

Award No. 8508
Docket No. MW-7844

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC
RAILROAD COMPANY

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

(1) The painting of the interior of the Carrier's depot at Fredonia, Wisconsin, by other than B&B employes was in violation of the Carrier's Agreement with the Brotherhood of Maintenance of Way Employes;

(2) B&B employes J. E. Miller, R. F. Belanger, G. H. Spore, P. G. Holler, G. J. Younger, A. F. Pellath, V. K. Sikowski, R. C. Miller and H. H. Sievert each be allowed eight hours' pay at their respective straight time rates account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On various dates between January 8 and February 15, 1954, the Carrier's agent at Fredonia, Wisconsin performed painting work on the interior of the depot at that location, despite previous instructions given to him in 1950 to refrain from performing any maintenance and repair work on buildings and structures at Fredonia; said instructions being issued because of claims having been filed account of this same agent performing maintenance and repair work on buildings and structures at Fredonia. That 1950 claim was withdrawn when Assistant Superintendent Hayes assured the Organization that similar violations would not happen again.

The painting of the interior of the Fredonia depot was one of the projects listed on the 1954 work program; 70 man hours having been allocated for such painting by B&B forces.

The Carrier has declined the instant claim.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

(Carrier's Exhibit "B") in which he clearly indicates that he consumed 9½ hours in painting certain portions of the interior of the depot. The fact that the agent performed this painting, regardless of what it was, has not taken away one bit of work from the B&B Department employes as the painting of the interior of the depot at Fredonia is still scheduled to be performed by B&B Department employes irrespective of the painting by the agent.

Summarizing, the Carrier respectfully directs attention to the fact that the work here in question was not performed at the request of or by direction of the Carrier, nor was it done with the Carrier's knowledge or consent. Under the circumstances prevailing in this case the Carrier submits that the painting work which the agent chose to do without instruction or authority on the interior of the depot at Fredonia does not constitute a violation of the schedule agreement between the Carrier and the Brotherhood of Maintenance of Way Employes; further, if there is to be a penalty extracted from the Carrier because of the painting work which the agent performed, then it cannot exceed an amount equivalent to the time consumed by the agent in performing the painting work which was 9½ hours and further, there is not the slightest basis for the claim of 72 hours which has been presented and which is wholly unsupported by any logical basis of reasoning.

The Carrier respectfully requests that the claim be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: Carrier's original submission to this Board—

"* * * respectfully directs attention to the fact that the work here in question was not performed at the request of or by direction of the Carrier, nor was it done with the Carrier's knowledge or consent. Under the circumstances prevailing in this case the Carrier submits that the painting work which the agent chose to do without instruction or authority on the interior of the depot at Fredonia does not constitute a violation of the schedule agreement between the Carrier and the Brotherhood of Maintenance of Way Employes; further, if there is to be a penalty extracted from the Carrier because of the painting work which the agent performed, that it cannot exceed an amount equivalent to the time consumed by the agent in performing the painting work which was 9½ hours and further, there is not the slightest basis for the claim of 72 hours which has been presented and which is wholly unsupported by any logical basis of reasoning."

The same agent who did the painting here complained of was similarly involved in 1950.

It is the claim of the Organization that in 1950, "After a lengthy handling Assistant Superintendent Hayes assured us that if we would be good enough to drop that particular case that it would not happen again. * * *" That claim was dropped. Now we have Organization alleging the same violations by the same agent a second time.

Argument offered in behalf of Carrier notes that Employes "cite the Scope and Seniority provisions of the Agreement. It is not necessary for us to discuss these provisions because the Carrier frankly states that if it had

assigned this painting to its employees, it would have been assigned to M. of W. Painters."

"The Carrier has agreed," such argument continues, "that its Painters will paint the depot when it is painted in accord with the Carrier program. Where a third party who moves in and performs part of this work with his own tools and paint without the knowledge, consent, or authority of the Carrier, the Carrier obviously owes nothing to the third party or to the painters. * * * It is elementary that the Carrier is not responsible for, or an insurer against, the acts of an employe outside the scope of his authority, and without the knowledge or consent of the Carrier. * * *"

From the record here made we will sustain part (1) of the claim that—

"The painting of the interior of the Carrier's depot at Fredonia, Wisconsin, by other than B&B employes was in violation of the Carrier's Agreement with the Brotherhood of Maintenance of Way Employees."

