AWARD NO. 21
CASE NO. 21

PUBLIC LAW BOARD NO. 4402

PARTIES TO DISPUTE) BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
) BURLINGTON NORTHERN RAILROAD COMPANY

STATEMENT OF CLAIM

1. The Carrier violated the Agreement when it assigned outside forces to construct and repair right-of-way fence between Glendo and Guernsey, Wyoming beginning May 15, 1986 (System File #10 Gr./DMWA 86-10-28).

2. The Carrier violated the Agreement when it assigned outside forces to construct a right-of-way fence between Fort Laramie and Guernsey, Wyoming beginning June 23, 1986 (System File #10 Gr./DMWA 86-10-27A).

3. The Carrier violated the Agreement when it assigned outside forces to construct a right-of-way fence between Bayard and Bridgeport, Nebraska beginning June 23, 1986 (System File #10 Gr./DMWA 86-10-27B).

4. The Carrier violated the Agreement when it assigned outside forces to build and repair right-of-way fence from Mile Post 737 to Mile Post 745, within the Parkman, Wyoming section territory, beginning July 31, 1986 through September 29, 1986 (System File #17 Gr./DMWA 87-1-14C).

5. The Agreement was further violated when the Carrier failed to give the General Chairman timely and proper advance written notice of its plans to contract out any of the afore-described work, as stipulated in the Note to Rule 55.

6. As a consequence of Parts (1) and (5) hereof, Section Foreman R. E. Silsby and Laborer M. L. Jensen shall each be allowed eight (8) hours' pay at their respective straight time rates for each work day the outside forces performed the work described in Part (1) above, beginning May 15, 1986 and continuing.

7. As a consequence of Parts (2) and (5) hereof, Section Foreman A. R. Marez and Sectionmen M. D. Misner and H. E. Schillereff shall each be allowed pay at their respective rates for all straight time and overtime work performed by the outside forces in connection with the work described in Part (2) above, beginning June 23, 1986 and continuing.

8. As a consequence of Parts (3) and (5) hereof, Foreman D. E. Didler

and Sectionmen D. J. Neely and J. G. Sanchz shall each be allowed pay at their respective rates for all straight time and overtime work performed by the outside forces in connection with the work described in Part (3) above, beginning June 23, 1986 and continuing.

9. As a consequence of Parts (4) and (5) hereof, Section Foreman J. G. McCasland, Truck Driver R. S. Castro and Sectionmen R. E. Kobielusz and W. L. Leatherwood shall each be allowed eight (8) hours' pay at their respective straight time rates for each work day the outside forces performed the work described in Part (4) above, beginning July 31, 1986 through September 29, 1986.

OPINION OF BOARD

Four separate claims arising from the Carrier's use of outside forces to perform fence construction and/or repair have been consolidated in this dispute. All of the named Claimants hold seniority in the Carrier's Track Sub-Department of the Maintenance of Way Department.

The undisputed facts relevant to the individual claims are summarized by the following table as alleged by the Organization and discussed by the Carrier:

Date Fencing Work Commenced	Location of Work	Work Performed By	Notice Given To Organization
05/15/86	Between Glendo and Guernsey, Wyoming	Two individuals	No
06/23/86	Between Fort Laramie and Guernsey, Wyoming	P & D Service (3 employees)	No
06/23/86	Between Bayard and Bridgeport, Nebraska	Panhandle Fence Company (3 employees)	No
07/31/86	Between MP 737 and 745 within the Parkman section territory	Carrico Fencing (minimum of 4 employees)	Yes, but was received by the Organization on 08/01/86

The Organization supplied numerous statements from employees to the effect that over the years in the course of their duties, the Carrier's employees have performed fence construction and/or repair.[1] From the Carrier's perspective, its Submission at 3 sums up

[1] Portions of those statements provide: "While laboror [sic] and foreman during my 15 yr. plus on the railroad, I have build [sic] or helped repair fence at these locations ... Without exception section forces and fencing gangs have always mended right of way fences, rejuvenated old fencing, and removed and *completely built new sections of fence ... On every section crew that I have been on it has always been our* responsibility to inspect and maintain right of way fence, as well as to build new fence where needed ... On every section or gang I've been on or around it has always been the responsibility of the section crew,

the relevant facts:

> In this case there is no dispute as to the facts: Contracts were entered into between the Carrier and property owners, lessees of railroad property or fence contractors to either build or repair right-of-way fences, or in some instances provide fencing materials to property owners or lessees to build or repair fencing on Railroad or privately owned or leased premises. The history on this property has shown that Maintenance of Way Employes have shared this work when called upon with outside contractors and others.

