Award No. 10781
Docket No. MW-9877

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Eugene Russell, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned other than painters to perform painting work on the St. Louis freight house and roundhouse on May 17, 18, 21, 22, 23, 24, 25, 28, 29, 31, June 1, 4, 5, 6, 8, 11 and 12, 1956; 576 hours being consumed in the performance thereof.

(2) The Carrier again violated the Agreement on August 2, 3, 6, 7, 8, and 9, 1956 when it assigned other than painters to perform painting work at the Franklin Avenue freight house; 112 hours being consumed in the performance thereof.

(3) Each member of Paint Gang No. 4 be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by other forces in performing the work referred to in Parts (1) and (2) of this claim.

EMPLOYES STATEMENT OF FACTS: On the dates specified in Part (1) of the Statement of Claim, the work of painting windows in the freight house, as well as the painting of windows and doors in the roundhouse at St. Louis, Missouri, was assigned to and performed by the employes on Bridge and Building Division Gang No. 6. 576 man hours were consumed in the performance of the above referred to painting work.

Similarly, on the dates specified in Part (2) of our Statement of Claim, the work of painting windows in the Franklin Avenue freight house at St. Louis was assigned to and performed by the employes on this very same Division Bridge and Building Gang. 112 man hours were consumed in the performance of this work.

The employes on B&B Division Gangs and Paint Gangs are in separate and distinct seniority groups in the Bridge and Building Sub-department and are carried on separate seniority rosters.

outlined in the letter of understanding dated January 27, 1954 (Carrier's Exhibit No. 9).

The total amount of time claimed by Petitioner in this case embraces all of the time spent by B&B forces in making all of the repairs enumerated in Carrier's exhibits and in applying a prime coat of paint to the repair work. In fact, the total of 688 hours claimed includes time the B&B forces spent working away from the freight house and roundhouse, as shown in Carrier's Exhibit No. 3. For example, 348 hours of the total 688 hours claimed embraced such work as repairing roofs, platforms, water tank, freight house dock, tables; rebuilding steps; waterproofing the deck of a bridge; trucking material; moving toilet; and placing support for clock. Stated differently, only a very small portion of the total time claimed was spent in applying a prime coat of paint to the repair work. This fact was directed to the attention of the General Chairman while the claims were being handled on the property, as shown in letters dated October 10, 1956 and January 16, 1957, copies of which are attached hereto identified as Carrier's Exhibits Nos. 10 and 11. The General Chairman obviously concurred in the statements contained therein, because nothing further was heard from him subsequent to Carrier's letter of January 16, 1957.

In conclusion, Carrier respectfully submits that the evidence contained herein clearly proves that:

(1) The only painting performed by B&B forces was the application of a prime coat of paint to repair work.

(2) The parties have agreed that such application of a prime coat of paint is permissible as shown in Exhibit No. 9.

(3) Only a very small portion of the time claimed was actually spent in applying a prime coat of paint. Carrier's exhibits clearly show that the B&B force was engaged in making repairs to windows and other work, in addition to applying a prime coat of paint, during the periods involved in the claim.

In the light of the foregoing, there can be no decision but denial of the claim in its entirety.

The Carrier affirmatively asserts that all data herein submitted have previously been submitted to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim arises out of the contention that on the dates specified therein Carrier had Employes on the Bridge and Building Division Gang Number 6 perform work of painting on the St. Louis Freight House and Roundhouse and the Franklin Avenue Freight House, in violation of the rules of its Agreement with the Brotherhood. Based upon this alleged violation it asked that the Claimants who are regularly assigned to Paint Gang Number 4 be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by the other forces in performing the work referred to.

Rule 2, Sub-Department b. Bridge and Building places painters in Seniority Group 3, whereas the same places B&B Division Gang Mechanics

and Helpers in Group 4. Rule 4 (a), as far as here material, provides "Seniority rights of all employes shall be confined to the group of the sub-department in which employed, and to the territory of one Operation Division, . . ." Claimants had seniority as painters on Carrier's Lines in the area involved.

