

The Second Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

Parties to Dispute: (System Federation No. 2, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Carmen)
(
(Missouri Pacific Railroad Company

Dispute: Claim of Employees:

1. That the Missouri Pacific Railroad Company violated the controlling agreement, particularly Rule 117, when employes from McCormick Painting Company were assigned to perform carmen painters' work in the Annual House and Diesel Ramp Facilities, North Little Rock, Arkansas, on December 30-31, 1974 and January 2-3-6-7-8-9, 1975.
2. That accordingly, the Missouri Pacific Railroad Company be ordered to compensate Carmen Painters W. A. Williams, H. W. Palmer and F. Hood in the amount of seventy hours (70') each at the pro rata rate covering period December 30-31, 1974 and January 2-3-6-7-8-9, 1975, as they were available to perform this carmen painters' work.

Findings:

The Second 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 waived right of appearance at hearing thereon.

On December 30 and 31, 1974, and on January 2, 3, 6, 7, 8 and 9, 1975, painters of the McCormick Painting Company were used to paint the overhead cranes, jacks and electrical switch and fuse boxes in the Annual House and the Diesel Ramp facilities at the Carrier's Pike Avenue Shops located in North Little Rock, Arkansas. The Organization contends that the work given to the outside painters was Carmen's work under Rule 117 and contends that the work has always been performed by Carmen Painters. The Carrier contends that the dispute is barred by the time limit rules; must be denied for a complete failure of proof on the question of past practice; or must be dismissed for lack of jurisdiction for failure to follow the procedures for resolving disputes on "subcontracting" under Article II of the September 25, 1964 Agreement.

Concerning the Carrier's contention that the failure of the Organization to progress the claim concerning B & B employes painting the overhead crane in the Blacksmith Shop should serve as a basis to preclude the instant claim: the Organization contends that this is nonsense. We find the Carrier's position to be erroneous.

The Carmen's Classification of Work Rule states in pertinent part as set forth by Mr. J. D. Hicks in his letter of February 10, 1975:

"Rule 117 ...; painting with brushes, varnishing, surfacing, decorating, lettering, cutting of stencils and removing painting; ... and all other work generally recognized as painter's work" (Carrier's Exhibit 3).

In Employees' Exhibit A, it is stated:

"It has been long understood that the painting of the overhead cranes, jacks, all electrical switch boxes and electrical fuse boxes has been work of the Carmen Painters and we have performed this work for almost thirty (30) years."

The Organization submits the following statement signed by four Carmen Painters as evidence:

"The overhead cranes in the North Little Rock shop have always been painted by Carmen Painters.

We have on different occasions painted these cranes during our tour of duty. At no time has this painting ever been done by any other craft.

This is for your information and use in returning this work to its proper craft." (Employees Exhibit "I-1")

The Organization submits a statement from Carman Painter B. W. Wigginton which states:

"J. D. Hicks

This is for your information and use.

After reading Terminal Master Mechanic, A. J. Daniel's letter of March 31, 1975, I wish to make the following statement concerning the Painting of the overhead cranes in the Pike Avenue shop complex.

"The Carmen Painters have always painted the overhead cranes in the Pike Avenue Shop complex. I painted the overhead cranes in 1950 and in 1960. In 1966, I also painted the overhead cranes in the shop complex and the B&B employes operated a so-called crane or cherry picker to lift us (C. O. Clark and myself) to paint the cranes. The B&B employes did not paint the overhead cranes at this or any other time.

Since 1946 when I was hired by the Missouri Pacific Railroad, I know of no time that the B&B employes have ever painted the overhead cranes in the Pike Avenue Shop complex." (Employes Exhibit "M")

Rule 117, the Classification of Work Rule, quoted in part above, does not set forth the work of painting overhead cranes as being that of Carmen Painters. The Organization states in Employes' Exhibit A, set forth above, that Carmen Painters "have performed this work for almost thirty (30) years". The Organization, it would appear, is relying on "the all other work generally recognized as painters work" language of Rule 117 as Agreement support for its contentions before this Board. It is well settled that in order to establish exclusive rights to work not otherwise expressly reserved to the Organization, the Organization must prove the work belongs to them by past practice on a system-wide basis. The statements made in Employes Exhibit "I-1", and "M" relate only to the local practice and do not prove the requisite system-wide practice. Further, the Carrier disagrees with the statements of the Employes as follows:

"We acknowledge receipt of the statements pertaining to the work in question, but must disagree with the statement of Carman Painter Wigginton implying that painting of the overhead cranes has been done only by Carmen. We have been informed that B & B employes, for example, painted the crane in the Electric Shop in 1972, and in the demount house in 1973....." (Carrier's Exhibit 12)

It is well settled that this Board does not resolve conflicts in evidence. Yet in this case, since the Organization offers no evidence of a system-wide practice, the Organization's case based on the practice of the parties under Rule 117 must fail.

Argument was made before the Board that all painting of tools and equipment in the Locomotive and Car Departments belong to the Carmen Painters (Organization's Brief, pp. 3, 4, 5 and 6) Carrier contended on the property as follows:

"Nowhere in Rule 117 are Carmen assigned the painting of buildings or appurtenances thereto. As the jacks, switch boxes and fuse boxes are affixed to walls, they are not moveable and constitute appurtenances to any building in which they are found. The overhead cranes are appurtenances inasmuch as they are confined to operation upon a beam or rail which is an integral part of the building in which it is located. Furthermore, the crane itself is not portable because of its size. This work would have been assigned to B & B employees who usually paint buildings and appurtenances had they been available." (Carrier's Exhibit No. 12)

The Carrier thus contends that the items painted were "building and appurtenances" not tools and equipment. The major contention of the parties as handled on the property and its Submission to this Board and the evidence submitted to the Board dealt with the practice of the parties, i.e., the statements of Employees Exhibit "I-1 and 2" and Exhibit "M" and the Carrier's contrary statement (Carrier Exhibit 12). The ascertions on the overhead crane being part of the "building and appurtenances" was made by the Carrier on the property (Carrier Exhibit 12) and in its Submission to the Board (Carrier's Sub., p. 12). No proof that the overhead crane was "a tool or equipment" (Organization's Brief, p. 5) was offered by the Organization on the property or in its Submission to the Board. While the Organization argues to the contrary in its Rebuttal p. 12, it is insufficient to satisfy the burden of proof, which is on the Organization. We find only that the Organization has failed to satisfy its burden of proof in view of counterveiling factors which are: (1) it is uncontested that the rails are attached to the top of the walls of the shop and are permanently part of the building (Employees Rebuttal, p. 12), 2) the crane itself is not portable because of its size (Carrier's Exhibit 12), 3) the past assignment of the painting of overhead cranes on the property to B & B employees in the Electric Shop in 1972, in the demount house in 1973 (Carrier's Exhibit 12) and in the Blacksmith's Shop on dates in July and August 1974 (Carrier's Exhibit 2); the Carrier has contended throughout the handling of this case that assignments made to B & B employees to paint the overhead cranes was based on the theory of such cranes being "building and appurtenances". The matter should have been handled by the Organization on the property and in its Submission to the Board with evidence and proofs on the technical aspects of the overhead crane and the manner in which it is attached to the buildings. Assertions alone, at the rebuttal stage of the processing of the case, is not sufficient to sustain its burden of proof.

Since the Organization has not met its burden of proving an exclusive right to the work in question, we must deny this claim.

Form 1
Page 5

Award No. 7295
Docket No. 7150
2-MP-CM-'77

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 29th day of April, 1977.

