Award No. 1453
Docket No. MW-1519

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Thomas F. McAllister, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
CHICAGO, ROCK ISLAND & GULF RAILWAY

STATEMENT OF CLAIM: "Claim of Employes' Committee, first, that the Carrier violated agreement in effect between itself and the Brotherhood of Maintenance of Way Employes by contracting the work of painting water tanks and certain other buildings at Caldwell, Kansas, during the month of October, 1939, thus having this work performed by employes having no seniority rights as painters on the Oklahoma Division, Rock Island Railroad.

"Second: that D. M. Wooten, Painter Foreman, W. K. Martin, L. J. Smith and J. D. Ayers, painters, be paid for forty-eight hours each at their respective rates on account of that paint work to which they were entitled to under their seniority rights was performed by outsiders."

EMPLOYES' STATEMENT OF FACTS: "During the month of October 1939 the Carrier contracted the work of painting of certain water tanks and a pump house at Caldwell, Kansas to outsiders, who were not railroad employes and who had no seniority rights in the Bridge and Building Department, on the Rock Island Railroad.

"This outside contractor devoted an aggregate of 192 man hours to this paint job."

POSITION OF EMPLOYES: "The first part of Rule 1, of the current agreement between the Carrier and the Brotherhood reads:

'RULE 1. SCOPE. These rules will govern the hours of service and working conditions of all employes not including supervisory forces above the rank of foreman, performing work of a maintenance and construction character in Maintenance of Way Department (not including Signal, Telegraph and Telephone Maintenance Department, nor employes performing work of a clerical nature) and employes listed below:

Coal Chute Foremen
Coal Chute Laborers
Locomotive Fuel Oil Handlers
Sand House Men
Track, Tunnel, Bridge and Highway Crossing Watchmen
Maintenance of Way Department Welder Foremen, Welders, Grinders and Helpers
Roadway Machine Operators and Helpers.

"In conclusion, we reiterate that the employes in question lost no time—there were no furloughed employes holding seniority as painters available for the work in question, and, therefore, no employes were deprived of employment.

"The work performed was necessary at the time it was performed, and if it was deferred the regular paint gang could not have taken care of the work account of weather conditions.

"There has been no violation of any rule in the Maintenance of Way agreement.

"The claim has no merit and should be declined."

OPINION OF BOARD: Under the scope rule, the rules of current agreement govern the hours or working conditions of all employes whose work includes the painting of all buildings, bridges, signs, etc., of the carrier which comes under the supervision of the Master Carpenter, Division Engineer, or Engineer Maintenance of Way. The employes on whose behalf petition is filed are painters included in the agreement. The agreement, therefore, in our opinion covers all paint work in the maintenance of way department of the carrier.

The entire painting crew on the division in question worked continuously up to the end of November, 1939, when they were laid off for the winter months. The painting program of the carrier had been curtailed for a number of years because of lack of funds. When inspection was made late in 1939, it was the judgment of the officials of the carrier that certain buildings at Caldwell, Kansas, should be painted before the end of the season, and not postponed over the winter months to the following spring. The carrier at that time was engaged in rather extensive painting work to prevent deterioration and, what was considered might be, permanent damage to bridges and buildings that had been neglected for a long period due to the lack of funds. At the time it was decided to paint the buildings in question, the regularly assigned paint crew was employed many miles away painting bridges which had been given preference over other work. All painters in the seniority district were being employed at the time, and no painters holding rights under the agreement were on furlough or were available for the Caldwell work. In this situation the carrier employed a contractor to do the job. Claim for 48 hours' pay for each of four painters covered by the agreement was made by the employes, under the contention that they were entitled, because of their seniority rights, to do the work at Caldwell. The paint crew, including the painters for whom claim is made, were the first to return to work after the winter, for the season of 1940. The employes worked during the entire period, while the work was done at Caldwell, and lost no time. It is agreed that the carrier had the right to program its paint work; but it is contended that inasmuch as the agreement covers all paint work of the carrier, there was a violation of the agreement by the carrier in having the Caldwell work done by contract, and that the painters covered by the agreement should be paid for the work done by the contractor.

Numerous awards are referred to by the employes to sustain the right to pay under such circumstances; but we find them inapplicable to this case. All of these awards are from this Division. Award No. 1018 was an instance where work was let under contract, while employes covered by an agreement were left without work; Award No. 1020, where painting was let by contract, left employes covered by an agreement unemployed; in Award No. 323 there was a transfer of work to employes of another carrier, and employes under an agreement were deprived of work; in Award No. 360, where work was contracted for, it was ordered reassigned to employes covered by an agreement; in Award No. 425 it was only held that certain work should be performed by employes under an agreement; in Award 331 employes under an agreement had been deprived of work because of a new arrangement by the carrier with another company; and in Award No. 757 employes covered by an

agreement had been left unemployed, because work had been let under contract. In none of the foregoing cases was there an allowance of pay to employes who had lost no time and who had worked continuously during the period in which the work under contract was also being carried on.

It may be of significance that in Award No. 1020, it was stated that there was evident an intent "to furnish excuses for having the stations in question painted by independent contract, rather than by painters coming within the existing agreement." No such intent appears in the case before us. In Award No. 757, it was said by the Board, with Referee Swacker participating:

> "It is well settled by many decisions of this and the First Division of this Board and predecessor Boards, that as an abstract principle a carrier may not let out to others the performance of work of a type embraced within one of its collective agreements with its employes. See awards of this Division, 180, 323, 521 and 615; of the First Division, 351 and 1237. This conclusion is reached not because of anything stated in the schedule but as a basic legal principle that the contract with the employes covers all the work of the kind involved, except such as may be specifically excepted; ordinarily such exception appears in the Scope Rule, **but the decisions likewise recognize that there may be other exceptions, very definite proof of which, however, is necessary to establish their status as a limitation upon the agreement.** Mere practice alone is not sufficient, for as often held, repeated violations of a contract do not modify it."

Furthermore, it was stated in the same award that the Board was without facts to warrant a determination as to whether the work was being let in violation of the agreement, or **whether due to some peculiar condition it was legitimately entitled to be regarded as excluded therefrom:**

> "We are not informed as to the reason for contracting the work; the employes state that the work was 'of the same class ordinarily done by regular Bridge and Building forces.' If this is so it is an invasion of their contract unless some valid reason can be shown to the contrary * * *."

Under a strict construction of the agreement, it is difficult to see where there could be exceptions, not specifically set forth in the Scope Rule. But the award is illustrative of the fact that the Board was reluctant to come to the conclusion that such possible exceptions were not within the realm of possibility. In our opinion it is not necessary to discuss or speculate upon such considerations. We are of the opinion that there was a violation of the agreement by the carrier, but it was a violation that, under the circumstances, cannot be said to be more than a technical violation. Because it was not intended to deprive employes under the agreement of work by letting the paint job in question under the contract; because it was done in good faith by the carrier, acting in its discretion to preserve the property and to avoid the reasonably probable futility of painting during the worst winter weather; because none of claimants were deprived of work during the period of painting and there was no attempt at evasion of the contract to the disadvantage of the employes, we are of the opinion that no loss resulted to claimants.

Under different circumstances, the claim for compensation could be properly sustained; but in view of the foregoing, it is our determination that such claim should be denied.

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 employes involved in this dispute are respectively carrier and employes 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 committed a technical violation of the agreement, resulting in no deprivation or loss to employes covered by the agreement.

AWARD

Claim "first" sustained.

Claim "second" denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of May, 1941.