Award No. 5839

Docket No. MW-5772

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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

(1) That the Carrier violated the effective agreement when they assigned a General Contractor to paint the interior of the Fremont Passenger Station, beginning June 1, 1950;

(2) That the Bridge and Building employes on the Nebraska Division, regularly and customarily assigned to perform work at Fremont, be paid at their respective straight time rate of pay for an equal and proportionate share of the man-hours consumed by the Contractor's forces engaged in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On or about June 1, 1950, the Carrier assigned a General Contractor to clean and paint the interior of the Passenger Station at Fremont, Nebraska.

The Employes contended that the Carrier's actions constituted a violation of the effective agreement and as a result, filed a claim in favor of the Bridge and Building employes on the Nebraska Division, who customarily perform painting work at Fremont.

The Carrier denied the Employes' claim contending that the assignment was consistent with past practice, and therefore, the Employes' claim was not supported by the controlling rules of the effective agreement.

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

POSITION OF EMPLOYES: Painting the interior and exterior of the buildings on this Carrier's Nebraska Division is ordinarily and customarily performed by Bridge and Building Department employes holding seniority on the Nebraska Division. However, on or about June 1, 1950, the Carrier assigned individuals holding no seniority under the effective agreement, to paint the interior of the Carrier's Passenger Station at Fremont, Nebraska. This station is located on the Carrier's Nebraska Division.

By agreement effective January 1, 1947, this Carrier contracted with the Employes for the performance of all exterior and interior painting of its buildings. It is the Employes' contention that provisions of the Carrier's

CARRIER'S STATEMENT OF FACTS: On or about June 1, 1950, the carrier let the work of cleaning and painting the interior of the passenger station at Fremont, Nebraska to a contractor.

The waiting room ceilings in the Fremont passenger station are 33 feet high, and the railway company did not have the special scaffolding equipment required for use in handling cleaning and painting in this type of high-ceiling buildings. The consist of the B&B crew regularly assigned to perform work in the Fremont District included five elderly men who, due to their age, could not be considered qualified or capable of performing work on high scaffolding such as was required for use in the cleaning and painting involved at Fremont passenger station. There were also young men in the crew who were not capable of performing the painting work due to their lack of the necessary qualifications and experience.

It has been the established practice to have the interior cleaning and painting at Fremont passenger station performed by a contractor. The records indicate that such work was performed by outside contractors in 1929, 1936 and 1945 during which years the carrier had a collective bargaining agreement with the Brotherhood of Maintenance of Way Employes. There was no contention by B&B Department employes or representatives of the Brotherhood of Maintenance of Way Employes at those times that the contracting of the work was contrary to provisions of the maintenance of way schedule rules agreement nor were any claims similar to those here in evidence filed with carrier. Further, the records indicate that B&B forces for whom claim is here made have not previously been used to perform the work in connection with the painting of the interior of Fremont, Nebraska passenger station.

The agreement in effect between the carrier and the brotherhood dated January 1, 1947 and subsequent amendments and interpretations are by reference made a part of this statement of facts.

POSITION OF CARRIER: It is the position of the carrier that in the circumstances outlined in its Statement of Facts the carrier's action in letting the work of cleaning and painting of the interior of Fremont, Nebraska passenger station to a contractor who had the necessary equipment and specialized in that type of work was not contrary to provisions of the applicable scheduled rules agreement and that the Board could not consistently do otherwise than deny the claim of the employes.

The facts and data used herein in support of the carrier's position have heretofore been made known to authorized representatives of the employes and made a part of the question in dispute.

If the Board holds it does have jurisdiction in this case, it is the desire of the carrier that an oral hearing be held in order that it may, if necessary, submit supplemental argument in support of its position.

OPINION OF BOARD: The claim here in its terms is not greatly involved. It is claimed that the Carrier in violation of the Agreement let a contract for the painting of the interior of the Passenger Station at Fremont, Nebraska to a General Contractor and thus deprived Bridge and Building employes covered by the Agreement with the Brotherhood of Maintenance of Way of work to which they were entitled. The Brotherhood claims on behalf of the employes as compensation or penalty an equal and proportionate share of the man-hours consumed by the Contractor's forces engaged in the work.

