

Award No. 13446
Docket No. MW-12859

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

NORFOLK AND WESTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, on June 9, 1960, it assigned or otherwise permitted Signal Maintainers to paint crossing signals on the Blue Stone Branch at Bramswell, West Virginia, and at Simmons Crossing and when on June 28, 1960, it assigned or otherwise permitted a signal maintainer to paint a crossing signal and relay case at Coopers and a relay case at Bramswell.

(2) Painter F. F. Edmunds, who was in furloughed status on June 9 and 28, 1960, be allowed pay at the painter's straight time rate for the same number of hours as were consumed by maintainers in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On June 9, 1960, about four (4) hours' time was consumed by Signal Department employees in performing the work of painting crossing signals on the Bluestone Branch at Bramswell, West Virginia, and at Simmons Crossing.

On June 28, 1960, about two and one-half (2½) hours were consumed by Signal Department employees in performing the work of painting crossing signals and a relay case at Cooper and a relay case at Bramswell, West Virginia.

Inasmuch as work of this character has been customarily and traditionally performed by B&B painters in the Maintenance of Way Department, the subject claim was presented and progressed in the usual and customary manner on the property, but was declined at all stages of the appeals procedure.

The Agreement in effect between the parties to this dispute dated December 16, 1944, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

changed by its terms, such practices are enforceable to the same extent as the provisions of the contract itself (see Award 2436 and Awards cited therein)."

The Carrier submits that the work involved in the instant case, painting a signal relay case and a crossing signal, likewise, does not require the services of a skilled Painter, and that the work of applying a coat of paint to such equipment is a minor element of painting work which is a logical incident to a Signal Maintainer's work of maintaining signal apparatus.

The Carrier asserts that the claim in this case must fail for reasons enumerated as follows:

1. The work involved is not reserved exclusively to employees under the Maintenance of Way Employees' Agreement by Scope Rule provisions, tradition, historical practice, or custom, and has always been performed by employees of both the Signal Department and the Maintenance of Way Department.
2. The employees have not and cannot prove that the work involved is reserved exclusively to members of their craft.
3. The work involved is incident to the work of maintaining signal equipment and may, therefore, properly be performed by employees of either the Signal Department or the Maintenance of Way Department.

Denial of the claim in its entirety is respectfully requested.

(Exhibits not reproduced.)

OPINION OF BOARD: Involved in this claim is the exclusive right of maintenance painters to paint crossing signals and relay cases. Carrier had permitted signal maintainers to do the painting instead of using maintenance painters.

The exclusive right to this work cannot be sustained on the language of Rule 1 — Scope or Rule 2 — Seniority Groups, Classes and Grades. These Rules are general in nature, and do not define the work of the positions mentioned. This Board has frequently held in cases involving Scope Rules of a general nature, that exclusivity should be determined by reference to custom, tradition and practice on the property and that the burden of proof is upon Claimant. It is the Organization's position that it has sustained this burden of proof.

The Organization's proof of practice consists of five letters, one of which was sent by Claimant. The Carrier submitted 22 affidavits which swear that painting of signal equipment was always performed by both signal men and maintenance men. The Organization objects to these affidavits being considered in the determination of the issue because they were not submitted to the Organization during the processing of the claim on the property.

The objection is well founded. Circular No. 1 of this Board prohibits the consideration of evidence not presented to the other side on the property. Award 12942.

Carrier's position, with respect to practice, minus the affidavits, becomes mere assertion, and not proof. It remains for us to consider whether the Organization has sustained its burden of proof by means of the letters it submitted.

Carrier argues that these letters merely state that maintenance workers have always done this work, which is not denied, but do not say the work was reserved to them exclusively.

While the word "exclusively" does not appear in these letters, it is a fair inference that they intended to convey that impression. One letter states that this work "has been customarily and traditionally done by us." Another states, "In the past it has been the work of the paint forces to paint relay cases and crossing signals."

Technically, on the evidence before the Board, we hold that the Organization has sustained its burden of proof. It must be pointed out that this decision cannot be deemed decisive on the question of exclusivity on this property for this work. In the next such similar case Carrier may make a more positive effort to dispose of such claims by disclosing all of its evidence and making a fuller statement of its position on the property than a mere, terse denial of the claim, as was done here. It is the purpose of the Railway Labor Act and the Rules of this Board to encourage the disposition of claims on the property. This objective is better served by requiring both sides in a dispute to lay all their cards on the table rather than to play it close to the vest.

In part 2 of the claim, the Organization seeks only the same number of hours as were consumed by signal maintainers in performing the work. Carrier asserts and we find that this work consumed approximately one hour and thirty minutes on June 9, 1960, and two hours and thirty minutes on June 28, 1960.

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 Employees involved in this dispute are respectively Carrier and Employees 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 as stated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of March 1965.