

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25396  
**Docket** Number MW-25425

Eugene T. Herbert. Referee

(**Brotherhood** of Maintenance of **Way** **Employees**

PARTIES TO DISPUTE: (

(Norfolk and Western **Railway** Company  
(Formerly Virginian Railway Co.)

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

(1) The Carrier violated the Agreement when it assigned Shop Craft employes instead of Bridge and Structure Painters to perform painting work at Princeton during July, 1982 (System File **V-TC-1391/MW-MU** 82-51).

(2) Because of the aforesaid violation, **Mr. W. M. McGuire** shall be allowed one thousand seventy-seven (**1077**) hours of pay at his straight time rate and two hundred fourteen (**214**) hours of pay at his time and one-half rate.

OPINION OF BOARD: The record indicates that during July, 1982, Carrier assigned certain Shop Craft employes none of whom held seniority in the Maintenance of Way and **Structures Department**, to perform painting work in the shop buildings at Princeton, West Virginia.

Organization asserts that the work assigned and performed violated the applicable Scope Rule which reserves such work exclusively for Bridge and Structure Painters. While Carrier concedes that the painting of "structures" is reserved to that Craft, it denies that any part of a "**structure**" was painted on the occasion in question. The evidence of record reveals that machinery, lockers and other equipment were painted by the Shop Craft employes.

Neither the Scope Rule nor any provision of the Agreement between the Parties defines 'structure'. Earlier decisions of this Board have held that a "**structure**" is a building, a construction affixed to the realty. Award 13045. Clearly something that is not a fixture, as that term has been defined in **common** law, cannot be part of a structure. Hence furniture, removable or portable lockers and equipment **are** not part of a structure.

**Whether**, for the purpose of resolving the instant dispute, something that is a fixture is determined to be part of a structure does not depend **strictly** on principles of common law but rather on the intention of the parties as determined by specific language in their Agreement or clearly established past practice.

The Agreement, including the Scope Rule, is silent on the matter. Under these circumstances, the burden of proof rests on Organization to establish that the painting of **certain** fixtures has historically, traditionally and customarily been exclusively reserved to it. If successful, Organization must thereafter carry the burden of proving that those fixtures were in fact painted by third parties.

While there was some evidence in this case that certain fixtures such as machinery embedded in concrete, window frames and floors, may in fact have been painted by the Shop Craft **employees**, Organization has failed **either** to specifically identify those items or to meet the standard of proof regarding systemwide past practice as to them when the Scope Rule, as here, **is** general in character and does not specify the functions contained therein=. Award 10389.

It is the **opinion** of the Board therefore that the evidence does not show that the **work** claimed by the Organization was exclusively done by its members.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest::

  
Nancy J. Dever - Executive Secretary

**Dated** at Chicago, Illinois, this 15th day of April 1985.