Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40817
Docket No. MW-40823
10-3-NRAB-00003-090075

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

(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago &
(North Western Transportation 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 (rebuild right of way fence) beginning at Mile Post 33.1 on the Kenosha Subdivision near North Chicago beginning on June 6, 2007 and continuing (System File B-0701C-104/1484766 CNW).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with an advance notice of its intent to contract out the aforesaid work or make a good-faith attempt to reach an understanding concerning such contracting as required by Rule 1(B) and Appendix '15'.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants R. Modrow, G. Smith, M. Kaminski and E. Vinson, III shall now each be compensated at their respective and applicable rates of pay for an equal share of the total man-hours expended by the outside forces in the performance of the aforesaid work beginning June 6, 2007 and continuing."

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 portion of Scope Rule 1(B) that is pertinent to the instant dispute reads as follows:

> "Employes included within the scope of this Agreement in the Maintenance of Way and Structures Department shall perform all work in connection with the construction, maintenance, repair and dismantling of tracks, structures and other facilities used in the operation of the Company in the performance of common carrier service on the operating property. This paragraph does not pertain to the abandonment of lines authorized by the Interstate Commerce Commission." (Emphasis added)

It was effectively undisputed in the record that the fencing in question was installed on property that was leased from the Carrier by the local municipality. The local municipality hired the contractor to install the fencing for its own purposes. Moreover, the Carrier does not own or have responsibility to maintain the fencing.

Given the text of the Scope Rule excerpted above, we must find that the fencing was not a structure or other facility used in the operation of the Carrier in the performance of common carrier service on the operating property. Accordingly, the record does not establish that the fencing work fell within the scope

of the Agreement. As a result, the Carrier did not have any obligation to provide notice concerning the fencing to the General Chairman.

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 40817, Docket MW-40823
(Referee Wallin)

This dissent is being submitted because of the Majority's unreasoned and factually incorrect finding that:

> "It was effectively undisputed in the record that the fencing in question was installed on property that was leased from the Carrier by the local municipality. ***"

The facts are that the Organization filed a claim on August 3, 2007 citing the Carrier's failure to assign Maintenance of Way employes to scope covered fence work and for the Carrier's failure to provide advance notice in connection therewith. Additionally, the claim clearly asserted:

> "... Claimants have incurred a loss of work opportunity as a direct result of the Carrier assigning outside forces of Midwest Fence Company to perform the work of fence installation **on Carrier Property** beginning at MP 33.1 on the Kenosha Subdivision near North Chicago. ***" (Emphasis added) (Employes' Exhibit "A-1")

The Carrier denied the claim in a letter dated September 27, 2007 by contending it had a right to subcontract this type of work. In this connection the Carrier denial in pertinent part stated:

> "... the Carrier has customarily and traditionally utilized contractor forces to perform the type of work disputed in this case. ***" (Employes' Exhibit "A-2")

The Carrier's first level denial answered the claim based upon an allegation that it had a right to subcontract this type of work. This was a clear implication that the Carrier contracted out the subject work. Furthermore, nowhere in the Carrier's first level denial did it imply that the fence work was allegedly performed on property leased to a third party. However, nearly six (6) months after the claim, by letter dated January 26, 2008, the Carrier denied the Organization's appeal by purporting that the land on which the fence was constructed was leased to the "local municipality".

Putting aside the obvious fact that the Carrier's defense on appeal was inapposite to its defense of the initial claim, the very next step of the grievance process was the March 19, 2008 claim conference wherein the Organization maintained that: (1) the fence work was performed on the Carrier's right of way; (2) the Carrier's lease defense was an allegation; and (3) that the Carrier did not produce a copy of the alleged lease to support this allegation. The Organization's post claims conference letter memorialized the March 19, 2008 claims conference and, in pertinent part, read:

"In conference the Brotherhood cited three points supporting our claim:

* * *

3: The fence construction in this dispute was performed by outside contractor forces on Carrier's right of way. Carrier has alleged the property involved is leased to the local city. Carrier has failed to produce a copy of the alleged lease to support this allegation." (Emphasis added) (Employes' Exhibit "A-5")

Contrary to the Majority's finding on the key issue in this case, it was not undisputed in the record that the subject work was performed on property leased to the local municipality. In fact, precisely the opposite is true - - the Organization not only disputed this fact, but expressly requested that the Carrier provide a copy of the lease to support its affirmative defense. The Carrier's failure to produce a copy of the purported lease should have resulted in a sustaining award in accordance with well-established precedent, including Third Division Awards 20895, 20945 and 21079 on this property, all of which were presented to the Neutral member.

It is transparently clear that the Majority's findings on the key factual issue in this case was not simply wrong, but glaringly and obviously wrong. While the fundamental fallacy of this award is bound to the facts of this case, that does not mean that the error was insignificant. To the contrary, decisions like this undermine the confidence of the employes that they can get a fair hearing on their disputes and shakes the very foundation of the statutory dispute resolution process.

Therefore, I must emphatically and vigorously dissent.

Respectfully submitted,

Timothy W. Kreke
Labor Member