Award No. 1610
Docket No. MW-1605

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Bruce Blake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

WABASH RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of Employes' Committee, First, that the Carrier violated Schedule Rule 4 (e) by laying its paint gang off for a short period of six days from October 1st to 7th, 1940.

"Second, that the Carrier violated the agreement in effect by contracting the work of painting certain buildings at North Kansas City, Missouri to outsiders, thus depriving its regular painters of that work.

"Third, that Painter Foreman Bernhardt and Painters O. E. Robertson, W. A. Summers, J. F. Sandell, Harley Mathews and P. A. McGee, Moberly Division, shall be paid eight hours per day, for six days each, at their regular rate, on account of being improperly laid off for a short period from October 1st to 7th, 1940."

EMPLOYES' STATEMENT OF FACTS: "Prior to October 1, 1940, a paint gang was regularly assigned on the Moberly Division. The following constituted the personnel of the gang:

"Foreman Fred Bernhardt; Painters, O. E. Robertson, W. A. Summers, J. F. Sandell, Harley Mathews and P. A. McGee.

"On October 1, 1940, O. E. Robertson, W. A. Summers, J. F. Sandell, Harley Mathews and P. A. McGee were laid off.

"Foreman Bernhardt continued in service, in charge of the outfit, which was located at Moulton, Iowa, and performed the regular duties of a Foreman on October 1, 2, 3, 4, 5 and 7, making out required reports such as daily time slips, and reports covering the distribution of labor and material. The service performed by Foreman Bernhardt on October 1, 2, 3, 4, 5 and 7 was no different from, and consisted identically of the duties performed by him as Foreman during the month of October.

"The Carrier owns an elevator building at North Kansas City, Missouri, which was painted by men other than those holding seniority under the Brotherhood agreement.

"Foreman Bernhardt was instructed by his superior officer to make an estimate of material and labor required in the painting of the above building and submitted same to the Division Engineer.

"For the period involved in this claim, Foreman Bernhardt was paid on an hourly basis at the rate of 65½ cents per hour, whereas his regular monthly rate is $192.17.

OPINION OF BOARD: Two questions are to be determined in this case, i. e. (1) whether the work of painting a grain elevator, at North Kansas City, owned by the Carrier and leased to Uhlmann Grain Company, comes within the scope of the current agreement between the Carrier and the Organization; and (2) whether the paint gang was laid off from October 1 to October 7, 1940 in violation of Rule 4 (e) of the agreement.

Both questions are subject to determination by undisputed evidence or admissions—express or implied of the parties to the dispute.

First: It is asserted by the Organization that the Carrier contracted the work of painting of the elevator in North Kansas City. This assertion carries the necessary implication that the Carrier paid for the work done. The Carrier nowhere categorically denies the assertion nor its implication. It temporizes with the issue throughout its defense—saying: ". . . that the elevator is not a part of the carrier operated property, but is leased to a Grain company and the Carrier has nothing to do with its operation and maintenance, hence painting thereof does not come within the purview of the Maintenance of Way Department Agreement." The conclusion contained in the above quotation may or may not be justified—depending on the terms of the Carrier's lease with the Grain Company. If, under the terms of the lease, the lessee covenanted to do such maintenance work as painting, it might well be contended that the job did not come within the purview of the scope rule. On the other hand, it may be that under the terms of the lease the Carrier was obliged to paint the elevator when need be. Since it has not seen fit to introduce the lease in evidence and has not denied the assertion that it contracted the work, we cannot escape the conclusion that it did, in fact, contract the paint job and did pay for it. The fact that the elevator was leased and was not "used in the operation of the carrier" is beside the question. The building was owned by it and painted by it. Under the facts the paint job clearly comes within the purview of the scope rule of the agreement.

Second: It is asserted by the Carrier that the paint gang was laid off on September 30, 1940 with the intention of discontinuing all outside bridge and building painting for the balance of the year; that it was the general practice of the Carrier to discontinue outside bridge and building painting as of October 1st of each year. This assertion is not denied by the Organization. That it was the bona fide intention of the Carrier to discontinue outside painting as of October 1st; and that the intention was so understood and acknowledged by the employes is evidenced by the fact that the latter did not submit time reports covering the period from October 1st to October 7th. That such was understood to be the intention of the Carrier is also evidenced by the fact that, when the gang was reassembled on October 7th two men failed to report—one not reporting until 2 days later and the other until 7 days later.

Under these facts we do not think that the disbanding of the gang on September 30th and the reassembling of it on October 7th constituted a layoff for such a short period as is contemplated by Rule 4 (e).

It is contended by the Organization, however, that the disbanding of the gang on September 30th would not have occurred if the Carrier had not contracted the job on the elevator at North Kansas City. The answer to that contention is that claimants were working on their jobs during the entire period the elevator was being painted. They lost no time on account of the Carrier's violation of the scope rule as did the claimants in Award 1020. Having lost no time as a result of the Carrier's violation of the scope rule, their claim must be denied under the holding of the Board in Award 1453.

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 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 violated the agreement in contracting the work of painting the elevator at North Kansas City; that the Carrier did not violate the agreement in disbanding the paint gang on September 30, 1940.

AWARD

Protest sustained. Claims for pay from October 1 to October 7, 1940 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1941.