

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Wiley W. Mills, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FLORIDA EAST COAST RAILWAY

STATEMENT OF CLAIM: "Claim of Committee of Employees, first; that the Carrier violated current agreement by contracting the work of painting of certain of its buildings at Miami, Florida, and West Palm Beach, Florida. Second: that Painter Foreman W. T. Morelock be paid for 34 days at Painter Foreman's rate of pay, and that Painter J. J. Walker be paid for 34 days at painter's rate of pay, the number of days engaged by the contractor in the performance of this work."

EMPLOYEES' STATEMENT OF FACTS: "Beginning November 28, 1938, and continuing through the month of December, the carrier painted certain of its station buildings at Miami and West Palm Beach, Florida. This painting was let to contractors, and performed by men having no seniority rights on the Railroad. There were two contractors engaged; one at Miami and one at West Palm Beach. The contractor painting the buildings at Miami worked six men 22 days; the contractor painting buildings at West Palm Beach worked four men 12 days; the combined time of the two contractors being 34 days. While this paint work was being performed by outsiders, Maintenance of Way painters holding seniority rights on the Railroad were laying off losing time on account of force reduction.

"The Agreement, effective April 12, 1932, copies of which are on file with this Board, is by reference made a part of this Statement of Facts."

POSITION OF EMPLOYEES: "Rules 1 and 4 of Agreement in effect between the Carrier and the Brotherhood, read:

'SCOPE

Rule 1. Rules, working conditions and rates of pay contained herein apply to the following classes of employees: Track, Extra gang, Bridge, Carpenter, Paint, Scale, Pipe, Cement and Diving Gang Foremen, Work Train Foremen, and Assistant Foremen, Draw Bridge Tenders and Assistant Drawbridge Tenders, Shovel, Dragline and Ditcher Cranemen, Pumpers and White Bridgemen, Carpenters, Painters and laborers in the Bridge and Building and Water Supply Departments.'

'Rule 4. Bridge and Building Sub-department:

No. 1: Bridge, Carpenter, Paint, Cement and Diving and Scale Foremen.

tention was made about other painting work which was let to contractors by the Railway; and in this connection it is requested that especial attention be given to Carrier's Exhibits 'L,' 'N,' and 'P.'

"4. The Carrier has no advice as to the basis upon which the employees computed that Messrs. Morelock and Walker lost 34 days' pay as a result of the Railway contracting this work, and concluded that they should be compensated for that number of days. The Carrier's Statement of Facts indicates quite clearly that the work at the two points had to be carried on simultaneously; and even if the Railway had been able to perform the work with its own employees, instead of contracting it, Messrs. Morelock and Walker could not have worked at both points; and at neither point would there have been 34 days employment in order to accomplish the painting within the desired time.

"5. It is the position of the Railway that the claim is not supported by the rules of the agreement, and that it should therefore be denied.

"The Florida East Coast Railway reserves the right to introduce and examine witnesses in support of its position in connection with all issues in this case, and to cross-examine witnesses who may be introduced by petitioners, as well as to answer any further or other matters advanced by petitioners in relation to such issues, whether oral or written."

OPINION OF BOARD: The claims, the facts and the contentions of the parties are hereinabove set forth.

Carrier says:

"On January 15, 1938, because of limited maintenance funds, a paint gang consisting of Foreman W. T. Morelock and seven painters, including J. J. Walker, was cut off."

The carrier also states:

"During the month of November, 1938, an especial fund was made available to the Maintenance of Way Department, for the purpose of repairing and painting the passenger station buildings at West Palm Beach and Miami, primarily for the purpose of having these facilities reconditioned, if possible, by the time the inbound tourist travel became heavy."

It was further contended:

"The contracting of the work of painting the passenger station buildings at West Palm Beach and Miami was not an unusual procedure, or a departure from a long established practice. It has been necessary, upon numerous other occasions prior and subsequent to the negotiation of the current agreement, to contract the work of painting certain buildings of the Railway; and the passenger station buildings at West Palm Beach and Miami, involved in this dispute, have been previously painted by contract arrangements, since the current agreement between the Railway and the Brotherhood of Maintenance of Way Employees became effective, the last occasion prior to the one which originated this dispute having occurred at Miami, in October, 1934, and at West Palm Beach in October, 1936."

We believe that the paragraphs quoted fairly represent the carrier's position. And we believe that a fair and just, if not a necessary, inference from the language therein used, is that it was intended to furnish excuses for having the stations in question painted by independent contract, rather than by painters coming within the existing agreement. If that was not the intention, the language would seem to be without point or purpose. If that was the intention, it is not convincing. It betrays a deliberate attempt by

unilateral action and over protest to over-ride an existing contract obligation; and that, too, so far as the records shows, without any effort whatever to invoke negotiation.

If this course can be pursued with impunity, it is difficult to see how any agreement could afford security to any group. (The Board, in Award Number 456, is correct:

"The Carrier's argument to the effect that long practice permits this action is not sound. Continued violation of existing rules does not change or diminish the binding effect of such rules. If change in the agreement is desired, that result must be attained in the prescribed manner and through the proper channels."

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the carrier violated the agreement between the parties.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of January, 1940.

DISSENT TO AWARD No. 1020, DOCKET MW-970

This record shows, without dispute, that in January of the year involved, 1938, the single 7 man painting gang on the Railroad had been discontinued,—an action wholly practicable and necessary as determined by the management, and one which the employes have not and would not contend in any way violated their rights under the contract. Thereafter during the year until in November, 1938, when the work involved in this dispute was undertaken, certain sporadic jobs of painting involving the use of one or two painters were done, concerning which period and work these parties were in no disagreement. The only 2 painters holding rights under the agreement during that period had been employed variously as needed for those jobs, and one of them, who alone of the two could qualify for other position for which he held seniority rights, also worked on such position, as a bridge tender.

Then came in November the occasion to do the painting on the two stations at Palm Beach and Miami,—jobs which theretofore had been done by contract since the agreement between the parties became effective. The dispute thereupon arose as to the management's purpose to again contract the work.

In view of the claim thus raised, the decision in this case, as in all cases if they are to be credited as worthy, should have been limited to and related

to the facts as they thus appeared in detail in the record as the agreement bore upon them. Instead, in the Opinion of Board after a recitation of the above facts, we find a basis for the decision in these words:

"and we believe that a fair and just, if not a necessary, inference from the language therein used, is that it was intended to furnish excuses for having the stations in question painted by independent contract, rather than by painters coming within the existing agreement, etc."

Details in the positions of the parties and of the circumstances precede the Opinion of the Board in the award and are supplemented by further arguments in the records of the case. Review of them will indicate that a conclusion such as that quoted is totally unjustified; it makes apparent the error in this award and equally makes it unnecessary to repeat or to summarize those details to show that error, in view of the extraneous and improper reason given for the decision here reached.

Reason and justice both have disappeared when settlements of disputes are founded upon evident lack of knowledge of the subject dealt with, and upon a presumption of motive as a substitute for a properly found violation of a contract, such as is expressed by the Opinion in this award. It is sufficient here simply to note the reliance upon presumption of a motive by the carrier which even the petitioners did not charge, such presumption being adopted instead of fundamental evidence of record as bearing upon the agreement which was available and should have been the basis for the award. From such presumption, distorted by reason of lack of knowledge of the practical phases of the subject with which it dealt, and in error so far as it may be measured by the record, there could only result that which has here resulted—an unjust and unwarranted award.

/s/ R. F. Ray
/s/ C. P. Dugan
/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. C. Cook