Award No. 8126
Docket No. MW-5908

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

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

(1) That the Carrier violated the effective agreement when it assigned Signal Department employes to perform the work of constructing foundations and erecting, installing and painting housing structures on the Missouri Division;

(2) That Bridge and Building employes Clarence E. Robinson, Emery L. Chestnut, B. D. Bennett, John E. Vernon, T. H. Osborn, D. J. Stiber, C. Montgomery, E. L. Layne, R. L. Graham and George Williams be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by Signal Department employes in the performance of the work referred to in part (1) of this claim, beginning on February 20, 1951 and continuing until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Subsequent to February 19, 1951, employes of the Signal Department were assigned to the construction of concrete forms, excavation, setting of forms, pouring and finishing of concrete foundations, the assembling, erecting and painting of certain small buildings of various dimensions.

Foundations constructed of wood, however, were installed by Bridge and Building employes who customarily and traditionally erect, install, repair and maintain all buildings, including the foundations.

We attach hereto as Employes' Exhibit "A", a photograph of a type of building referred to in this claim. The foundation for this building was constructed and installed by Bridge and Building employes, but signal forces erected and installed the building and performed the painting work.

Employes' Exhibits "B", "C" and "D" attached hereto, are photographs of similar buildings which were installed on concrete foundations. All work related to the erection of these buildings and their foundations was performed by Signal forces, including the foundations.

The Carrier has contended that the work was properly assigned to Signal forces, and has denied the Employes' claim that work of this character is

(Exhibits not reproduced.)

OPINION OF BOARD: Before considering this dispute on its merits, it is necessary to dispose of a Motion in this docket to the effect that action be withheld pending the giving of notice of hearing to other parties involved.

In view of a number of awards of this Board and the decisions of the Supreme Court of the United States in the case of Whitehouse vs. Illinois Central Railroad, and the finality of this matter (No. 131, October Term of U. S. Sup. Ct., 1954), followed by the dismissal of the cause of action by the United States District Court, the Board now has jurisdiction over the only necessary parties to this proceeding and over the subject matter hereof.

Claim is made in behalf of several named claimants for a proportionate share of the straight time rates for man-hour consumed, when it is alleged, beginning on February 20, 1951, certain work covered by the Maintenance of Way Agreement was assigned to, and performed by employes not covered thereby.

The work in controversy apparently concerns the constructing of foundations, and erecting, installing and painting certain housing structures.

The Organization asserts that all work in connection with completion of concrete foundations as well as the assembling, erection and painting of the various buildings, has always, by custom and tradition been performed by B and B employes, and that there exists no justification for any attempt, as here, to differentiate between types of foundations and size or type of buildings.

The Respondent took the position that the construction of concrete foundations and the erection of pre-fabricated houses and cabinets has been at all times assigned to and performed by Signal Department employes and that the work is not of the type traditionally and customarily performed by Maintenance of Way employes. It was further contended that the purpose must of necessity determine the nature of work and the assignment thereof. The Respondent took the further position that this claim was invalid for the reason that it was vague, indefinite and uncertain.

The types of functions and the structures in question are detailed in the record both by picture and written description. Foundations are concrete and the buildings (structures) while small are purchased in a knocked down or pre-fabricated state and erected or assembled on the said foundations.

We are of the opinion that the issues here involved were decided by this Board in awards 4845 and 5276.

In Award 4845 we stated:

> "* * * The construction of buildings is work included in that which is traditionally and customarily performed by maintenance of way employes. The structures involved are buildings within the meaning of the foregoing statement. It will be observed that they require a foundation, have an entrance and must be assembled. The fact that they are prefabricated and purchased in a knocked down condition does not change their classification as buildings within the meaning of the rule. Nor does their small size change the application of the rule. * * *"

In Award 5276 we stated:

> "There is a marked distinction between affixing a box to a post and the construction of the housing in question here. These structures, regardless of their exact size, were buildings. And although they were constructed for the exclusive purpose of housing signal apparatus, they were still simply buildings without any distinguishing

feature which would render their use peculiar to the storage or housing of signal apparatus."

We can find no justifiable basis for departing from the principles enunciated therein so therefore we conclude that the work with which we are here concerned is properly performable by Maintenance of Way employes.

We likewise cannot agree that the confronting claim is vague, indefinite or uncertain. The type of work and the Scope of its performance is stated. The date on which the violation commenced is stated and the employes affected are named. Further detail is not essential. These claims are valid.

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 effective Agreement.

AWARD

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November, 1957.

DISSENT TO AWARD NO. 8126, DOCKET NO. MW-5908

Once again we are compelled to dissent to the majority's finding that we have jurisdiction over the only necessary parties and over the subject matter of this dispute, and that due notice to the Signalmen's Organization is not required. In previous dissents and concurring opinions it was pointed out that where, as here, another party is involved in a dispute docketed with this Division, whether directly or indirectly, it is necessary to give such party due notice and opportunity to be heard. We have cited the provisions of Section 3, First (j) of the Railway Labor Act as our authority in support of this position. Therefore, the Dissents to **Awards 7311, 7372** and **7960,** and the Special Concurrence to **Award 7387,** are equally applicable here, and are made a part of this Dissent.

We also take exception to the majority's finding that the question here involved was decided by this Board in **Awards 4845** and **5276.** Neither of these Awards is controlling herein, for the following reasons: (1) In both Awards, a different Carrier was involved. Thus, the Agreement applied in those cases was not the Agreement involved here. It is fundamental that one must rely on his own Agreement in support of a claim based on an alleged contract violation. **Award 3489.** (2) In **Award 4845,** it was found that the scope rule of the Maintenance of Way Agreement embraced the work involved because **all** work of this type was customarily performed by Maintenance of Way personnel at the time the rule was negotiated. No such preliminary finding could be made by the majority here. (3) The claim of the Signalmen's Organization was denied in **Award 5276** because they were not able to show that

the work was exclusively reserved to them under their scope rule and because practice under the Agreement did not lend support to their position.

In the instant case, neither the scope nor the practice supports Petitioner's position. The facts of record make it very clear that the disputed work on this property was never work reserved to Maintenance of Way employes under the terms of the scope rule of the Agreement, either before or after that rule was negotiated. These same facts clearly show that this work has always been assigned to employes of the Carrier's Signal Department. The majority's inability to note, or willingness to completely overlook these patent distinctions is reflected in the erroneous Award to which this Dissent is directed.

Practice, custom and tradition favored the assignment of this work to Signal Department employes, rather than to employes of the petitioning Organization. There is no doubt whatsoever that the claim made herein would have been promptly denied if the dispute was disposed of on its own facts, rather than on facts peculiar to other disputes. See **Awards 5404, 6032** and **6824**, among many.

For the foregoing reasons, **Award 8126** is in error and this Dissent is directed to all of the findings announced by the majority.

/s/ J. F. Mullen
/s/ R. M. Butler
/s/ W. H. Castle
/s/ J. E. Kemp
/s/ C. P. Dugan