In Award 20 of this Board, we set forth in detail the underlying rules for how we view the implications of the Note to Rule 55 and the Letter Of Agreement dated December 11, 1981 (Appendix Y). As that award relates to the issues in this dispute, we held that the Organization need not demonstrate that the work performed by outside forces had previously been "exclusively" performed by the covered employees, but the Organization must show that work was "within the scope" of the Agreement and "customarily performed" by the employees.

Applying that rationale to this case, we find the fact that the employees may not have exclusively performed fence construction and/or repair in the past does not defeat the claims. Under the Note to Rule 55, these employees "perform work in connection with the construction and maintenance or repairs of ... structures or facilities located on the right of way ..." and fence construction and/or repair clearly falls within that phrase.[2] The extent

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bullentined [sic] fence crew or a maintenance crew to build, repair and maintain the right of way fence ... [T]he responsibility of repairing fence and building new fence along the railroad right-of-way, was that of the section crew ... When I have fence to be repaired, it is and always has been the section force's, in that area, responsibility to repair the fence along the right-of-way. ... During the past ten years, the responsibility of maintaining and building right-of-way fences for the railroad has been the sections or maintenance gangs. ... I have been with the B.N. since April 9, 1976 and have done fences on the following sections ... [I]t has always been my experience to build or repair any right of way fences on the sections I have worked on. ... On all of these sections I have built or repaired right of way fences. ... I went to work May 5, 1955. Every section I worked on, we repaired, maintained or built new fence which ever was needed as part of work performed."

The Carrier does not dispute that covered employees have performed this work. *See e.g.*, the Carrier's letter of August 31, 1987 (Carrier's Exh. 7 - "It is not denied that Maintenance of Way employees have also constructed and repaired some fences ...."). *See also*, Carrier Submission at 8 [emphasis in original] ("The statements which are general in nature merely attest to the fact that the individual writing the statement performed construction, maintenance and repair of right-of-way fences at *some* time, at *some* location on the Railroad. Carrier does not deny this fact.").

2 *See also*, Rule 5, Track Sub-Department, Roster 1, Rank C governing "Fence and Tile".

and duration of the prior performance of such work by the covered employees as evidenced by the letters submitted with the claims, while not demonstrating that the employees "exclusively" performed such work, are sufficient to establish that the covered employees "customarily performed" this work.

Therefore, under the terms of the Note to Rule 55, the Carrier was obligated to give at least 15 days prior notice to the Organization of its intent to contract out the fencing work to outside forces. By failing to given any notice in three of the cases and by giving notice less than "fifteen (15) days prior thereto" in the fourth case, the Carrier violated the Note to Rule 55. Because of the reaffirmation of the notice requirements contained in the Note to Rule 55 as found in Appendix Y, that provision has also been violated.

With respect to the reasons for contracting out the work at issue, the Note to Rule 55 is specific. The Carrier can contract out work customarily performed by covered employees "provided that special skills not possessed by the Company's employes, special equipment not owned by the Company, or special material available only when applied or installed through supplier, are required; or when work is such that the Company is not adequately equipped to handle the work, or when emergency time requirements exist which present undertakings not contemplated by the Agreement and beyond the capacity of the Company's forces." No evidence in this record demonstrates that the reasons for contracting out the fence construction and/or repair work fell within those stated exceptions. Therefore, we also conclude that by contracting out the fence construction and/or repair work, the Carrier violated the Agreement.

The Carrier's arguments do not change the result. First, Third Division Award 10937 did not address the language found in the Note to Rule 55 concerning the applicability of the contracting out limitations to work "customarily performed" rather than "exclusively performed" and that award issued in 1962 - long before the language

determinative of this dispute was negotiated by the parties.[3] Therefore, the doctrine of *res judicata* urged by the Carrier cannot apply when subsequent to the issuance of Award 10937 the parties negotiated language that ran contrary to the exclusivity principle relied upon in that award that the Carrier asserts is determinative of this dispute.

