

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28543
Docket No. MW-27330
90-3-86-3-542

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier violated the Agreement when it assigned outside forces to clean and repaint Bridges 138.1 and 133.3 beginning December 19, 1984 (System Files 180-A8-857/11-1940-20-232 and 180-A8-859/11-1940-20-234).

(2) As a consequence of the aforesaid violation, Los Angeles Division B&B Painters R. S. Gonzales, P. L. Jacome, R. E. Henderson, B. L. Gambill, M. N. Romero, G. W. Beauregard, M. D. Bowlin, D. J. Ritter, E. Delgado and T. G. Eikom shall each be allowed one hundred ninety-two (192) hours of pay at their respective rates."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

At issue in this case is whether the Carrier violated the controlling Agreement when it contracted out the work of cleaning and painting two bridges on the Los Angeles Division during December, 1984 and January, 1985. The Organization asserts that instead of assigning the Claimants to perform this work, Carrier hired Lundeen Coatings Corporation and, beginning December 19, 1984, five of the contractor's employees worked 27 days cleaning and painting Bridge No. 138.1. From January 15 through 28, 1985, the contractor's five employees cleaned and painted Bridge No. 133.3. The Organization argues that the work of cleaning and painting bridges has customarily and historically been performed by B&B Painters, and, further, that the work is contractually reserved to them under the provisions of Rules 1, 2(a) and Appendix 24, which state in pertinent part:

"RULE 1 - SCOPE

This Agreement governs the hours of service, wages and working conditions of employees of the following classes in the Maintenance of Way and Structures Department: Track Supervisors and Motor Track Inspectors, to the extent set forth in Appendix No. 23; Bridge and Building Foremen; Paint Foremen; Bridge men (not including Steel Bridge or Assistant Steel Bridge Foremen); Bridge and Building Mechanics; Bridge and Building Painters; Bridge and Building Helpers; Welder Gang Foremen; Welders; Heat Treaters; Welder Helpers; Extra Gang Foremen; Fence Gang Foremen; Section Foremen; Assistant Extra Gang Foremen and Assistant Section Foremen; Trackmen; System Rail and Plow Gang Employees; Fuel Foremen; Pumpers and Water Treaters; Machine Operators; Bridge and Building and Water Service Laborers; Fuel Station and Sand House Helpers and Laborers; Track, Bridge, Tunnel and Crossing Watchmen and Flagmen and such other classifications as may be shown in the appended wage scale or which may hereafter be added thereto.

RULE 2 - SENIORITY

2 - (a) - Establishment of Seniority. Except for track, bridge, tunnel and crossing watchmen/flagmen, who do not establish seniority as such, seniority shall be established as Track Supervisor, Motor Track Inspector or in one of the following groups:

Group 1. -

- Class 1: B. & B. Foremen and Bridge Inspectors
- Class 2: Assistant B. & B. Foremen
- Class 3: B. & B. Mechanics
- Class 4: B. & B. and Painter Helpers
- Class 5: B. & B. and Water Service Laborers

Group 2. -

- Class 1: Paint Foremen
- Class 2: Painters
- Class 3: B. & B. and Painter Helpers

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WAGE APPENDIX
RATES EFFECTIVE JULY 1, 1983

(* Rates effective July 1, 1983, include 3% General Increase effective July 1, 1983.)

B&B AND PAINTER FOREMEN:

First two years' service as such.....\$2319.40 per month
Third year's service and thereafter as such...\$2340.90 per month

B&B MECHANICS (Including B&B Painters).....12.1408 per hour
B&B Mechanics, when they perform welding, will receive a rate of \$12.4060 per hour in accordance with the provisions of Memoranda of Agreement dated July 15, 1976 and November 10, 1981.

A B&B Mechanic selected as lead workman, pursuant to Rule 39, Section (a), as amended by the November 10, 1981 Memorandum of Agreement, will be paid the lead mechanic's rate (\$12.4060 per hour) for such days as assigned." (Emphasis added)

During the handling of this dispute on the property, the Organization submitted to the Carrier nearly 30 letters from B&B employees stating that the work in question has always been performed by Bridge and Building Painters. The Organization submits that Claimants were available, qualified, and willing to perform all of the cleaning and painting work involved here. In its view, the reservation of bridge painting work to B&B Painters is one of the most fundamental components of the controlling Agreement, and allowing the contracting out of such work renders the Agreement virtually meaningless.

Carrier contends, first, that the Claim is vague and indefinite and does not constitute the filing of a proper Claim under the provisions of Rule 14(9)(1). On the merits, Carrier maintains that the work is not reserved exclusively to the Claimants either by Agreement or practice. Moreover, Carrier insists that there were special procedures and equipment needed to handle the cleaning and painting of the bridges involved, and that similar kinds of special projects have been contracted out in the past. Finally, it is Carrier's position that Claimants were fully employed and lost no earnings as a result of the disputed work being contracted out. Therefore, Carrier requests that this Claim be denied.

After careful review of the record in its entirety, we find no merit to the Carrier's contention that this Claim should fail for lack of specificity. In our view, the Claim was sufficient to join the issues and to fully inform the Carrier of the nature of the grievance, and, therefore, we will not dismiss the Claim on that basis.

We do agree with the Carrier, however, that Rules 1, 2(a) and Appendix 24 are general in nature and do not confer upon the Claimants the exclusive right to perform the disputed work.

In cases of this nature, where there is no specific reservation of work provision in the Agreement, it is incumbent upon the Organization to show that the work has customarily and traditionally been performed by members of its craft. Third Division Awards 26711, 23423, 25276. The Organization has failed to meet that burden here. While it was proven that B&B employees have generally performed the work of cleaning and painting bridges in the past, there was equally probative evidence submitted by the Carrier that the particular work at issue, which involved bridges located in densely populated areas and crossing over heavily traveled highways, thereby requiring the use of special procedures and equipment, has been contracted out by the Carrier on numerous prior occasions. We must conclude that there is insufficient evidence that the Organization was entitled to perform the disputed work on the dates claimed here.

As a final matter, we reject the Organization's assertion that, by notifying the employees of its intent to contract out the cleaning and painting work, Carrier implicitly admitted that the work was specifically covered under the Scope Rule. That argument has been rejected in several prior Awards. Third Division Awards 25370, 20920. The rationale generally given is that such notice is a procedural requirement and does not establish, either affirmatively or negatively, that the disputed work is exclusively covered under the controlling Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1990.