Award No. 5747
Docket No. MW-5686

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that:

(1) The Carrier violated the effective agreement when they assigned a general contractor to repoint all loose or open mortar joints in the exterior of the brick areas of the two office buildings at Knoxville, Tennessee; the replacing with new brick of all missing or badly broken brick; the caulking of all windows and doors in the buildings; and the painting of the exterior of the two buildings;

(2) Bridge and Building Foreman J. T. Purkey and the members assigned to his crew at the time that this work was performed, be paid at their regular straight time rate of pay for an equal proportionate share of the time consumed by the contractor's forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the month of December, 1949, the Carrier assigned the work of repairing and painting two office buildings at Knoxville, Tennessee, to the Universal Engineering and Waterproofing Company.

The work consisted of rejointing all loose and open mortar joints in the exterior of the brick areas of the two office buildings at Knoxville; the replacing with new brick of all missing or badly broken brick; the caulking of all windows and doors in the buildings and the coating with Perm-O-Morotex coating the exterior of the two brick buildings.

The individuals employed by the Contractor that were assigned to perform the above referred to work, are not covered by the effective agreement between the Carrier and the Maintenance of Way Employes.

Claim was filed with the Carrier in behalf of Bridge and Building Foreman J. T. Purkey and the members assigned to his crew at the time that this work was performed, for compensation at their regular straight time rate of pay for an equal proportionate share of the time consumed by the Contractor's forces in performing the above referred to work.

Claim was declined.

The agreement in effect between the two parties to this dispute dated August 1, 1947 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

execution of the agreement. They have **never** been so engaged. (See Awards 2812, 2819 and 3839.)

(8) None of the claimants were adversely affected as result of the water-proofing work having been performed under contract. They all worked full time during the period involved except one man who was on vacation.

(9) Claim is one for compensation for work not performed and is specifically barred under Rule 49, which provides that no compensation will be allowed for work not performed.

(10) Claim is one for a penalty payment, which, under the effective agreement the Board has no authority to grant. Furthermore, the Brotherhood and the Board have heretofore recognized, as evidenced by awards cited herein, that the **make-whole** theory is to be followed in situations where employes were adversely affected (and none were adversely affected in this case).

(11) The Board is empowered only to decide this dispute according to the specific provisions of the effective agreement and as the work here claimed does not come within the scope of such agreement the Board has no authority to award the payment claimed.

(12) The Brotherhood is here attempting to cause the Carrier to pay or deliver or agree to pay or deliver money in the nature of an exaction for services which were not performed by claimants. The Labor Management Relations Act of 1947 and the Communications Act of 1934, make demands such as this unlawful.

For all the reasons given the claim should be denied and Carrier respectfully requests that the Board so hold.

All revelant facts and arguments involved in this dispute have heretofore been made known to the employes' representative.

Apparently the employes fail to realize that they as well as their employer are engaged in a highly competitive business and the more expensive they make railroad operations the less work there will be for them and other railroad workers to perform. They should recognize that the Transportation Act places upon all railroads the responsibility of operating in an efficient and economical manner, which cannot be done by making double payments such as here demanded.

OPINION OF BOARD: The Brotherhood contends Carrier violated its Agreement with them when it contracted with and had the Universal Engineering and Waterproofing Service of Newark, New Jersey, whose employes are not covered by the Agreement, perform certain work at Knoxville, Tennessee. It claims that by so doing the Carrier violated the scope thereof. It asks that Bridge and Building Foreman J. T. Purkey, and the members of his crew at the time this work was performed, be paid pro rata, in equal proportionate shares, for the time used in performing the work.

The work involved was the preparation of the exteriors of the General Office Building and the General Manager's and Freight Office Building at Knoxville, Tennessee, for waterproofing and the application of a coat of waterproofing paint thereto. It consisted of repointing all loose or open mortar joints in the exteriors of the brick areas thereof with waterproof cement mortar, of replacing all missing or badly broken brick with new ones, of cleaning the surface by brushing, of caulking all windows and doors in the exteriors of the buildings with Perm-O-Caulkit and of covering the exteriors thereof with a coating of Perm-O-Morotex, a patented waterproof product. The work was performed between November 7 and December 17, 1949, both dates inclusive.

The Scope Rule of the parties' effective Agreement covers Bridge and Building Sub-Department Foreman, Assistant Foremen, Mechanics and Helpers, which includes painters and masons.

This Scope Rule embraces all work which employes of the class covered thereby usually and customarily performed at the time the contract was negotiated and entered into.

The Carrier has established that work of the type here involved, that is, preparing the exteriors of its buildings for waterproofing and the application of a coat of waterproof paint thereto, has not been performed by Maintenance of Way employes but has, in fact, been contracted to others. In view thereof, although it is a type of work which masons and painters could perform, it does not fall within the scope of the Agreement but is excepted therefrom.

When a contract is negotiated and existing practices are not abrogated or changed by its terms such practices are enforceable to the same extent as the provisions of the contract itself.

Not only is the foregoing principle applicable here but the parties have expressly so provided by Rule 61 of their Agreement. The rule, as far as here material, provides: "It is understood and agreed that this agreement * * * does not, except where rules are altered, amended or changed, alter past, accepted and agreed to practices not in conflict herewith."

We find the practice here complained of has not been abrogated by the Scope Rule of the parties' effective Agreement.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 1st day of May, 1952.