Second, the result of PLB 2206, Award 8 is not persuasive. That award is consistent with the Carrier's position that exclusivity must be demonstrated in these types of cases. In Award 20 of this Board we stated that we were aware of the split in authority on the question of whether the doctrine of exclusivity applies to contracting disputes under the Note to Rule 55. We stated at footnote 2:

> We recognize that there is a split in authority on this question and that awards exist requiring a demonstration of exclusivity. However, we believe that the basic principle of contract construction discussed above concerning manifestation of intent through the clear language of "customarily" rather than "exclusively" along with the rationale of those awards that do not adopt the exclusivity requirement are the better reasoned approaches to this question.

The rationale of PLB 2206, Award 8 and those awards of a similar result effectively reads the language "customarily performed" out of Note to Rule 55 and replaces that language with "exclusively performed". It is not our function to change the language of the parties' carefully negotiated Agreement. Therefore, we cannot agree to apply the rationale of PLB 2206, Award 8 to this case.[4]

In reaching this conclusion, this Board, and particularly this neutral member, is most cognizant of the effect that differing awards can have on parties to a collective bargaining relationship. Simply stated, opposite results from different referees can lead to chaos because the parties are without guidance as to how to order their actions under their agreements. Often, although a referee might have reached a different conclusion on an

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3 *See* Carrier Submission at 10 ("... Rule 55, and Appendix Y (said rules cited in support of Organization's position) ... were entered into with both parties in execution of the present Schedule Agreement dated June 16, 1982 ....").

4 Third Division Award 24853, involving a different carrier, is not persuasive for the same reasons.

issue had that referee had the opportunity to address the question in the first instance, in order to promote stability in the relationship and preserve the finality of prior awards, the correct decision is to defer to a previously decided case which goes contrary to the referee's own thinking on the subject. That deferral is appropriate - indeed, required - because the prior decision is the prevailing precedent on the property and that deferral must be made so long as that prior decision is not clearly erroneous. But, that line of thought is not applicable on this issue between these parties. The split in authority on the Organization's need to demonstrate exclusivity exists between these parties. Compare PLB 2206, Award 8, *supra*, holding that exclusivity must be shown with the awards discussed in this Board's Award 20 at 4-6 [footnote omitted]:

> Third, we disagree with the Carrier that in order to demonstrate a violation of the contracting provisions in the Note to Rule 55 and the December 11, 1981 letter that the Organization must show that work that has been contracted out has been previously performed exclusively by the covered employees. The negotiated language governs work "which is *customarily* performed by the employees" - not work that is "exclusively" performed [emphasis added]. The analysis on this question is similar to the resolution of the Organization's arguments concerning the notification requirements. Had these sophisticated negotiators intended that these disputes were to be governed by the exclusivity doctrine, they could have easily said so. *See e.g.*, Third Division Award 20633 between the parties (quoting Third Division Award 20338) "'... Additionally, we observe that the Note to Rule 55 specifically alludes to work which is *customarily* performed by the employes rather than the frequently argued doctrine involving work *exclusively* performed.'" [emphasis in original]); PLB 4370 Award 21, quoting Third Division Award 24280 ("... [T]he Organization need not meet the burden of exclusivity of work assignment ...."). Of particular interest is PLB 4768, Award 1 and awards cited therein, which, although discussed in a notice context, makes the correct analysis [emphasis in original]:
>
> > ...[T]he Board takes guidance from Awards which distinguish "customarily performed" from "exclusively". Citation of only a few of these will suffice.
> >
> > Third Division Award No. 26174 (Gold) states:
> >
> > ... While there may be a valid disagreement as to whether the work at issue was exclusively reserved to those employes, there can be no dispute

that it was customarily performed by Claimants.

* * *

Third Division Award No. 27012 (Marx) states as follows:

> The Board finds that the Carrier's insistence on an exclusivity test is not will founded. Such may be the critical point in other disputes, such as determining which class or craft of the Carrier's employees may be entitled to perform certain work. Here, however, a different test is applied. The Carrier is obliged to make notification where work to be contracted out is "within the scope" of the Organization's Agreement. There is no serious contention that brush cutting work is not properly performed by Maintenance of Way employes, even if not at all locations or to the exclusion of other employees. ...
>
> Therefore, we find that the Organization need not demonstrate exclusivity to prevail under the Note to Rule 55 and the December 11, 1981 letter. The exclusivity principle is for analysis of disputes determining which class or craft of the Carrier's employees are entitled to perform work and is not relevant to contracting out disputes. The Organization must, however, demonstrate that the employees have "customarily performed" the work at issue.

