

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42479
Docket No. MW-41737
16-3-NRAB-00003-110293**

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**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned outside forces (Ball Paving & Fencing) to perform Maintenance of Way work (build right of way fence) between Mile Posts 187.2 and 188.0 on the Fort Scott Subdivision on November 28, 29, December 1, 2 and 3, 2008 (System File B-2416-6/12-09-0015 SLF).**
- (2) The Agreement was further violated when the Carrier failed to provide the General Chairman with a proper 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. McElroy, M. Hyde, J. Montgomery and B. Hall shall now each be compensated for forty (40) 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 essential facts of this case are not in dispute. At the time of the incident leading to the claim, Claimants were assigned to their regular positions on Carrier's Maintenance of Way and Structures Department. By letter of July 31, 2008 the Carrier notified the Organization of its intent to utilize a contractor to perform work at culvert 187.47 on the Fort Scott Subdivision, on Line Segment 1001. It stated the contractor would bore in new steel pipes and grout fill existing structures at each location. It further noted that Carrier forces would assist as needed.

In connection with the culvert installation at mile post 187.47, the land owner requested that a fence be installed in exchange for access across his property to the job site. By letter of October 23, 2008, the Carrier notified the Organization of its intent to utilize a contractor to install approximately 3,200 linear feet of five strand barbed wire fence at the Fort Scott Subdivision in the 187 mile near Ash Grove, Missouri. The Carrier stated the Local Roadmaster was contacted but had no resources to do the work.

The Organization responded to the Carrier's letter of intent to utilize a contractor to install the barbed wire fence and stated it did not agree with that decision. The Organization requested a meeting with the Carrier to discuss the contracting situation in accordance with Rule 99(b) of the August 1, 1975 Agreement. On November 7, 2008, a conference was held and confirmed that day by letter of the Carrier that it intended to proceed with the fence project as planned.

By letter of December 18, 2008, the Organization notified the Carrier that Claimants' seniority was not respected when the Carrier used a contractor to perform Maintenance of Way work. Specifically, the claim stated that on November 28, 29, December 1, 2 and 3, 2008, the Carrier contracted with Ball Paving & Fencing the construction of fence building between MP 187.2 and 188.0 on the Fort Scott Subdivision, Springfield West Division. It noted the contractor used one bobcat, one foreman, and two trackmen working a total of 160 man hours. The Organization

alleged the Carrier violated Rules 1, 2 and 3 of the March 1, 1951 Agreement and Rules 2, 3, 4, 5, 31, 32, 33, 42, 76, 79 and 99 of the August 1, 1975 Agreement or the May 17, 1968 and the December 11, 1981 Agreements. That claim was denied by the Carrier by letter of February 10, 2009.

The Organization further appealed 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 November 17, 2010 after which it remained in dispute. Accordingly, the matter is appropriate for reference to this Board for adjudication.

At the outset, the Organization argues fence construction is Maintenance of Way work and therefore the Carrier violated the Agreement when it assigned outside work. The Organization contends 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 June 26, 1957 General Chairman letter, July 26, 1957 Amendment to Agreement, May 20, 1959 letter to all Division Engineers covering fencing, and April 17, 1967 letter from Chief Engineer of the SLSF Railway.

Moreover, the Organization insists that construction of right-of-way fence is covered by the Scope Rule of the Agreement. It disagrees 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 protests the Carrier's October 23, 2008 letter of intent. It contends the notice and questions what specific resources did the Roadmaster not have available to him. The Organization notes that the Board has previously held that manpower shortage or conditions brought about by a Carrier's failure to adequately staff its forces is not a sufficient excuse for violating the Agreement. Further, the Organization alleges that the Carrier has continued to fail to make any efforts to reduce subcontracting and increase the use of Maintenance of Way employees.

Finally, the Organization contests the Carrier's assertion that Claimants were fully employed during the claimed period. For these reasons, the Organization urges the claim be sustained.

It is the position of the Carrier that it provided notice of intent to contract out the work per its October 23, 2008 letter. The Carrier argues that the Scope Rule in the Agreement does not identify any specific tasks as being reserved to Maintenance of Way employees. It maintains the Organization has the burden of proof. Specifically, it notes the Organization must either prove that the Agreement reserves an exclusive right to the work in question or it must show by probative evidence that the work in question has been exclusively reserved by custom, practice, and tradition system-wide. In this case, the Carrier alleges the Organization has failed to do so. In support of its position, the Carrier points to Fencing Performed by Other Than MOW Forces document.

The Carrier contends that the Organization's letters do not establish exclusive or customary performance of fence construction. It insists that the 1957, 1959, and 1967 letters of General Chairman and Operating officer provided by the Organization are solely opinions and not proof of Maintenance of Way work. In particular, the Carrier argues the June 26, 1957 letter proves that others have performed the disputed work as evidence of a Special Equipment Operator (SEO). It also notes the claim is related to Foreman pay for a laborer, not for fence construction. Furthermore, the Carrier disputes the July 26, 1957 Amendment mentioning of Fence Gangs still does not provide an exclusive right to the work in question. In sum, the Carrier maintains that Rule 100 of the Agreement highlights that only agreements between the General Chairman and the Director of Labor Relations are binding upon the parties.

Moreover, the Carrier draws attention to Third Division Award 20640 in which the issue of fence construction was resolved in an arbitration on its property. It points out that the Board found that the Organization failed to prove an exclusive reservation of fence construction by custom, practice and tradition system-wide by Maintenance of Way forces.

The Carrier also disputes the Organization's assertion that manpower shortages or inadequate staffing issues validates their claim. It insists there is no evidence whatsoever that these circumstances existed.

Lastly, the Carrier asserts that Claimants were fully employed and lost no earnings during the claimed period. It notes that most Claimants worked substantial overtime in addition to their regular assignments. Accordingly, the Carrier urges the denial of the claim was justified.

The Board has reviewed all the evidence in this case. We find the Carrier was appropriate when it assigned outside forces to perform fence construction. The record clearly established that the Carrier provided notice to the Organization. Specifically, we draw attention to the Carrier's intent letter dated October 23, 2008 which provided notice 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 28th day of November 2016.