

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40786
Docket No. MW-40513
10-3-NRAB-00003-080330**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Mechanical Department (Firemen and Oilers) laborers to perform Maintenance of Way and Structures Department work (painting on floors) at the Lincoln Diesel Shop in Hobson Yards at Lincoln, Nebraska on August 3 and 4, 2006 [System File C-06-J030-3/10-07-0004(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants L. Divoll and J. Scherer shall now each be compensated for sixteen (16) hours at their respective straight time rates of pay and Claimant W. Flentie shall now be compensated for eight (8) hours at his respective straight time rate of pay.”**

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 were given due notice of hearing thereon.

This dispute arose after the Carrier assigned Laborers from the Mechanical Department, who were members of the National Conference of Firemen & Oilers (NCF&O) to paint yellow safety stripes on the floor of the Diesel Shop in the Hobson Yard at Lincoln, Nebraska, on August 3 and 4, 2006. Two Laborers worked on August 3, and three on August 4; each of the Laborers worked eight hours each day. The Organization contends that the work at issue should have been assigned to B&B forces because it is Maintenance of Way and Structures Department work that is reserved to M of W employees by Rules 1, 2, 5, and 55. One of the Claimants is a B&B Foreman and the other two are B&B First Class Carpenters.

The Organization contends that the painting work at issue is work reserved to M of W B&B employees by the terms of the contract, as well as past practice. Specifically, painting at Carrier buildings and structures is reserved for M of W employees under the parties' Agreement. Rule 1 identifies Sub-departments within the M of W Department; B&B is one of those Sub-departments. Rule 5 establishes the various rosters within the Sub-departments. The B&B Sub-department rosters establish B&B Foreman, B&B Painter Foreman, B&B Carpenter, and B&B Painter, among others. Rule 55 establishes classification of work and describes the nature of work and duties to be performed by various classifications. Rule 55 F and J establish First Class Carpenter and Painter classifications. Therefore, painting or applying other materials used as preservatives to structures is scope-covered work for employees who hold B&B seniority. The Claimants' B&B seniority gives them entitlement to work of the character involved here. Numerous Awards support this principle. Employees who hold seniority within the B&B Sub-department are the proper class of employees to perform this work and it should have been assigned to them. The Carrier violated the Agreement when it assigned the work to non-M of W forces. Moreover, the work at issue has historically been performed by B&B forces.

Employee statements attest to the fact that painting work has never been assigned to other crafts. The Carrier's assertion that there are no facts to support the Organization's claim is false. The Awards cited by the Carrier in support of its position do not apply to any parties on the property. Moreover, the sections of the Fireman & Oilers Agreement submitted by the Carrier prove the opposite of what the Carrier alleges. Nowhere is painting mentioned in the Laborers' job duties. Painting for Carmen is limited to cars, locomotives, and cabooses, with no mention of painting structures or buildings. In the end, the framers of the Agreement intended that work of the character involved here would be reserved to M of W forces, and the claim should be allowed.

According to the Carrier, the Organization utterly failed to prove its case. There is no probative evidence regarding what work was performed and how many hours the Claimants worked, or regarding whether BMW-represented employees have performed this work on a system-wide basis to the exclusion of all others. From the very beginning, the Organization has been vague as to the claim's subject matter; it did not identify what was painted until more than seven months after the Carrier had responded to the Organization's claim. Absent such fundamental information, the Organization failed to establish a prima facie case and its claim was invalid from the outset. Because the Carrier immediately challenged the Organization regarding the identification of the claimed work, it was the Organization's duty to respond with evidence. Its failure to respond is fatal to this claim. Even the statements ultimately provided by the Organization are vague and self-serving; they do not describe the nature of the painting or support the number of hours claimed. One would expect that the Claimants would be able to report with great accuracy the details of someone performing "their" work. Allegations are not enough; there is no way to verify the statements made. Casting further doubt on the accuracy of the Organization's claim is the fact that the Foreman who allegedly assigned the work was on vacation during that period and did not make the assignment. Moreover, the Organization failed to prove exclusive performance of the disputed work on a system-wide basis, as required by Rule 55. At best, the Organization can establish a mixed practice, a conclusion which is supported by evidence from a Foreman Locomotives at the Diesel Shop, who stated: "... historically painting has not been the exclusive domain of B&B personnel, and ... we have utilized all crafts to perform this type of work."