Therefore, given that between these parties there is a decisive split of authority on the question of whether or not the Organization must demonstrate exclusivity in these contracting out cases, this Board is not required to defer to prior awards which hold on either side of the question, but we must decide which line of authority is the better reasoned. For reasons set forth in this award and in Award 20 of this Board, we agree with the Organization that those awards finding that exclusivity need not be demonstrated are the awards that appropriately analyze the questions on this issue.

Third, the fact that the Carrier may have entered into lease arrangements with individuals that require those individuals to keep fences in good repair (e.g., Carrier Exh. 7(a), p. 1 - "Lessee agrees to keep in good condition and repair any and all necessary and lawful fences which may be required around said demised premises ...."), or that contracts have been made having strangers to the Agreement perform that function also cannot

change the result. The Organization was not party to those arrangements or contracts and the only relevant concern before us is the parties' negotiated language which obligates the Carrier to limit contracting in accord with the terms of the Note to Rule 55 and Appendix Y.

The question now becomes how to remedy the proven violations of the Agreement? Several factors stand out to dictate that no affirmative monetary relief can be awarded in this case. Initially, from what we can discern, this is the first series of claims by the Organization concerning the Carrier's use of outside forces to perform fence construction and/or repair under the language in the Note to Rule 55 and Appendix Y. While we have found that the Carrier's main exclusivity argument is not compatible with the language in the Note to Rule 55 and Appendix Y, we note that the Carrier has established that the actions complained of by the Organization in these claims have gone on for some time, even after the applicable language at issue became effective, without objection by the Organization.[5] While the Organization's inaction in this regard does not change the clear language of the Agreement or the Carrier's obligations under that language, we believe that the Organization's prior lack of protest can be considered in determining the appropriate remedy for demonstrated violations of the Agreement in this case. Further, the Carrier has operated under the rationale of previously decided awards requiring a showing of exclusivity. *See* PLB 2206, Award 8, *supra.* Weighing those factors in this case against the demonstrated violations of the Agreement, we therefore decline to impose affirmative monetary relief in this particular case.[6]

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5 *See* Carrier's Exh. 7 (Carrier's August 31, 1987 letter) which states "Further, in this regard, attached are copies of several lease contracts, statements, and invoices wherein the Carrier has contracted this work over the years with no objection from your Organization until the instant claims were filed." *See also*, Carrier's Exh. 7(f):

> We then made a practical deal in where we supplied the fence materials and paid a fair labor price to have the fence repaired.
> This type of negotiated practice is well established with land owners or their leasors [sic] adjacent to our right of way. They are more satisfied doing it this way and it is less expensive.

6 In light of the above, it is therefore unnecessary to address in this case the impact of the fact that Claimants were employed during the time the outside forces performed the disputed work.

AWARD

Claim sustained as set forth in the Opinion. No affirmative monetary relief shall be required.

Edwin H. Benn
Neutral Member

E.J. Kallinen
Carrier Member (Written Dissent attached)

P. S. Swanson
Organization Member

Denver, Colorado
March 11, 1991

DISSENT TO AWARD 21 OF PUBLIC LAW BOARD NO. 4402

This Award vividly illustrates the unfortunate consequences which flow from the analytical errors pointed out in our Concurrence to Award 20 of this Board.

First of all, the term "railroad right-of-way fence" to describe the work involved in this dispute, is a misnomer, because such fences are not intended in any way to fence in the right-of-way or to protect railroad property from trespass. Obviously, such fences could not perform that function, because they are not continuous. In fact, none of these fences would be built at all if it were not for state laws which, while not identical, generally require that the railroad bear the burden of providing a fence along the property line, if the adjoining landowner fences the other three sides of his property. Even the type of fencing is governed by the type of fence erected by the adjoining landowner, as for example, under the Iowa statute a "hog-tight" fence must be provided if the adjoining landowner erects such a fence on three sides of his property. Therefore, these fences are for the sole purpose of fencing in the crops and livestock of the adjoining landowner, and erection and repair of the fences fall outside of the work covered by the NOTE to Rule 55, which is confined to ". . tracks, structures or facilities located on the right of way and used in the operation of the Company in the performance of common carrier service . ." Unfortunately, this aspect of the case was not fully developed in the Carrier's presentation to the Board, and we bring it up here primarily to call to the attention of persons dealing with future claims, that this award does not deal with the fundamental "scope" issue involved in right-of-way fence work.

