

Award No. 18471
Docket No. MW-18837

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, on or about January 13, 1969, it assigned other than B&B forces to perform the work of washing walls and/or ceilings in the Endion Depot at Duluth, Minnesota. (System File 7-69.)

(2) B&B employees Einar Carlson, Norman Bourdage and Mathew McMahon each be allowed pay at their respective straight time rate for an equal proportionate share of the total number of man hours expended by other than B&B forces in performing the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimants have established and hold seniority in Group (A) 4 within the Bridge and Building Sub-Department on the Iron Range Division. The clerical employees, who were assigned and used to perform the work in question, do not hold any seniority under the provisions of the Agreement controlling in this dispute.

The factual situation here involved is partially described in a letter of appeal reading:

LETTER "A"

"May 14, 1969

Mr. R. B. Rhode, Chief Engineer
Duluth, Missabe & Iron Range Railway Co.
Wolvin Building
Duluth, Minnesota 55802

Claim No. 7-69

Dear Sir:

This is to appeal the decision rendered by Mr. H. J. Nystrom in his letter of March 18, 1969, wherein he denied claim No. 7-69.

either by brush, spray or other methods, or glazing, including the cleaning or preparation incidental thereto, shall be classified as a painter."

The claimants were actively at work on regular assignments in the Bridge and Building Department during the hours when the work, which is the subject of this dispute, was performed.

A copy of the correspondence involved in the handling of the claim on the property is attached and marked as Carrier's Exhibit A.

(Exhibits not reproduced.)

OPINION OF BOARD: The facts out of which the claim arose are not in dispute. During the period from January 13 through January 24, 1969, three employees represented by the Brotherhood of Railway, Airline, and Steamship Clerks were employed to wash the walls and ceilings of Carrier's Endion Station building located at Duluth, Minnesota.

The Organization contends that this work should have been assigned to B and B forces on the Iron Range Division. Claimants hold seniority as B and B employees, and should have been assigned the work in question. Carrier contends that the wall and ceiling washing was not incidental to painting, and consequently was janitorial work, not reserved exclusively to B and B employees.

The Organization alleges that, as a result of its assigning Clerks in lieu of B and B forces to perform the work in question, Carrier violated Rule 1, Scope Rule, and Rule 29, Classification of Work Rule of the Agreement.

The pertinent provisions of the Agreement relied on by the Organization are as follows:

"RULE 1. SCOPE

The rules contained herein supersede all previous rules and agreements and shall govern the hours of service, rates of pay and working conditions of all employees in any and all sub-departments of the Maintenance of Way and Structures Department.

This agreement shall not apply to the following:

1. Assistant Roadmasters, General Bridge and Building Foremen, or other comparable supervisory employees and those of higher rank.
2. Clerical and civil engineering forces.
3. Employees in signal, telegraph, and telephone maintenance departments."

"RULE 29.

CLASSIFICATION OF WORK

* * * * *

(c) An employe assigned to construction, repair, maintenance or dismantling of buildings, bridges, or other structures, including the building of concrete forms, erecting falsework, setting of columns, beams, girders, trusses, or in the general structural erection, replacement, maintaining or dismantling of steel in bridges, buildings or other structures and in the performance of related bridge and building iron work, such as riveting, rivet heating, or who is assigned to miscellaneous mechanics' work, shall be classified as a bridge and building carpenter and/or repairman.

(d) An employe assigned to mixing, blending, sizing, applying of paint, kalsomine, whitewash or other preservatives to structures, either by brush, spray or other methods, or glazing, including the cleaning or preparation incidental thereto, shall be classified as a painter."

In order to sustain their contention, the Organization has the burden of proving that the Agreement clearly grants it exclusive right to the work complained of by saying that such work is reserved to the Organization, or, in the absence of such a Rule, it must prove, by probative evidence, that the work is of a kind that has been historically, customarily, and exclusively performed by employes covered by the Agreement.

An examination of the Rules relied on by the Organization fails to produce evidence of exclusivity of the work in question being reserved to B and B forces. The Scope Rule of the Agreement, is general in nature, and under innumerable decisions handed down by the Board, does not grant the Organization exclusive right to the work in question. Nor does Rule 29, the Classification Rule, support the Organization's contentions. It is axiomatic that the mere inclusion of a classification rule, does not, by itself, mean that the work of each classification will be restricted exclusively to the employes of the class. Rule 29 cannot be construed to provide the Organization exclusive right to the disputed work.

It should be made emphatically clear that this decision in no way passes on the exclusivity of washing and cleaning walls and/or ceilings when such work is incidental to painting. That issue was not before the Board.

Since the Agreement does not vest in the Brotherhood the exclusive right to wall and ceiling washing, in order to prevail, the Organization must prove that work of such nature has been traditionally and exclusively reserved to B and B employes. This is a question of fact which must be proven by a preponderance of the evidence.

The Organization proffered no evidence which would shed light on the issue of past practice, and it has long been established by this Board that unsupported assertions do not constitute proof.

The record shows that the Organization failed to sustain its burden of proof and therefore we must deny the claim.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1971.