Award No. 2812
Docket No. MW-2816

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL SYSTEM

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

(a) That the Carrier violated the agreement in effect between itself and the Brotherhood of Maintenance of Way Employes by contracting the work of painting car shed at McComb, Mississippi during March and April, 1942; and

(b) That Albert R. Hennington et al., painters, Louisiana Division, laid off in force reduction while this work was performed by contractor, be paid at their regular rates, 8 hours per day, for the number of days set out as follows:

Albert R. Hennington	— 31 days
Clyde O. Hennington	— 26 days
Martin L. Rich	— 13 days
Dewey V. Jackson	— 8 days
Paul E. Hales	— 36 days
John P. Box	— 17 days

EMPLOYES' STATEMENT OF FACTS: During the period March 9th to April 23, 1942 inclusive work of painting car shed at McComb, Mississippi was let to and performed by the Ellington Miller Company, general contractors. The contractor devoted in excess of 131 man days to this work.

While this paint work was being performed by the contractor or by employes having no seniority rights on the railroad, the claimants, painters in the Maintenance of Way Department who held seniority rights on the railroad, were off in force reduction and not working.

There is an agreement in effect between the parties, bearing effective date of September 1, 1934, which is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope of the Agreement in effect between the Illinois Central System and the Brotherhood of Maintenance of Way Employes reads:

"SCOPE. This schedule governs hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, except:

(a) Signal Department employes.
(b) Clerical forces.

Under these circumstances we are claiming time from March 3, 1942, which date the job started, up to this date, and hereafter until job is completed or work is ceased.

We trust you will handle this matter for us.

Very truly yours,

/s/ Albert R. Hennington
/s/ Clyde O. Hennington
/s/ Martin L. Rich
/s/ Dewey V. Jackson
/s/ Paul E. Hales
/s/ William H. Hennington
/s/ George W. Watson
/s/ John P. Box

cc: Mr. J. E. White—McComb, Miss.
Mr. L. S. Marriott, B. & B. Supervisor, McComb, Miss."

OPINION OF BOARD: The controlling facts in this case are not disputed and can be briefly stated. Sometime during January or February of 1942 the Carrier having decided to make certain repairs to its Car Repair Shop at McComb, Mississippi, entered into an agreement with Ellington Miller Company, general contractors, for the performance of that work on what is commonly referred to as a cost plus basis. The proposal finally accepted is revealed by a letter from the Contractor to Carrier which in part reads:

"We propose to furnish necessary labor, materials and small tools to make repairs to your Car Shop at McComb, Miss., in accordance with plans and instructions of Mr. Frank R. Judd for actual cost plus a fixed fee for handling and profit of $2,000.00. This fee is based on total cost of work not exceeding $25,000.00. If additional work is ordered by you above this amount, we are to be paid additional cost plus eight percent for handling.

"Actual cost to include cost of Compensation, Public Liability and Contingent Insurance also Unemployment and Old Age Payments, and Sales Tax, if assessed, and agreed rental of all power driven equipment, including loading, handling, transportation and trucking. Small special tools, brushes and small tools worn out during progress of work will be considered a part of cost."

The Car Shop was 176 ft. × 600 ft. in size and the repairs made under the contract included corrugated metal siding replaced with asbestos siding, valleys reroofed, roof coat applied to roof tile, sheet metal downspouts and downspout heads renewed, skylights repaired and replaced, structural steel cleaned and painted. Work was commenced on March 9, and completed on April 23. All work including painting was performed by employes of the Contractor who had no seniority rights on the railroad and while it was being done the painters in the Maintenance of Way Department were in force reduction and not working. Alleged and not denied is the fact that man days lost during the period by the claimants while they had no other employment were 133 for which they claim pay at the regular rate of 77 cents per hour. On all dates involved there was in force and effect between the parties an agreement, the Scope Rule of which reads:

"This schedule governs hours of service and working conditions of all employes in the Maintenance of Way and Structures Department, except:" (then follows list of exceptions).

Painters are not listed in the exceptions mentioned in the rule and are covered by the Scope provisions just quoted.

As we view the facts and understand the arguments advanced by the respective parties they raise two salient issues, (1) whether recovery is precluded by Rule 26 (a) of the Agreement, and (2) whether the Carrier violated its Agreement with the Brotherhood of Maintenance of Way Employes in contracting work on the Car Repair Shop to the general contractor heretofore identified.

We do not experience great difficulty in resolving the first of these issues against the Carrier. The portion of Rule 26 (a) alleged to be applicable and referred to by it as a cut off rule reads:

> "An employe disciplined or who feels unjustly treated shall upon making written request to the immediate superior officer within ten days from date of advice or occurrence, be given a fair and impartial hearing within ten days thereafter and a decision will be rendered within twenty days after completion of hearing. . . ."

It insists that because a request for redress was not made until two days prior to the date the work covered by the Ellington Miller Company contract was completed the language just quoted limits recovery pay to a period of 12 elapsed days preceding the making of such request. We realize there is a conflict in the awards of this Division as to whether rules possessing characteristics of the one in question are to be given the effect contended for by the Carrier. Be that as it may we do not believe it is necessary here to discuss the character of the claims to which the rule applies as has been done in some of those decisions and we shall not attempt to do so. We direct attention to the words "from date of advice or occurrence" and then point out that under the conceded facts the request was made two days before the work was completed, also that the record does not disclose when advice was received by the claimant it was being done. For all the record shows it may have been on the date the request was made. The word "or" is a disjunctive conjunction and permits the taking of such action either ten days from date of advice or ten days from date of occurrence. The exercise of the alternative under the rule is the prerogative of the one who feels unjustly treated and in the absence of evidence to the contrary we are not permitted to indulge in the position advice of the fact the work was going on was received by the claimants on some date prior to the making of their request, nor are they under our liberal rules of procedure required to affirmatively establish that date. If the record is silent advice should be regarded as received on the date it was made.