Rule 50 (c) defines a Painter as "An employe skilled in and assigned to the mixing, blending or applying paint either by brush or spray, . . ."

Under these rules it was not permissible for Carrier to have B&B Employes do painting without violating its Agreement with the Brotherhood unless what they did come within an agreed exception which permitted B&B employes to apply a prime coat of paint to new material used in repair work, or new construction.

The burden of establishing facts sufficient to authorize the allowance of a claim is upon the party seeking its allowance.

The exception above referred to is covered in the written understanding between the parties dated January 27, 1954 which appears as Carrier's exhibit number 9 the pertinent parts of which are as follows:

> "Referring to our conversation today concerning the understanding with respect to the long existing practice under which B&B employes are permitted to apply prime coat of paint to new material used in repair or new construction.
>
> "For the sole purpose of reducing this well understood principle to writing, this will confirm the understanding that B&B men may apply a prime coat of paint to new material used in repair or new construction work for the purpose of protecting the material from the weather until a paint gang is available to properly apply the finish coat of paint."

This record discloses that there is no disagreement between the parties, that the B&B Division Gangs and the Paint Gangs are in separate and distinct seniority groups in the Bridge and Building Sub-department and are carried on separate seniority rosters.

The record also establishes by a preponderence of the evidence that certain painting work, not covered by the exception, was performed by the B&B Division Gangs during the months of May and June and based upon the probative evidence in this record your Board necessarily finds that the contract was violated to the extent of the painting work performed beyond that of "applying a prime coat of paint to new material used in repair or new construction work for the purpose of protecting the material from the weather until a paint gang is available to properly apply the finish coat of paint".

It appears from this record that the buildings involved were scheduled for a new coat of paint by the paint gang to be applied during the fall of 1956 and that the repairs being performed by the B&B Gang in May, June and August of 1956 were for the purpose of placing the buildings in condition, due to their deteriorated state, and to place them in readiness for the paint gang later in the fall. It also appears that the color of the paint applied by the B&B Gang was not the same color to be applied in the overall painting job, however, there is no doubt in the mind of the

Board that the B&B Division Gang did apply some paint not covered in the exception.

The best evidence in the record with respect to the time involved in the months of May and June appears in Carrier's Exhibit 3 and from a thorough analysis the entire time spent by the B&B Gang in painting would amount to approximately 68 hours including the painting covered by the exception and the painting which properly belonged to the Claimants. Your Board further finds that the painting work complained of during the month of August was within the exception and was not work properly belonging to Claimants.

Based upon the foregoing determinations from this record, the Board finds that a portion of the approximately 68 hours painting work performed by the B&B Division properly belonged to the Claimants; however, the proof in this record is not sufficiently clear for the Board to establish the exact number of hours pay to which Claimants are entitled; therefore, it becomes necessary in this case, as was done by the Board in Award Number 3130 between the same Brotherhood and Carrier, to refer the matter of computing the exact number of hours involved from the approximate total of 68, back to the property.

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 to the extent set forth in this Opinion.

AWARD

Claim sustained in accordance with the Opinion and Findings and referred back to the property for computation in accordance with this Award.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10781, DOCKET MW-9877

In this Award the majority have properly stated the universal rule that the burden of establishing facts sufficient to authorize the allowance of a claim is upon the party seeking its allowance, but they have failed to apply the rule in arriving at their decision.

The claim submitted to us is that in May, June and August, 1956, B&B Gang No. 6 worked a total of 688 man-hours doing painting to which they were not entitled. There has been complete agreement of all parties throughout all handling of the claim on the point that members of B&B Gang No. 6 were entitled to apply a "prime coat of paint to new material used in repair or new construction work". Carrier's defense at all times has been that all painting done by the B&B gang was such prime coat painting. Hence the case turns on a simple question of fact, namely, whether the B&B gang did painting other than prime coat painting for any ascertainable period of time.