One question for determination is that of whether or not this was work which was encompassed by the Agreement with the Carrier. Another is, assuming that it was so encompassed, were the circumstances and conditions such as to permit the Carrier to take it from the employes and cause it to be done by a Contractor without penalty in favor of the employes.

Whether or not it was encompassed by the Agreement depends upon the content of the Scope Rule, its interpretation and application, and the facts as disclosed by the docket.

The part of the Scope Rule defining employes of the class or classes involved here is the following:

> "Employes (not including supervisory officers above the rank of foreman) engaged in or assigned to building, repairs, reconstruction, and operation in the Maintenance of Way Department."

It is to be observed that the work of the Department is not defined in the Rule. It therefore becomes necessary to ascertain the definition or definitions from usage, custom, tradition and the disclosed facts bearing on the subject. This is the approach which was taken in numerous awards cited by the Carrier and the Organization. Concern here however is limited to the definition of the interior painting of the Fremont Passenger Station.

It becomes clear from the examination which has been made of previous awards that at least some painting of buildings, repairs, reconstructions and operations is work belonging to Maintenance of Way Employes. Awards making this clear need not be cited herein. Evidence presented with the record discloses like information. The appendix of the Agreement discloses classifications of painter and painter helper. It is true that no painters or helpers are listed as employes on the Division from which this claim was progressed. The contract however is for work of a classification or classifications and not of regional or divisional employes. This appears to demonstrate that painting is a Scope Rule classification.

The Carrier does not concede that painting as a craft or class comes within the Rule. It concedes only that Bridge and Building employes may perform ordinary painting incident to other work but not such as involves decorative skill or the skill required in the painting of the Passenger Station at Fremont. This is one of the grounds on which the claim is defended.

Another ground of defense is that the forces of the Division were insufficient and not qualified because of advanced age on the one hand and inexperience on the other. Another is that because of the character and the quality of the materials used the work could be performed only by an outside contractor. Another is that on account of past similar practice this work could not be regarded as coming under the Agreement. Still another is that even if it be regarded as coming under the Agreement no compensation is allowable, since no employe lost time or pay as a result of the work being performed by others than Bridge and Building employes.

It appears well established that mere lack of qualified employes does not furnish a carrier with grounds for removal of work covered by a Scope Rule. Awards 5470 and 5471 appear to indicate that the Carrier under such circumstances before contracting must either seek to recruit capable employes for the work or negotiate with the Organization in an effort to work the matter out satisfactorily or both. Also the fact that particular employes have been fully employed and have lost no time does not operate to defeat a recovery. Again past practice in and of itself does not operate to take work out from under an Agreement. In instances such as this however, it may be considered in determining the question of whether or not the parties intended that particular work should or did come under the Agreement.

It being apparent that painting (some painting) came under the Scope Rule the burden devolved upon the Carrier to show that conditions existed which permitted the diversion of this painting to a contractor. Awards 4701, 4833, 4888, 5151, 5152, 5470, 5471.

The showing under the defense of lack of qualified employes, under application of Awards 5470 and 5471 is found to be insufficient.

Whether or not this was work which was intended by the parties to be encompassed by the Rule, or constitutes an exception thereto depends upon the facts as disclosed by the docket.

Factually it appears that the interior of this station was on three previous occasions painted under contract as in this instance without complaint. The Carrier did not have equipment on the Division designed to be used in this type of work. There were not recognized skilled or decorative painters on the Division. The work in its nature required decorative skill. The work called for the use of specialized and licensed equipment and a secret chemical formula which was available in Fremont only to the Contractor who performed the work.

The information with regard to licensed equipment and secret formula was furnished by the Division engineer. The answer of the Organization to this is that inquiry was made of local building contractors as to whether or not it was true that the secret chemical referred to by the engineer was available only to the contractor who performed this work and that negative answers were received. This was not sufficient to overcome it.

The conclusion is that painting done as was this in the light of the disclosed evidence of conditions and circumstances may not be regarded as work required to be given to the Organization under the Agreement. This should be regarded as an exception to such requirement as exists that painting should be performed by Bridge and Building employes.

FINDINGS: The Tihrd 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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Divison

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

Dated at Chicago, Illinois, this 30th day of June, 1952.