What, then, of Carrier argument that it "is not responsible for, or an insurer against, the acts of an employe outside the scope of his authority, and without the knowledge or consent of the Carrier"?

Several awards have been cited by or in behalf of Carrier on this point.

Award 6329 (Smith). This involved a claim "by virtue of Respondent's alleged violation of the effective Agreement in permitting alterations to be made on a trestle by individuals not covered thereby." In denying that claim, this Board held that—

"Respondent had agreed that all alterations and maintenance work should be performed by the Maintenance of Way employes. * * * No benefit accrued to the Carrier. All benefits, if any there were, inured to this organization."

Award 7793 (Smith). This involved the composite service rule. In addition to the fact that Organization had failed to prove the higher rated work preponderated, the Award also held claimants had not been instructed to perform such work.

Award 4890 (Carter). Carrier here involved directed certain of its employes to undergo physical examinations during the period February 1 to March 1, 1948. Claimant in this case was idle on January 28 because of inclement weather. He elected on his own to travel to Monroe, La., for the physical examination, then sought pay from Carrier for doing so. This Board found claimant performed the service upon his own volition and prior to the time specified, and denied the claim.

Award 6164 (Stone). This denial Award involved the finding that the spreading of salt on ice was not the exclusive work of any particular craft, and that it was done as a necessary safety measure.

Award 7389 (Cluster). This is more in point because it involved the painting of an office in the Scranton depot by other than painters. Carrier's painters at the time were furloughed and working as crossing watchmen. Carrier wrote them asking if any of them was interested in doing the work

at a contract price of \$90. None of them replied or contacted the Carrier. The Carrier then contracted the work to a janitor. Claim was thereafter filed in behalf of the senior painter. This Board sustained the claim that the Agreement was violated, but denied compensation, holding that Carrier—

"offered the work to painters before it attempted to get anyone else for the job. If the Organization felt that the proposed procedure was a violation of the Agreement, it should have put the Carrier on notice before that time."

With respect to the angle of "no benefit" accruing to Carrier at Fredonia depot, as argued by and in behalf of Carrier, this record does show that—

"The Carrier does not deny that painting work is essential in the conduct of its business the same as in any other business, but it contends that the painting work which the agent at Fredonia performed was not essential to the Carrier in the conduct of its business * * *. As a matter of fact, it may be said with all due respect to the agent that the painting work which he performed was a detriment rather than a benefit because the agent was an agent and not a painter. The painting work which he performed was not that which would be expected or required of one classified as a painter. * * *"

Carrier had scheduled 70 manhours for the painting of the Fredonia depot interior in 1954, and rescheduled 70 manhours on its work program for 1955.

Carrier admitted that prior to the agent's painting, the Fredonia depot was "in need of painting," and thereafter "there continued to be a necessity of painting the depot interior." Yet the painting by M. of W. painters scheduled for 1954 was "deferred."

We cannot agree that to sustain the principle of compensation as sought in part 2 of the claim would be to say that a Carrier is responsible for or an insurer against the acts of an employe beyond the scope of his authority.

This is not a court proceeding, nor are we here trying to legally define Carrier's liability under any law. We are here concerned with interpretation of a wage agreement, and must try to fix Carrier's obligations under that agreement in the light of its own admission that painting of the Fredonia depot is work properly belonging to M. of W. painters.

Despite its protestations, two of Carrier's statements in this record are significant:

(1) " * * * if there is to be a penalty extracted from the Carrier because of the painting work which the agent performed, then it cannot exceed an amount equivalent to the time consumed by the agent in performing the painting work which was 9½ hours and further, there is not the slightest basis for the claim of 72 hours which has been presented and which is wholly unsupported by any logical basis of reasoning."

(2) Letter of Carrier's Superintendent to Organization's General Chairman, referring to the Agent at Fredonia:

"I impressed upon him the seriousness of it and that it cost the Railroad Company a lot of money when he did these things, and I

am sure that he is impressed now that he realizes there is money involved."

The parties here are far apart on the amount of time actually spent by the Agent as well as the extent of the painting he actually did. The time range is from the agent's statement of 9½ hours to the claim for 72 hours.

We will not attempt to separate fact from fiction, but will remand part (2) of the claim to the parties with instructions to reach agreement on the hours involved in the painting and the proration of the total among the claimants.

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 violated.

AWARD

Part (1) of claim sustained.

Part (2) of claim remanded to parties for settlement in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of November, 1958.