Award No. 9555
Docket No. MW-8822

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Merton C. Bernstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, on February 24, 1955, it assigned other than Bridge and Building Painters to wash the walls of two offices located in Freight House #7 at Boston, who consumed a total of sixteen (16) hours in the performance of said Painters' work.

(2) B & B Painters J. M. Green and Wm. H. O'Brien each be allowed eight hours' pay at their respective straight time rate account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On February 24, 1955, the Carrier assigned other than Bridge and Building Painters to wash the walls of two (2) offices located in Freight House No. 7 at Boston, who consumed a total of sixteen (16) hours in the performance of this work. The employes assigned to do this work are classified as Clerical Department employes. The Carrier's B & B Painting Forces have performed similar work in the past.

Claim as set forth herein was filed and the Carrier has declined the 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.

POSITION OF EMPLOYES: The Scope of the effective Agreement, reads as follows:

"MAINTENANCE OF WAY AGREEMENT

SCOPE—These rules governing the hours of service, rates of pay and working conditions of the following class of employes:

In accordance with the above decisions Carrier submits the instant claim should be denied, except as it is dismissed for lack of jurisdiction.

All of the facts and arguments used in this case have been affirmatively presented to Employes' representatives.

OPINION OF BOARD: Under Rule 53 Claimant establishes a prima facie case that the wall cleaning work here in dispute was covered by the Maintenance of Way Agreement. It states:

"RULE 53—CLASSIFICATION

"Painter's Work:

> **"Cleaning,** painting, refinishing and glazing on all bridges, **buildings,** signs and other structures."

The Memorandum of Agreement of February 24, 1954 specifies certain procedures before "work covered by the Agreement" may be "performed by parties other than those coming under the Scope of the Agreement." This has the effect of guaranteeing the "cleaning" of "buildings" to B & B employes unless the specified procedures are followed and there is no assertion that they were.

The Carrier contends that the "General Understanding" of the Agreement limits the effect of Rule 53. We agree that it operates to limit the work classifications to "practices as in effect on this property" as of the time the Agreement was concluded.

The Carrier asserts that wall cleaning was not the exclusive work of painters but offers no probative evidence to support the assertion. As the Claimant makes a prima facie case based on Rule 53 that the disputed work belonged under this Agreement, the Carrier had the affirmative burden to prove "practice" under the "General Understanding".

The Carrier cites Award 7105 (Carter) to show that "cleaning" was within the province of janitors covered by the Clerks' Agreement. The facts of the case do not support the Carrier's position. There floor waxing had been contracted out and the Board held the work should have been performed by janitors. The case does not stand for the broad proposition for which it is cited, i.e., that "cleaning" without limitation is janitorial work. The case merely shows that floor cleaning and waxing had been and should be performed by janitors covered by the Clerks' Agreement.

We think it obvious that wall and ceiling cleaning are different from floor cleaning. The latter is done often and regularly. Wall and ceiling cleanings are infrequent and periodic. Rule 53 and the 1954 Memorandum would not mean much, if anything, were "cleaning" of all varieties to be deemed the work of two or more groups of employes under as many contracts.

Vice President Pearson's letter of September 18, 1943 does not prove practice. Its assertions as to practice were self-serving in the course of a dispute with the Organization. It only stands for the limited "principle" (which helps Carrier not at all and Claimant only slightly) that washing and painting of a waiting room (part of a building) should have been performed by painters and not a contractor.

The Carrier failed to prove "practice" which would remove wall cleaning from the exclusive province of painter's by virtue of the operation of Rule 53 and the 1954 Memorandum.

Award 5345 (Robertson) does not require a different conclusion because it involved another carrier under an agreement which, so far as the case report shows, did not contain any provisions similar to Rule 53 and the 1954 Memorandum.

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

The Claims are sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of September, 1960.

DISSENT TO AWARD NO. 9555, DOCKET NO. MW-8822

Rule 53, in defining painters' work, makes "cleaning" painters' work only when "painting, refinishing and glazing" is also involved; the rule contains the conjunction "and", not "or". Furthermore, the rule specifically refers to cleaning and painting "on", meaning surfaces outside thereof, and not "in" buildings, etc. Accordingly, Carrier's statement of the practice is in conformity with the Rule, and, consequently, the burden of proof was on the Employes to show otherwise which they failed to do. In any event, Award 7105 is proof that "cleaning" without limitation is not exclusive to painters and Award 9555 does not take issue therewith. The 1954 Memorandum of Agreement is simply coextensive with the Agreement between the parties and does not apply to work which is not exclusively reserved thereunder.

For the foregoing reasons, Award 9555 is in error and we dissent.

/s/ W. H. Castle

/s/ R. A. Carroll

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ J. F. Mullen