Claimants submitted contradictory and vague statements designed to prove that the B&B gang had worked 688 man-hours painting other than prime coat painting (Employes' Exhibit A and Vice Chairman Heath's letter of September 8, 1956). The majority recognize that the Claimants' evidence is less reliable than Carrier's and state in the Award:

> "The best evidence in the record with respect to the time involved in the months of May and June appears in Carrier's Exhibit 3 and from a thorough analysis the entire time spent by the B&B Gang in painting would amount to approximately 68 hours including the painting covered by the exception and the painting which properly belonged to the Claimants. . . ."

Carrier's Exhibit 3, being a copy of the Company's records of work performed by B&B Gang No. 6 during the period involved, is certainly the best evidence, but that Exhibit does not disclose that any time whatever was devoted to painting other than prime coat painting coming within the "exception". The Company has thus given us the benefit of its records, and the Claimants admittedly have failed to adduce evidence from which it can be determined that any ascertainable amount of time was worked by the B&B gang in doing painting to which it was not entitled. The Claimants thus failed to meet their burden of proof and the claim should have been denied.

We do not agree with the majority's conclusion that "certain painting work, not covered by the exception, was performed by the B&B gang". In view of the entirely correct finding that the Company's records constitute the best evidence before us, plus the statement of the foreman of B&B Gang No. 6, we wonder what evidence the majority could have been considering when they reached this conclusion. Furthermore, we believe that if any valid basis for such a conclusion appeared in the record, the majority would have identified the "certain painting work". In the absence of specific identification of the work that is supposed to have been done by B&B Gang No. 6 in violation of the Agreement, the Award leaves parties in precisely the same positions they occupied before they came to the Board. It gives them nothing to assist in determning whether any ascertainable amount of time was worked doing other than prime coat painting, and hence would be a useless gesture even if it were proper for us to throw the case back to the parties instead of denying the claim when the Claimants failed to prove their basic contention.

Award 3130 (Youngdahl) which is cited as authority for sending this case back to the property "for computation in accordance with this Award" certainly does not support the action here taken. In that case the litigated issue concerned the interpretation and coverage of a Scope Rule (specifically, whether definitely identified painting and whitewashing

were covered by the rule). There was complete agreement in the record as to the specific painting and whitewashing work there involved. The Board ruled that the painting was covered and that the whitewashing was not, thus leaving a simple computation to be made on the basis of undisputed facts. There was nothing in that record to suggest any problem in making a simple computation of the time devoted to the painting alone since its nature and extent was agreed upon. We wonder how that case can be compared to the instant case. Here, the only litigated issue is one of fact, namely, whether any ascertainable amount of painting other than prime coat painting was done by B&B employes. We are throwing the case back to the parties with the unsupported assertion that some of that work was done by the B&B employes, and directing the parties to determine how much was done. In other words, we are telling the parties to decide the very same question of fact which they submitted to us because of their inability to reach a solution. The only guiding principle laid down in the Award for the guidance of the parties in resolving this factual question is the ruling that the Carrier's records are the best evidence. Since we already know that those records do not indicate any painting other than prime coat work was done by the B&B gang, it is obvious that this will not help the parties to agree that a specific amount of such painting was done by the gang. Thus, **Award 3130** resolved the question at issue between the parties and returned the case to them for a mere computation based on undisputed facts, while the instant Award refers the very question at issue between the parties back to them and gives them no basis for resolving it — it merely refers them to the perfectly clear Agreement provision which both parties have consistently recognized as the controlling rule.

As we see it, the Award is simply an attempt on the part of the majority to compel this Carrier to develop a claim for the Claimant when there is no rule in the controlling Agreement requiring such action (**Award 10435** — Miller). It is axiomatic that such an Award exceeds the the powers of this Board and is therefore void.

We dissent.

/s/ G. L. Naylor
G. L. Naylor

/s/ O. B. Sayers
O. B. Sayers

/s/ R. E. Black
R. E. Black

/s/ R. A. DeRossett
R. A. DeRossett

/s/ W. F. Euker
W. F. Euker