It follows then that however viewed the request was made within the time limitation of the Agreement. The question remains as to whether the language requires the conclusion its terms limit reparation to 12 elapsed days, as argued by the Carrier. Whatever may have been the effect of our other decisions on the subject we do not believe that construction can be justified. To so hold we would be obligated to read into the rule something we do not find there, namely that recovery of compensation on claims based on unjust treatment, if for our purposes here it be conceded but not decided they come within the rule, is restricted to the ten day period of time elapsing prior to the date of request for hearing. That we cannot do, not only because the language of the rule in itself does not permit it, but for another reason. The result of such a decision would be to give to the rule as written the force and effect of a statute of limitations. Under well defined principles of judicial statutory construction limitation statutes being penal in their character are strictly construed and enforced only to the extent required by the clear and concise language to be found therein. Nothing is read into them by intendment or implication. Under the more liberal practice permitted by our rules and regulations it is certain contractual provisions possessing their characteristics should at least be given the benefit of a similar construction. So construed the language found in the rule falls far short of a bar to the maintenance of the instant claim. Therefore, the Carrier's position on this question cannot be sustained.

We find the problem presented by Carrier's second contention more difficult of solution.

As we have said, painters come within the Scope Rule of the Agreement. It is not vigorously contended and its submission inferentially concedes that even though the Scope Rule makes no mention of the work attached to hours of service and working conditions referred to therein, necessary, reasonable and practical recognition of what is preserved to the employes through its provisions requires the implication that such work as at the time of the negotiation and execution of the Contract its employes were customarily engaged upon was contemplated by its terms. We go further and hold that we regard it as covering all work in the Maintenance of Way Department except such, there being no exceptions contained in the scope rule or elsewhere in the Agreement, as in view of the exigencies confronting the Carrier can under our decisions be properly excepted under what in judicial parlance is known, for want of a better term, as "operation of law." Perhaps better for our purposes would be to describe it as that which from the very nature of the work involved the Carrier does not possess sufficient equipment and skill to perform under the exigencies of the situation prevailing and with which it is required to deal. That conclusion brings us to the question of whether a situation of such character existed when the Carrier entered into the agreement with the general contractors and permitted them to do the work on its shops at McComb.

Preliminary to our determination of such question we digress for the movement to dispose of the contention that we cannot limit our decision to the paint work involved but must base it upon the proposition of whether the entire job as contracted came within the exception to which we have referred. We do not think that conclusion necessarily results unless, of course, we conclude the paint job could not have, within the limitations of practicability and reason, been separated from the other work contracted.

Fairness requires, and we readily concede it, that in the building of bridges and construction of other projects involving services of a specific character under conditions where the Carrier does not possess the skilled force and other things such as equipment it could not provide or would not be justified in maintaining for rare occasions on which they would be required, the Carrier should be, and is, permitted to go outside and contract for their construction. But was the paint work on the shop in question of such a character as necessitated that action? We observe that not only could it not let out to others the performance of work of the type comprehended by the Scope Rule in its collective Agreement with its Employes, but that if it did it was incumbent upon it to be able to establish, if the question was raised, that the circumstances prevailing required such action. The record as we have indicated reveals this was a lump sum contract under which it was to pay all the bills and assume many other obligations which are to be found in the letter heretofore quoted. So far as we have been able to find from our examination it made no effort under these circumstances to induce the Contractors to permit its employes to do the paint work, although they were qualified and notwithstanding such Contractors were short of painters and notwithstanding in addition, it was to pay the bills plus cost and also to furnish part of the equipment and other items. Under those conditions we believe a proper regard for the Contract and for the Carrier's employes required it to exert some effort along those lines. That, the record reveals, was not put forth. In addition, from what we find in it, we are not satisfied it was not possible and practical for the Carrier to have done its own painting job and let the contract on other items required for the completion of the Repair Shop. That, of course, involves a conclusion of fact but it is one which we are entitled to make. We, therefore, hold in view of all the facts and circumstances disclosed by the entire record and our conclusion on the factual situation just announced, and limiting our decision solely to this particular situation, that, not only did the Carrier fail to establish it, but that in fact no situation existed

where, under the provisions of the existing Agreement between it and the Brotherhood it was justified in taking the paint work required from its employes and turning it over to the Contractor who in turn delegated its performance to individuals who possessed no seniority rights under its terms and provisions.

In reaching our conclusion we have at all times been cognizant of the Carrier's argument that the paint work involved included approximately but four percent (4%) of the entire amount of the cost of the contract. In view of our finding the paint job could have been eliminated from the contract we regard that fact as of little if any importance.

Likewise regarded is the argument the Carrier has throughout the years exercised its discretion to determine if painting is to be performed in conjunction with contract work or by its employes. Continued violation of an existing rules does not change or diminish its force and effect. Changes in the Agreement if desired come in the manner prescribed by the Agreement, through negotiation and not by interpretation theretofore placed upon its provisions by the Carrier.

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 violated the Scope Rule of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of February, 1945.