

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42343
Docket No. MW-41189
16-3-NRAB-00003-090492**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
(Division – IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former St. Louis-San
(Francisco Railway 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 (build right of way fence) from Mile Posts 329.2 to 330.2 between Seneca, Missouri and Wyandotte, Oklahoma beginning on June 20, 2005 and continuing through July 2, 2005 [System File B-2101-6/12-05-0077(MW) SLF].**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with an advance 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 R. Wheeler, W. Greenfeather, H. Simpson and R. Bradley shall now each be compensated for eighty (80) hours at their respective straight time rates of pay and for sixteen (16) hours at their respective time and one-half 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 essential facts of this case are not in dispute. At the time of the incident leading to the claim, the Claimants were assigned to their regular positions in the Maintenance of Way and Structures Department. During the period of June 20 through July 2, 2005, the Carrier used a contractor to build right-of-way fence from Mile Post 329.2 to 330.2 between Seneca, Missouri, and Wyandotte, Oklahoma.

By letter of August 12, 2005, the Organization notified the Carrier that the Claimants' seniority was not respected when the Carrier used a contractor to perform Maintenance of Way work. Specifically, the claim stated the contractor used four men, each working 80 hours of straight time and 16 hours of overtime. The Organization alleged the Carrier violated Rules 2, 3, 4, 31, 32, 33, 42, and 99 of the August 1, 1975 Agreement. In addition, it also maintained that the Carrier ignored past practice and historical exclusivity under the May 20, 1959 letter to all Division Engineers covering fencing and an April 17, 1967 letter from the Chief Engineer of the SLSF Railway. The claim was denied by the Carrier by letter of October 5, 2005.

The Organization further appealed the Claimants' contracting out claim which continued to be denied by the Carrier. The claim was subsequently appealed, up to and including conference on the property on March 10, 2009 after which it remained in dispute.

It is the position of the Carrier that it provided notice of its intent to contract out the work per its October 5, 2004 letter. Specifically, it alleges the notice stated that the work would consist of the removal and replacement of fence on or near the right-

of-way in the area identified above beginning on or after October 21, 2004. The Carrier points to a statement provided by Roadmaster Terry Farris, which notes the owner of the property requested the Carrier to delay beginning work on this project until 2005 because he needed the use of his fields. As a result of spring rains in early 2005, the project was further delayed and consequently, the fence was not completed until July 2005. Moreover, the Carrier also disputes the Organization's claimed 384 total man hours to complete the project and draws attention to an invoice provided by the contractor indicating the work only took 53 hours.

The Carrier argues that Rule 99 of the 1975 Agreement supersedes the 1959 and 1967 letters provided by the Organization. In particular, it contends the Rule outlines the steps the Carrier must follow when contracting out work. Further, the Carrier insists that fence construction along the right-of-way is not work exclusively reserved work to BMW-represented employees. In support of its position it cites the Scope Rule.

Lastly, the Carrier asserts that the Claimants were not available to perform the work because they were already fully employed, or on voluntary types of absences. It also notes the Claimants worked overtime in addition to their regular assignments. Accordingly, the Carrier urges the denial of the claim was justified.

At the outset, the Organization argues building of right-of-way fence is Maintenance of Way work and, therefore, the Carrier violated the Agreement when it assigned a contractor to perform the work. The Organization contests the Carrier's exclusivity defense and emphasizes that an appropriate fundamental test provides that Maintenance of Way forces have traditionally, on an as needed basis, performed the work of constructing and/or maintaining right-of-way fences. In support of its position it references the May 20, 1959 letter to all Division Engineers covering fencing and an April 17, 1967 letter from the Chief Engineer of the SLSF Railway.

Moreover, the Organization insists that construction of right-of-way fence is scope-covered Maintenance of Way work. It disputes that Rule 99 does nothing in terms of removing any work from the scope of the Agreement. The Organization argues that the Rule 99 does not supersede the Parties' recognition letters from 1959 and 1967. It further notes the Rule was adopted directly out of Article IV of the 1968 National Agreement.

The Organization dismisses the Carrier's October 5, 2004 notice letter. It asserts the notice did not cover the location of the claimed work and, therefore, has no application. Further, the Organization alleges the Carrier has continued to not make any efforts to reduce subcontracting and increase the use of its Maintenance of Way forces.

The Organization also disputes the statement provided by Roadmaster Farris from an employee of the outside contractor involved on the project. It alleges the Carrier did not deny that the project involved four men plus the involvement of the landowner. In support of its position, the Organization points to statements provided by Claimants R. Wheeler and R. Bradley affirming the Organization's claim. The Organization also notes the Carrier has not provided any other documents from the remaining employees of the outside contractor.

Finally, the Organization stresses the Carrier has not provided any evidence on the record to establish that the work had to be performed on a specific date, or that it made an attempt to schedule the Claimants to perform the work. Moreover, it takes exception to the Carrier's assertion that the Claimants were fully employed or voluntarily absent during the claimed period. For these reasons, the Organization urges the claim be sustained.

The Board carefully reviewed all the evidence. The record clearly established that the Carrier provided no notice to the Organization. Specifically, we draw attention to the Carrier's October 5, 2004 notice letter regarding the Springfield Division Fence Project. Nowhere in the letter did the Carrier identify Mile Post 329.2 to 330.2 between Seneca, Missouri, and Wyandotte, Oklahoma. In addition, no further correspondence or updates were provided in the record indicating that the Carrier had provided notice to the Organization.

In light of the foregoing and under the unique circumstances of this case, we find that the Carrier was obligated to serve a notice of intent as a consequence of its decision to contract out fence construction along the right-of-way. Accordingly, the Claimants shall now each be compensated for 53 hours at their respective straight time rates of pay as appropriate for the total project hours of work it took to complete construction on the right-of-way fence performed during the period of June 20 through July 2, 2005.

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 28th day of July 2016.