Award No. 8150
Docket No. MW-7730

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Norris C. 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 General Contractor G. N. Spanos and Son, to remove paint and sand blast passenger station and freight house at Gaithersburg, Maryland, and to paint the waiting shed and interior of waiting station and freight house at this location;

(2) That Bridge and Building Carpenters, Albert S. Davis, Norman S. Best, Charles T. Colbert, Philip S. Heater, Charles F. Orrison and Charles P. Willard be paid at their respective straight time rate of pay for a proportionate share of the hours consumed by the contractor's employes in the performance of the above referred to work.

EMPLOYES' STATEMENT OF FACTS: The Carrier contracted with G. N. Spanos and Son, Inc., a general contractor, for the painting of the Carrier's passenger station, freight house, and waiting shed, at Gaithersburg, Maryland, together with preparatory painting work and other work incidental thereto.

The work consisted substantially of removing the paint from the brick exterior of the passenger station and of the freight house by the flame-burning process; then sand-blasting the same exteriors, followed by the application of paint thereto. In addition, the interior of the passenger station was patch plastered and cleaned as painting preparatory work; the waiting shed was similarly cleaned as painting preparatory work, following which the waiting shed was painted as was the interior of the passenger waiting station and the freight house.

The contractor started work on September 10, 1951, and employed five men on this project, each of whom were regularly assigned to and worked seven days per week until the work was completed. The contractor's employes were paid thirty dollars ($30.00) per day for each Saturday and Sunday worked and twenty dollars ($20.00) for each of the other days worked.

Prior to, during and subsequent to the period in which the contractor's forces were engaged on this project, the Carrier's Bridge and Building

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.

As 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. 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 same rule as those in Awards 8148 and 8149, announced contemporaneously herewith.

It is not surprising that these dockets present distinctions difficult to make but nonetheless fundamental, and particularly is this true where we are dealing with the new rule on this Carrier.

Here again we have the problem as to whether the Carrier has brought itself within one or more of the exceptions in the Scope Rule so that the agreement would no longer be applicable, and the Carrier would be free to contract the work involved.

The property on which the work was to be done is the little old station freight house at Gaithersburg, typical of those in all small towns across the

country. The buildings had been painted a number of times before and the Carrier desired in repainting them to have the old paint removed. This required the use of "the flame clean and sandblast methods" which Carrier insists requires specialized equipment and the necessary skill on the part of its users, which Carrier says it did not have. This involved Rule 5(a), 2 and 3.

The other exception which Carrier seeks to get under is Rule 5(a) 6 which provides "Employes covered by the agreement on the seniority district involved cannot be assigned to the work without impeding the progress of other projects."

We are not impressed with Carrier's contention that "the flame clean and sandblast methods" require specialized equipment not available to it or that it requires special skill to use it. The only purpose of the application of the flame is to blister the old paint so that it will more readily respond to the sandblast, and the sandblast is no more technical or specialized than a paint sprayer which is available in practically any "do it yourself" shop, except the blaster usually wears a mask or eye shield, about which there is nothing technical.

In connection with this group of dockets, the labor representative furnished the referee with the book entitled "History of the Brotherhood of Maintenance of Way Employes" by D. W. Hertel. At page 196 is a series of excellent photographs depicting various jobs of skill performed by M. W. men. None of these pictures may have been taken on this Carrier, but we would have a right to assume that the M/W men on the B. & O., it being one of the major carriers of the nation, would be of at least equal skill and ability, and have this usual equipment, which employes say it does have.

We think the equipment necessary on this job was readily available and claimants could have done it.

Now, as to Carrier's second contention we do not believe letting these claimants do this work would have impeded the progress of the other jobs (as was true in Award 8149). Carrier does not suggest there was any "magnitude" or "emergency" here, nor that this job extended over an extended time as was true in the Harpers' Ferry case (Award 8149 supra). The joint submission says that the job was started on September 10, 1951, but not when it was finished, but we assume from the fact that this was a "lump sum price job" that it was done as quickly as possible. The Scope rule (b) 5(a) 5 specifically provides "The time within which the work must be completed as related to other projects." This is the Carrier's responsibility and it fulfilled it in the Harpers' Ferry case.

Again we say the Carrier has the burden of proof to bring itself within an exception set out in the rule.

Our conclusion is that the Carrier violated the Agreement and that the claim should be sustained.

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.

AWARD

Claim sustained.

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.

DISSENT TO AWARD 8150, DOCKET MW-7730

The Award of the Majority is characterized by the same basic errors which we pointed out in our Dissent to **Award 8148**. There are three additional considerations which serve to point up the error of this Award.

The Docket shows that the Maintenance of Way Employes had tried unsuccessfully to remove the paint by use of Carrier's equipment. (Pp. 13, 18, 26, 27.) The Majority found, "* * * The only purpose of the application of the flame is to blister the old paint so that it will more readily respond to the sandblast, * * *." There is nothing in the Record to support this conclusion. When the flame method is used, the workman scrapes the old paint from the surface after it has been burned by the flame. Neither party contended that flame method was used in conjunction with the sandblast method. Sandblasting is used when the surface to be cleaned will not respond to the flame method of removing the old paint. It is ironic that the Petitioners should now have their claims allowed after they tried unsuccessfully to remove the paint by the only means available to them.

In its Opinion, the Majority states:

> "In connection with this group of dockets, the labor representative furnished the referee with the book entitled 'History of the Brotherhood of Maintenance of Way Employes' by D. W. Hertel. At page 196 is a series of excellent photographs depicting various jobs of skill performed by M. W. men. None of these pictures may have been taken on this Carrier, but we would have a right to assume that the M/W men on the B. & O., it being one of the major carriers of the nation, would be of at least equal skill and ability, and have this usual equipment, which employes say it does have."

This book was not part of the Record and was not considered at any stage of the handling of this dispute, either on the property or before this Division. Furthermore, it does not warrant the assumption upon which the Majority bases its finding.

In **Award 8149**, Docket MW-7729, same parties, we found that Carrier had not violated the Agreement because the Claimants were employed on other substantial projects and denied claim holding that the Claimants in that case were not entitled to the work by virtue of Section (b), 5 (a) 6 of the Scope Rule. The failure of the Majority to reach the same conclusion in this case is astonishing. The claim dates in **Award 8149** and in this claim are the same, September, 1951. Nevertheless, the Majority found that Section (b), 5 (a) 6 of the Scope Rule did not apply in this case, even though these Claimants were working on the very same projects and at the very same time as the Claimants in **Award 8149** were. In other words, in these two Awards, **8149 and 8150**, the Majority found that the Employes were both available and unavailable to perform work during the same period.

These conflicting Awards plainly illustrate the inconsistencies in which the Majority has become enmeshed when it elects to depart from firmly

established principles governing the application of these Agreements and chooses to entertain assumptions contrary to the facts of Record.

For these reasons this Award is in error and we dissent.

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