



Award No. 14204  
Docket No. MW-13958

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**(Supplemental)**

Bernard J. Seff, 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 that:

(1) The Carrier violated the Agreement when it assigned other than B&B forces to install a new roof on the Power House at Riverside, Baltimore Terminal during the week of April 10 to 16, 1960.

(2) B&B employees Roland Purcell and Rubin M. Stockman each be allowed five days' (40 hours) pay at their respective straight-time rates account of the violation referred to in Part (1) of this claim.

**EMPLOYEES' STATEMENT OF FACTS:** During the week of April 10 to 16, 1960, water station forces, who hold no seniority under the provisions of this Carrier's agreement with the Brotherhood of Maintenance of Way Employees, performed the work of installing a new corrugated metal roof on the Power House at Riverside Roundhouse in Baltimore Terminal. This roof was approximately 20 x 30 feet in size.

The time limits within which to institute proceedings to the Board on this case were extended by agreement and confirmed in a letter reading:

**"THE BALTIMORE AND OHIO RAILROAD COMPANY**

Baltimore 1, Maryland  
November 28, 1962

Mr. H. J. Walton, General Chairman  
Brotherhood of Maintenance of Way Employees  
703 United Bldg., Akron 8, Ohio

Dear Sir:

This will confirm conversation on November 27, 1962, that I am agreeable to granting you a period of six months commencing

November 15, 1962, within which to institute proceedings before the National Railroad Adjustment Board in Cases Nos. 2, 5, 24, 38, 42 and 46, all involving the third party notice issue, as originally listed in your several letters submitting cases before the Special Board and as described in my letters to you of March 22, 1962, and September 26, 1962.

Very truly yours,

/s/ T. S. Woods."

This case was identified on the property as Case No. 5.

The Agreement in effect between the two parties to this dispute dated April 1, 1951, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

**CARRIER'S STATEMENT OF FACTS:** The claim in this case alleges a violation of the agreement between this Carrier and its employees represented by the Brotherhood of Maintenance of Way Employees when " \* \* \* (the Carrier) assigned other than B&B forces to install a new roof on the Power House at Riverside, Baltimore Terminal during the week of April 10 to 16, 1960, \* \* \*."

The claim also asks that " \* \* \* B&B employees Roland Purcell and Rubin M. Stockman each be allowed five days' (40) hours pay at their respective straight-time rates \* \* \*."

The facts in this case are as follows:

In April 1960 it was found necessary to install a corrugated metal roof on the Power House at Riverside Roundhouse in Baltimore Terminal. This roof was approximately 20 x 30 feet in size.

In the past work of this nature in Baltimore had been handled by water station forces working under the provisions of the Sheet Metal Workers' Special Rules appearing in the agreement between this Carrier and its employees represented by System Federation No. 30 RED (Shop Crafts).

In accordance with this standing practice in Baltimore Terminal these forces were assigned to, and performed, the work made basis of claim in this case.

In handling this case on the property of this Carrier the Committee representing the Brotherhood of Maintenance of Way Employees was unable to cite this Carrier to any rule appearing in its agreement that would give work of this kind by some exclusive reservation to employees coming under the scope of the BMWWE Agreement.

**OPINION OF BOARD:** This dispute involves Carrier's assignment of Water Station forces, who hold no seniority under the Maintenance of Way Agreement to install a new corrugated metal roof on the Power House at the Riverside Roundhouse in the Baltimore Terminal.

It is the contention of the Organization that the work should have been performed by employees who are part of the Bridge and Building forces in the Maintenance of Way Department for two reasons:

- (1) the work is specifically reserved to the above employees as spelled out in the current contract between the parties;
- (2) the work in question does not fall within the specific exceptions of the Scope Rule and in support of its position the Petitioner calls particular attention to the said Rule, Section 1 (c), which in pertinent part states as follows:

"Bridge, Building and Structural Work.

Carpentry, painting, glazing, tinning, roofing, . . . required in the construction and maintenance of railroad structures, other than tunnels, shall be performed by B&B forces. . . ." (Emphasis ours.)

The burden of the Carrier's position can be summarized as follows:

- (1) Carrier raised a question that goes to the Board's authority to determine the issue on the merits claiming that the Sheet Metal Workers are involved in this dispute and pointing out that they were neither notified of the pendency of the instant dispute nor did they participate in the processing of the grievance on the property.
- (2) On the merits the Carrier claims there is no rule appearing in the Maintenance of Way Agreement, neither the "Scope Rule" nor Rule 1 which would operate to support the instant claim.
- (3) There is no exclusive reservation of any work of this kind to employees in the B&B forces.
- (4) By custom and long practice the work in question has been performed by water station forces in the Maintenance of Way Department.

The Carrier's threshold question concerning jurisdiction is without merit since the record contains a letter from the Sheet Metal Workers International Association, dated March 9, 1965 in which the said Organization's General Vice President, Mr. J. W. O'Brien, acknowledged receipt of notice of the pendency of the dispute and disclaiming any interest in the proceeding.

On the merits it appears that the Petitioner makes a compelling argument in support of its position. In the first place the Agreement in the Scope Rule Section 1 (c) quoted supra explicitly sets forth that ". . . tinning and roofing . . . required in the construction and maintenance of railroad structures . . . shall be performed by B&B forces . . ." Not only is this language clear and unequivocal but it also contains the word "shall" which is mandatory and not permissive. Furthermore the Carrier appears to place heavy reliance on what it calls an unchallenged and long continuing past practice which not only destroys the notion of exclusivity but allegedly denotes the Organization's acceptance, without protest, of the propriety of the Carrier's assignment of the work in question to the Sheet Metal Workers Union. This contention is challenged by the Organization on the record.

In the opinion of the Board this conflict in the position of the parties not only cannot be resolved by this Board on the present state of the record but need not be reached to arrive at a resolution of the instant dispute.

The only situation where evidence of a past practice is admissible is to explain away ambiguity in a contract. If there is no uncertainty as to the intention of the parties to be found in the controlling language in the contract then evidence of past practice, no matter how long continued, is not germane to the issue. In the case at bar the language quoted supra is clear, explicit, and mandatory: the work belonged to and should have been assigned to the employees on whose behalf the instant claim was filed. It would not appear that there can be any question as to the meaning of the words "tinning and roofing" required in the installation of a new corrugated metal roof on the Power House at the Riverside Roundhouse in the Baltimore Terminal. Evidence of past practice is not admissible to vary or controvert the express written terms of a contract.

It would also appear that those portions of the Carrier's argument which relate to the exception set forth in Scope Rule (b) (4) which excludes from the coverage of the instant Agreement "Employees, as of the effective date of this agreement, covered by agreements with other Labor Organizations" are not apposite to the instant case. The General Vice President of the Sheet Metal Workers Association in his letter dated March 9, 1965 expressly disavowed any interest in the instant proceeding.

**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 its Agreement.

#### AWARD

The claims will be sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1966.