way fence) between Mile Posts 272.09 and 272.9 in the vicinity of Verona, Missouri on the Springfield Division on February 20, 21, 25, 28, March 3, 4, 5 and 6, 2003 instead of Messrs. G. Jackson and E. Fisher [System File B-1495-2/12-03-0059(MW) **SLF**].

"(2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper notice of its intent to contract out said work or make a good-faith effort to reduce the incidence of subcontracting and increase the use of its Maintenance of Way forces **as required by Rule 99** and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Jackson and E. Fisher shall now each be compensated for sixty-four (64) hours at their respective straight time rates of pay.'

The Carrier has declined this claim."

Both parties filed submissions wherein each party presented its arguments and evidence in relation to the dispute under the Agreement covering the former St. Louis-San Francisco Railway Company. The case was assigned Docket No. MW-39634. The Third Division was unable to agree upon an award because of deadlock and subsequently agreed upon and selected Referee Daniel F. Brent to sit with the Division as a member thereof and make an award in accordance with Section 3 First (l) of the Railway Labor Act. On August 28, 2009, the Third Division held a Referee Hearing, at which time the parties had the opportunity to present their arguments to the Division. Labor Member Robinson, Carrier Member Reuther and Referee Brent sat as the panel designated by the Division to conduct the Referee Hearing and to consider the case in panel discussion.

After consideration of the case, on June 15, 2010, the Carrier and Labor Members of the Third Division adopted Award 40497, approximately one (1) year before my current tenure as a member thereof. All members of the Division had a full opportunity to review the proposed findings and to suggest any changes and/or corrections thereto. In an unfortunate turn of events, none of the Members of the Division – the Carrier Members signatory to the Dissent included – took note of the obvious scrivener's error wherein the Parties to Dispute erroneously referred to the former Burlington Northern Railway Company instead of the former St. Louis-San Francisco Railway Company.

Rarely is it appropriate to comment on extrinsic events within a dissent or response thereto. However, the following is informative in this instance. Representatives of the Organization have informed me that while meeting with the Carrier's General Director Labor Relations on July 27, 2010, in connection with a Public Law Board proceeding, there was conversation concerning Third Division Award 40497, including discussion of the fact that the "Statement of Claim" in the award

as issued by the Division contained an erroneous reference to the former Burlington Northern rather than the former St. Louis-San Francisco Railway Company. Carrier Member Reuther, who participated in the consideration at the Board and is signatory to the Carrier Members' Dissent, reports to that same General Director Labor Relations within the Burlington Northern Santa Fe Labor Relations Department. Consequently, there can be no doubt that the Carrier Members were aware of the scrivener's error in Award 40497 no later than July 27, 2010. However, the Carrier Members took no action and did not bring the error to the attention of the Division in order that it could be corrected. Moreover, the Carrier made the award effective as ordered without complaint to the Division. For nearly three (3) years, the Carrier and Carrier Member Reuther remained silent on the subject.

On March 18, 2013, the Carrier Members informed me that it was their intention to file a Dissent to Award 40497. First, I objected to the untimeliness of the dissent, coming so long after the award was rendered. Second, in reviewing Award 40497 to identify a possible cause for the Carrier to dissent, the above-noted scrivener's error was immediately obvious. Consequently, I proposed to the Carrier Members that we simply correct the error and issue a corrected award. There is, of course, ample precedent for issuing corrected awards correcting inadvertent errors such as the one involved here. However, the Carrier Members refused to join in issuing a corrected award. The reason for this refusal became obvious when their belated and untimely dissent was filed.

It appears from the tone and content of the Carrier Members' Dissent that their purpose is not to point to any rational basis for dissent, but merely to vilify the referee. In this connection, the reader should remember that when the inadvertent error was brought to the Division's attention, the Carrier Members refused to agree to correct the error and be done with it. Secondly, even if the error were not easily correctable, the Carrier Members' Dissent is based on a false premise of which they are well-aware. That is, awards of the NRAB are made not by the referee alone, but are made by the division to which the dispute is submitted, by majority vote of the Division. All the members participating in the adoption of an award by the Division are both jointly and separately obligated to assert good-faith efforts to ensure that an award of the Division is free from the sort of error that occurred here. That the Labor Members and Carrier Members failed to note and correct the inadvertent error about which the Carrier Members now so vociferously complain only shows that despite the good-faith efforts of all concerned in the adoption of the award, a mistake was allowed to slip by. As much as the Carrier Members attempt to impugn the reputation of the Referee in this instance, those same Carrier Members are equally responsible for the error in the award in the first instance.

Rather than to attack the Carrier Members in so personal and hyperbolic a fashion as they have done to the Referee, instead I would urge all concerned to keep in mind that the Members

of the Division, Labor, Carrier and Referee are all human and are all susceptible to the human failings such as momentary lapses of attention, as surely happened in this instance. In good faith, we can deal with such errors and continue on as reasonable people do. Where good faith is lacking, we can find results such as has now happened here: a much-belated personal attack by the Carrier Members on one (1) member of the Division while failing to acknowledge their own coextensive responsibility for the error in the award.

In reference to the substantive argument on the merits within the Carrier Members' Dissent, the Organization cited an April 16, 1967 letter to the General Chairman which stated that all construction of fences should be done by Frisco forces and by the BMWE. The Division found that this represents an understanding between the Organization and the Carrier that the Agreement requires that fences will be built by bargaining unit employees and that the Carrier will not provide materials to other entities, including adjacent landowners, in order to circumvent this reservation of work to the bargaining unit. Although the Carrier contended that the Agreement did not allow other than the Labor Relations Department to enter into binding agreements, that particular rule cited during the handling of this case is from the CBA dated August 1, 1975 – years after the April 16, 1967 letter. There was no evidence that the parties ever agreed to any provision that would have extinguished the agreement confirmed within that 1967 letter. Consequently, the Division properly found that its terms were yet binding on the parties and that the Carrier violated that Agreement when it contracted out the fence building and repair work that was the subject of the dispute.

In conclusion, the Carrier Members' Dissent with regard to the applicable CBA is entirely disingenuous. Every member of the Division knew which CBA was involved and the dispute was decided under the correct CBA. Insofar as the Carrier Members' Dissent touches on the merits of the dispute, their arguments are simply a regurgitation of the arguments that the Division considered and correctly rejected. There is no substance to the Carrier Members' Dissent and it would be best for all concerned if it were simply ignored.

The award is correct, except insofar as the inadvertent error that should have been corrected but for the Carrier Members' refusal. It stands as precedent for future disputes over contracting out under the CBA covering the former St. Louis-San Francisco Railway Company and stands as precedent.

Respectfully submitted,

Gary L. Hart
Labor Member