NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT NO. 1048

JOHN C. FLETCHER, CHAIRMAN & NEUTRAL MEMBER
E. N. JACOBS, JR., CARRIER MEMBER
RICHARD A. LAU, ORGANIZATION MEMBER

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

NORFOLK WESTERN RAILWAY COMPANY

Award No. 68
Case No. 68

Date of Hearing - August 1, 1997
Date of Award - January 26, 1998

Statement of Claim:

1. The Agreement was violated when the Carrier assigned outside forces (Barnett Construction Company of Ringgold, Virginia) to construct a right-of-way fence between Mile Posts 134.3 and 134.7 on July 26 and 27, 1994. (Carrier's File MW-ROAN-94-47.)

2. The Agreement was further violated when the Carrier failed to hold a conference when requested by the General Chairman in accordance with Article IV of the May 17, 1968 National Agreement (Appendix F) and the December 11, 1981 Letter of Agreement.

3. As a consequence of the violations referred to in Parts (1) and/or (2) above, Track Sub-department employees M. F. Tomlin, W. E. Agnor, G. A. Coleman, J. P. Mohler, M. A. Cochran, O. T. Claytor and R. P. Taylor, shall each be allowed an equal proportionate share of pay at the respective rates for all hours expended by the outside forces.

FINDINGS:

Special Board of Adjustment No. 1048, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

On May 23, 1994, Carrier notified the Organization that it intended to utilize the services of outside contractors to install fences at various right-of-way locations on its Virginia Division. On June 1, 1994, the Organization responded to Carrier's May 23, 1994 letter contending that the work associated with right-of-way fencing was work falling within the scope of its Agreement. It noted that Maintenance of Way Fencing Gangs have been doing this work since 1911. It stated that it objected to having the work performed by an outside contractor, and it asked that the matter be discussed in conference.

Carrier never scheduled the requested conference. Instead, it proceeded to have contractors perform the work. On July 26 and 27, 1994, Carrier utilized the services of Barnett Construction Company, Ringgold, Virginia to construct right-of-way fences between Mile Posts 134.3 and 134.7. This event triggered the filing of the claim under review here on September 13, 1994. Carrier responded to the claim on October 25, 1994, noting:

> The construction of right-or-way fence is not work for the purpose of operating or maintaining the railroad. The construction of such fences only serves to eliminate the railway's liability with regard to livestock pastured on land contiguous with operation of trains.
>
> The claimants were fully employed and performed work consistent with their assigned positions on the dates claimed and were not monetarily damaged. Therefore, no basis for a monetary claim exists. There has been no violation of Rule Appendix F, the December 11, 1981, letter of understanding, or any other rule of the current MW agreement; and this claim is denied in its entirety.

On Appeal to Carrier's Labor Relations Department the claim was again denied. In that denial Carrier noted that determinations as to when a right-of-way fence was to be built or repaired is made by the landowner independent of any Carrier considerations. As such the work does not fall within the scope of the Maintenance of Way Agreement. Carrier also listed fifteen examples of instances where fence building or repairs had been accomplished by outside forces between 1983 and 1987.

After review of all of the evidence in this record the Board concludes that building and repair of fencing on Carrier's right-or-way has been a fundamental element of Maintenance of Way work for a considerable period of time. Even though it may not have been exclusively performed in all instances by Maintenance of Way forces in the past, the work has been a frequent and customary activity of such forces with considerable regularity since at least 1911. And the notion expressed in Carrier's October 25, 1994 denial as to the purpose of such fences, as well as the comment in its February 28, 1995 denial as to determinations made with respect to rebuilding or repair of such fences, do not remove the work involved from the scope of the Agreement, when the fence is located on Carrier right-of-way.

Previously this Board has had the opportunity to consider "contracting out arguments" similar to those advanced by both the Organization and Carrier in this case. One such instance was our Award 21 (Revised), dated September 4, 1992. In that award the Board was concerned with a claim involving cleaning of hopper cars at Princeton, West Virginia. Specifically, Carrier argued there, as it does here, that the work in question was not covered by the scope rule, that the practice on the property did not reserve this work exclusively to Maintenance of Way employees, and that the Claimants were fully employed. The first two arguments were rejected because the work was, by an extended practice, placed within the scope of the Agreement. Therefore, before Carrier had the right to use an outside contractor it had an obligation to give the required contracting out notice to the Organization and engage in good faith discussions, as required by the December 11, 1981 Letter Agreement. Award 21 (Revised) is not found to be in error, and it will be followed here with respect to the determination as to the requirement that notice and meaningful negotiation occur before any fencing may be contracted to outsiders.

Furthermore, and of critical importance, in Award 21 (Revised) this Board stated that:

> We would repeat to the Carrier the advice which was proffered by 3rd Division, N.R.A.B. Award 19574 to the effect that "calculated violation of the contract, such as in this case, cannot lead to a constructive relationship between the parties." We would add that continued failure to abide by the terms of Appendix "F" and repeated instances of ignoring the provisions and conditions of nationally negotiated Letters of Agreement such as the December 11, 1981 Letter of Agreement, will surely generate additional decisions such as found in 3rd Division N.R.A.B. Award Nos. 28513, 26770, and 27189.

Award 21 (Revised) was re-issued on September 4, 1992, approximately twenty months before the instant contracting incident commenced. Carrier had ample notice that it was not privileged to continue to ignore the bargain it made with respect to notice and meaningful negotiation when it proposes to undertake the contracting out of maintenance of way work that by practice was usually performed by employees working under the Organizations Agreement. Carrier was also placed on notice that the work need not be exclusively that of Maintenance of Way forces to require notice and negotiation if it was the intent to have it performed by contractors. Yet in this instance the teachings and advice of Award 21 (Revised) and Third Division Awards 289513, 26770, and 27189 were ignored.

It would serve no purpose then to merely "slap carriers wrists" as was done in Award 21 (Revised), and fail to award compensation to members of the Maintenance of Way Craft that lost a work opportunity when the fencing work was contracted out and the procedures agreed to be followed in such matters were not followed. Accordingly, we will order that the Claimants be compensated for the lost work opportunities, as it is apparent in this record that Carrier is ignored the requirements of the Agreement on notice and negation.

A W A R D

Claim sustained.

O R D E R

Carrier is directed to make all payments necessary within thirty days of the date indicated below.

See Attached Dissent.

John C. Fletcher, Chairman & Neutral Member

E. N. Jacobs, Jr., Carrier Member

Richard A. Lau, Employee Member

Dated at Mt. Prospect, Illinois., January 26, 1998

CARRIER MEMBER'S DISSENT
TO
AWARD NO. 68 OF SPECIAL BOARD OF ADJUSTMENT NO. 1048
Referee Fletcher

We concur with the determination of the Board in this case that the evidence introduced in the record shows fence building or repairs have been accomplished by outside forces in the past. We also concur with the determination that the record adequately demonstrated the requirement that notice and discussion in conference per the applicable agreements must occur before fencing work is contracted to outsiders. We have so handled such matters for years and did so in this case.

We vigorously dissent to the conclusion that, after serving an appropriate notice, we ignored in a cavalier manner our obligations to discuss these matters in conference. The Organization presented no substantive evidence in support of this hypothesis, which on its face is incongruent. It is a fact that this scenario is not accurate. On this record we dissent to this Board's conclusion that Carrier did not follow the procedures in such matters and the decision to reward claimants because the Carrier purportedly ignored the agreement requirements on notice and discussion.

E. N. Jacobs, Jr.
E. N. Jacobs, Jr
Carrier Member
SBA 1048