Award No. 8149
Docket No. MW-7729

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris G. Bakke—Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD 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 Bridges No. "0" and No. "1" and freight house at Harper's Ferry, West Virginia during the period September 7, 1951 to October 18, 1951, such contractor's employes working 9 hours per day, 7 days per week;

(2) That Bridge and Building Carpenters:

Roger C. Harding	R. H. Davis	W. R. Pangle
S. C. Whitehair	Harvey R. Sagle	Dudley C. Wright
Lee W. Williams	O. F. Heafer	Roscoe Wenner
James S. Shoemaker	Harry L. Krank	W. C. Younker
Leon L. Snoots	Lawrence A. Himes	

and Bridge and Building Carpenter Helpers George A. Phillips and Willard A. Phillips, be paid at their respective straight time rate of pay for an equal proportionate share of the straight time hours consumed by the contractor's employes, and at their respective overtime rate of pay for an equal number of overtime hours consumed by the contractor's employes while engaged in the above referred to work.

EMPLOYES' STATEMENT OF FACTS: The Carrier assigned the work of painting Bridges No. "0" and No. "1" and the freight house at Harper's Ferry, West Virginia, to a general contractor whose forces hold no seniority under the effective Agreement.

The contractor's forces started this work on September 7, 1951, and finished on October 18, 1951, during which period they worked nine (9) hours per day for seven days of each week, being compensated at time and one-half rates for all hours worked in excess of eight on any one day and for all hours worked on the sixth and seventh days of each week.

During the same period, the Carrier's Bridge and Building forces were regularly assigned to and working five eight-hour days per week and at straight time rates.

with the independent contractor contained a specific time limitation within which the project had to be completed. It stipulated 120 consecutive calendar days. (See paragraphs 4 and 5 of rule (b)5(a).)

The Carrier asserts the factual circumstances existing in this case remove the Harper's Ferry project from the Scope rule of the working agreement. The magnitude of the project precluded the use of Bridge and Building forces. Furthermore, these forces were engaged on other projects which would have been delayed if Bridge and Building employes had been used on the Harper's Ferry project.

The Scope Rule of the current Maintenance of Way Agreement effective April 1, 1951 is involved in this dispute. It represents a negotiated rule, a fit subject and result of proper collective bargaining procedures on the property. When the previous Maintenance of Way agreement (April 17, 1930) was opened for revision, the Carrier sought and obtained a new and revised scope rule designed to remove ambiguities in the old rule and to provide additional flexibility with respect to contracting Maintenance of Way work which was not apparent in the old rule, in return for which the Organization received concessions and liberalizations favorable to it in other rules in the agreement. The new scope rule was not designed by chance; certainly it was not intended to afford the Carrier a relief no greater than that which it already had under the old rule. It was a bold new rule and it can only be interpreted on that basis.

While the instant case was in the process of being handled on the property, the Organization, urging that under an asserted application of the new scope rule the Carrier had no right to contract out the work, nonetheless served formal notice on the Carrier under Section 6 of the Railway Labor Act for the elimination of the exact sections of the scope rule upon which the Carrier presently relies. Specifically, the Organization sought the elimination of paragraphs 5(a)1, 5(a)2, 5(a)3, 5(a)4, 5(a)5, 5(a)6 and 5(b) of Section (b) of the scope rule. While efforts at mediation have thus far resulted in no change in the existing rule, still the plain intent of the mediation proceeding was to eliminate what the Organization considered objectionable parts of the rule. The presentation of the instant claim to this tribunal can mean only that the Organization seeks, by indirection, to obtain some strained and perhaps tedious interpretation of the existing rule that would in fact be a modification, having been unsuccessful as yet in obtaining modification by means of the Section 6 proceeding. Such character of procedure is clearly not contemplated by the Railway Labor Act. If the Organization is seeking to change the existing scope rule, which is apparent from both its prosecution of this case and the serving of its notice under Section 6 of the Railway Labor Act, it should follow the latter procedure and not attempt to have this Board change the rule by an obviously improper interpretation or construction thereof.

Because the project involved in this case is specifically excluded from the application of the agreement under the Scope Rule thereof, the Carrier submits the instant claim is not supported by the working rules. Under such circumstances this Division has consistently moved to decline claims of such nature. The Carrier asserts the instant claim is without merit and respectfully requests this Division to deny it accordingly.

This dispute has been handled in accordance with the provisions of the Railway Labor Act. No agreement on a settlement thereof having been reached between the parties, it is hereby submitted to the National Railroad Adjustment Board for decision.

OPINION OF BOARD: This docket involves the same parties and the same rule as that involved in Award No. 8148.

Again we have the same principal question, whether the Carrier has succeeded in proving a condition which would satisfy one of the exceptions that render the Agreement inapplicable.

In this case the Carrier relies on two exceptions:

> "1. By reason of the magnitude of the project." "6. Employes covered by the Agreement on the seniority district involved cannot be assigned to the work without impeding the progress of other projects."

As to the magnitude, it will be noted that this rule does not contain the adjective "great" which has usually been associated with magnitude in our awards, and we expect that it could well be argued that as a paint job, the work here involved was of "magnitude." Whether these parties in agreeing on this new scope rule intended to modify the "great magnitude" concept as used in our awards we are not advised, even though the Referee made specific inquiry in this regard.

If there was no intention to modify the rule as it had been applied by this Division, we are justified in taking into consideration the fact that "the Carrier's Bridge No. 1 at Harpers Ferry, West Virginia, was extensively damaged by fire" as stated by the Carrier. That this created an emergency may be assumed. An emergency has been associated with work of great magnitude. Award No. 6199.

However we need not deny this claim on the basis of magnitude, because we are satisfied that the Carrier has made out its defense under exception 6, supra, viz., that "Employes covered by the Agreement on the seniority district involved cannot be assigned to the work without impeding the progress of other projects."

This claim is for the entire paint job which lasted from September 7 until October 18, 1951. During this time the B&B Employes on this seniority district were employed on other substantial projects described by the Carrier, and we think there is no doubt but what that progress on those projects would have been impeded if the Claimants herein had been taken off those projects to go to Harper's Ferry to work on this paint job.

Having fulfilled this requirement the Carrier was out from under the Agreement and was no longer obligated to bulletin the job or to work these claimants in overtime.

Our conclusion is that the Carrier did not violate the Agreement and this claim must be denied.

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

The Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1957.