With respect to those issues which were fully presented to the Board, there does not appear to be any dispute as to the facts. As the Award describes, the BMWE presented certain employee statements to the effect that they had built or repaired some right-of-way fences, sometimes, and those facts were admitted by the Carrier. However, none of the BMWE's evidence established that BMWE-represented employees had performed any significant proportion of the right-of-way fence work, not to mention exclusively. In fact, the record included conclusive evidence to the contrary, in the form of Third Division NRAB Award 10937, a decision issued in 1962 involving the same geographic area as the claims in the instant case, which trackage was then located on the former Chicago, Burlington & Quincy Railroad. The Third Division made the following

observation in holding that maintenance of way employees had no claim to right-of-way fence work:

> "That during that entire period (from 1922 through 1957), Carrier has contracted out the major portion of construction of right-of-way fence and during that period no claims have been progressed against the Carrier by Employees of the Maintenance of Way Department."

Can there be better evidence of what has, and has not been "customarily performed" than the Organization's failure, over decades, to object to the contracting out of "the major portion of construction of right-of-way fence?" Nevertheless, Award 21 of this Board rejects both the evidence of past practice and the holding of Third Division Award 10937, on the incorrect assumption that the existing language of the NOTE to Rule 55 has eliminated the exclusivity principle. However, the Board also ignored the implications of even its own statement on page 8, that recognizes such practices as having continued after the alleged change in agreement language:

> ". . we note that the Carrier has established that the actions complained of by the Organization in these claims have gone on for some time, even after the applicable language at issue became effective without objection by the Organization."

Should not the Organization's "prior lack of protest" have been a warning that "the clear language of the Agreement" was not quite so uncomplicated and unambiguous?. The Board's treatment of the parties' respective evidentiary showings is troubling because a minimal production of practice evidence was considered sufficient to establish that the covered employees "customarily performed" this work. More damaging, however, is the proposition that, because BMWE-represented forces had "customarily performed" some small part of this work, they thereby have by some unexplained process acquired rights to "customarily perform" all of it, and that, as a consequence, none of it could, now or hereafter, be contracted unless notice is served and one of the criteria for contracting is demonstrated. This turns the parties' own practices, which should be the best evidence of what has indeed been "customarily performed," on their head.

The Board seems to be of the impression that the parties' 1982 Agreement had added some new language on the matter of contracting. This is wrong. Instead, the Organization has, over the years, elected to retain the 1952 NP agreement, without any

changes of consequence, throughout the rest of the Fifties and Sixties; and then in preference to Article IV of the May 17, 1968 National Agreement; and then in the Agreement effective May 1, 1971 (which came after the merger that created BN, including both the NP and the CB&Q); and then in the most recent Agreement, reached in 1982, which came after the 1968 National Agreement and the 1981 Hopkins-Berge letter and the Awards of PL Board No. 2206, among others. Thus, by repudiating Awards which have been the governing authority as to the meaning of this unchanged contractual language for upwards of a dozen years, this Board is electing to "remedy" a situation that the parties themselves chose not to remedy when the 1982 Agreement was reached.

Where there is a genuine split of authority in the Awards, each arbitrator is necessarily left to determine which line of authority is, in his or her own view, the better reasoned. But here, the split seems a recent discovery, deriving solely from Award 1 of PL 4768, and Award 20 of this Board, while ignoring a uniform, unbroken pattern of earlier Awards from a variety of well-regarded neutrals. There had been no split whatsoever for well over a decade before the issuance of these most recent Awards Of the Awards cited in the quotation of pages 6-7 of this Award, 3-24280, 3-26174 and 3-27012 are all from foreign carriers with different contracting agreements; Award 21 of PL 4370 is from another segment of BN that is a party to its own, distinct BMWE agreement and not the 1982 Agreement or the 1952 NP agreement; and 3-20633 and 3-20338 have been addressed at page 4 of our Concurrence to Award 20. This is a thin foundation upon which to divine a supposed split of authority on this carrier, under this Agreement.

While perhaps minor, there other troubling matters in Award 21. The Board's description of the lease arrangements overlooks the significant and pertinent principle that BN-BMWE agreements do not extend to others--they cannot control actions on land over which we have no ownership or control. Also, the Board finds significant the listing of "fence and tile" in the seniority roster rule. That listing is a holdover from Supplement No. 8 to General Order 27 of the Director General of Railroads issued on September 1, 1918, during World War I, and such listings have been recognized as meaningless in innumerable awards.

We must respectfully dissent.

Eino J. Kallinen

Eino J. Kallinen, Carrier Member