The Organization filed a claim by letter dated September 9, 2006, in which it stated: "The facts surrounding this case are that on August 3, 2006, General Foreman Butch Bercholz assigned two Laborers to paint at the Lincoln Diesel Shop in the Hobson Yards, in Lincoln, Nebraska and that he assigned three Laborers to paint on August 4, 2006 at the same location. These three Laborers, who are members of the International Brotherhood of Firemen and Oilers, performed work belonging to the B&B Sub-department." The claim goes on to specify that two Laborers worked eight hours each on August 3 and three Laborers worked eight hours each on August 4. In its November 14, 2006, response, the Carrier expressed its opinion that the Organization had not put forth sufficient proof of its claim: "The Organization must give evidence/proof in their claim filings, along with adequate documentation to support what is being claimed, the hours and dates, and how the cited Rules have been violated. This has not been done." The Carrier went on to address the substance of the claim. First, it pointed out that the Foreman who allegedly assigned the work was on vacation when the work was done. Second, it denied that the painting at issue was scope-covered work: "In the past, painting in the Mechanical Shops has been performed by other departments and outside sources."

As an initial proposition, the Organization has an obligation to identify with specificity the work that it is claiming belongs to it. The original claim stated only that the Foreman had "assigned two Laborers to paint at the Lincoln Diesel Shop in the Hobson Yards." The complaint did not identify what was being painted or anything about what was involved in the work. Such a vague complaint is almost impossible to investigate and defend. In its response, the Carrier indicated that the claim was factually insufficient. In its appeal, the Organization demanded that the Carrier be more specific about what information it needed. In its February 24, 2007, response, the Carrier stated:

"The accusation of a violation is minimum at best, as there is no evidence on what was painted in the diesel shop. The Organization claims there is no evidence that mechanical employees ever painting [sic]. There are painters assigned in the Diesel Shop at Hobson that are mechanical employees. As the Organization has not bothered to show what was painted, this is a vague claim that should be withdrawn. . . . The Organization has stated that historically it has exclusively performed this work, but has provided no evidence that it

has exclusively performed this service; in fact there is no information on what was painted at the Diesel Shop. The true facts are that others, including the mechanical department, have performed the very work of painting. And painting is within the Scope of the Mechanical Department Agreement.”

The Organization subsequently submitted a letter from the Local Chairman dated October 21, 2007, to the Carrier which stated: “Per your request for additional information I hope that this will be of some help for the claim regarding this matter.” However, the letter contained no new factual information regarding the nature of the painting that was in dispute; it attached a copy of the NCF&O Agreement regarding the duties of Laborers. On the same date, the Organization submitted statements from the Local Chairman and one of the Claimants regarding the work in dispute. With the exception of the specific positions held by the two individuals and the dates of their service, the text of the two letters is identical:

“While assigned to [position #1] and [position #2] positions at the Lincoln Diesel Shops from [dates] some of my duties were to perform painting work where necessary. This work was performed on straight time when possible and on overtime when necessary. During this time I did not see any other crafts assigned painting work.

The claim currently at conference is regarding the assignment of shop laborers to perform painting work. During August 2007 one of my overtime assignments was to paint the office where the shop laborers meet. If painting the shop laborers’ office is B&B work, how can it be shop laborers’ work to paint somewhere else in the Lincoln Diesel Shop?”

There is still no mention of the specific nature of the work that was done. At some point the Organization must have done further investigation, because its oral presentation to the Board identified the work as painting yellow lines on the floor to designate walkways at the Lincoln Diesel Shop. The fact remains, however, that there is no objective evidence in the record developed on the property to identify the specific work that impelled the Claimants to lodge a complaint. There are various types of painting work that take place at the Diesel Shop, and if the Organization does not

specify the work complained of, the Carrier cannot determine whether the claim is valid or not. This is especially important where there is evidence of a mixed practice. The record includes an e-mail exchange between the local Supervisors, dated September 22-25, 2006, in which the Foreman Locomotives stated: "I do know that historically painting has not been the exclusive domain of B&B personnel and that we have utilized all crafts to perform this type of work," and the General Foreman who was alleged to have assigned the work stated: "First, per the rule stated, I would question if painting even pertains to it."

After examining the record in detail, the Board concludes that the Organization failed to meet its burden of proof to establish a violation of the Agreement. The record is unclear exactly what painting was at issue. The individuals who did the work were never identified; they may not in fact have been Laborers, but held some other position whose job duties included painting.¹ Finally, the evidence regarding the extent to which the Claimants painted to the exclusion of non-covered employees was inconclusive. In order to prevail, the Organization must establish exactly what work was done, who exactly did it, and that its members were entitled to perform the work. The record evidence is insufficient to establish these elements. As a result, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.

¹ The Carrier indicated that there were Painters assigned to the Mechanical Department on site.