Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40755
Docket No. MW-41233
10-3-NRAB-00003-100043

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 outside forces to perform Maintenance of Way and Structures Department work (install steel fence) in the vicinity of Mile Post 158.5, near Blackfoot, Idaho beginning on August 1, 2008 and continuing through August 29, 2008 (System File D-0852U-218/1510297).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a proper advance written notice of its intention to contract out said work and failed to make a good-faith attempt to reach an understanding concerning said contracting as required by Rule 52 and the December 11, 1981 Letter of Understanding.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants G. Chambers, R. Olsen, R. Tilly and W. Wallace shall now each be compensated for one hundred sixty-eight (168) 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.

By letter dated April 22, 2008, the Carrier advised the Organization as follows:

> "This is a 15-day notice of our intent to contract the following work:
>
> Location: Blackfoot, Idaho
>
> Specific Work: provide all labor, equipment and materials necessary to furnish and install 8 ft Deacero fence with 16 gauge posts."

The Organization requested a conference by letter dated April 25, 2008. The parties met in conference on May 13, 2008, but were unable to resolve the Organization's objection to the Carrier's stated intent to contract the work. The subcontracted work commenced in August 2008.

In 1994, this Referee addressed the Carrier's ability to contract out fence construction work. See Third Division Award 30167, wherein the Board held:

> "The ability of this Carrier to contract out fence construction work has been upheld in Third Division Awards 29393, 28789, 28558, 30004, 30007, and 30008. Given the practice established on the property for this kind of contracting out, we cannot say that those

> Awards are palpably erroneous. In the interests of stability, those Awards shall therefore be followed. . . ."

See also, this Referee's conclusions as set forth in Third Division Awards 32860, 31034, 30165, and 30163. Aside from the Awards cited above, other Referees have reached the same result. See Third Division Awards 32350, 31649, 31227, 30469, 30221, 30219, 30202, and 30201.

The notice of the Carrier's intent to subcontract the work was adequate under Rule 52. The parties met in conference, but were unable to resolve the Organization's objection to the Carrier's intended action. There is no reason to deviate from the very long-established precedent on this property permitting the Carrier to subcontract the work in dispute.

The Organization's reliance upon Awards such as Special Board of Adjustment (Loram Rail Handling) do not change the result. The Loram Rail Handling dispute was sustained because the ". . . Carrier failed to comply with the notice and conference requirements of Rule 52, thereby violating that provision of the UP Agreement." Id. at 38. If anything, that Award supports the Carrier in this matter. Id. at 38, note 2:

> ". . . [P]roperty awards taken from the detailed listing submitted by Carrier reveal that when Carrier fails to meet its notice and conference obligations, the claim is often sustained in part on that basis. However, when Carrier meets its notice and conference obligations, its resultant contracting is often held not to violate the Agreement."

The Carrier met its notice and conference obligations in this case. Consequently, this 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 15th day of December 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40755, DOCKET MW-41233 and AWARD 40757, DOCKET MW-41235
(Referee Benn)

It is transparently clear that the decision of the Majority in Award 40755 was based entirely on prior awards without any regard for the fact that the evidence and argument in the instant case was substantially different than the evidence and argument advanced in the cases decided by those prior awards. Indeed, the Majority simply relied on prior Award 30167 stating: "In 1994, this Referee addressed the Carrier's ability to contract out fence construction work.", then denied this case without any mention, much less a discussion and analysis of the argument and evidence particular to this dispute. This may have been convenient and expedient, but it was inconsistent with the Board's obligation to consider the evidence and argument in each case.

The value of treating like cases alike is well established. However, it is equally well established that arbitration awards are not binding in subsequent cases. Rather, prior awards may provide guidance, but they must be examined not only to determine if their reasoning is sound, but also to determine if they truly involve like cases with similar facts, evidence and argument. Simply put, neither labor arbitrators in general, nor the NRAB in particular, follow the principle of issue preclusion. Indeed, no less an authority than the United States Court of Appeals for the Seventh Circuit has ruled that the principle of issue preclusion does not apply at the NRAB but, rather, each side is permitted to try again with better arguments and evidence:

> "*** When multiple grievances pending at the same time depend on resolution of a single issue, the parties often designate one of the grievances as a 'lead case' whose resolution controls the others. Such a designation would be unnecessary if the first case to be decided had preclusive effect automatically. 'Lead case' designation informs the parties that they must assemble all of their evidence and make their best arguments in a single forum; the absence of such a designation implies that the parties need not concentrate their artillery but may make investments proportional to the stakes. ***
>
> **Because this was not a 'lead case,' the Board permits each side to try again, with better arguments and evidence. It applies not principles of preclusion but an approach very much like the 'law of the case': the Board feels free to disregard an earlier decision that appears 'palpably erroneous' in light of the evidence and arguments in the second arbitration.** E.g., *Brotherhood of Maintenance of Way Employees–Burlington Northern, Inc.*, Award No. 22374 (3d Div.–Sickles 1979), at 2. **** (Emphasis in bold added) *[Bhd. of Maint. of Way Employees v. Burlington N. R.R. Co., 24 F.3d 937 (7th Cir. 1999)]*

The Majority erred in Award 40755 by blindly following prior awards even though the evidence and arguments in this case were substantially different than the evidence and arguments presented in the cases decided by those awards. Future Referees should not compound this error by blindly following Award 40755 without carefully analyzing the arguments and evidence in the cases that are before them.

The findings in Award 40755 were blindly applied in Award 40757, so this dissent applies with equal force and effect to that award.

Respectfully submitted,

Timothy W. Kreke
Labor Member