Award No. 5120
Docket No. MW-4978

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC LINES

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood: (1) That the Carrier violated the Agreement by assigning to employes in the Reclamation Plant at Palestine, Texas, the work of constructing telephone booths, cattle guard A frames and the making of roadway signs, beginning with the period June 18, 1948, and continuing subsequent thereto;

(2) That the following employes: O. H. Walston, R. D. Sammons, R. F. Woodard, B&B Department employes, be compensated at their respective rates of pay at pro rata for an amount of time equal to the time worked by employes of the Reclamation Plant in the performance of the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The employes in the Reclamation Plant at Palestine, Texas, are not covered by the Scope of the Maintenance of Way Agreement.

The employes in the Reclamation Plant are required by the Carrier to construct telephone booths, cattle guard A frames and to build and paint roadway signs.

Since June 18, 1948, and on subsequent days thereto, the Bridge and Building Department Employes, who are claimants in this instant case, have protested the assigning of the above referred to work to employes not covered by the Maintenance of Way Agreement.

This protest of the Bridge and Building Department Employes was rejected by the Carrier, and claim was then filed by the Bridge and Building Department Employes because of the Carrier's improper assignment.

The claim was declined by the Carrier.

The agreement in effect between the two parties to this dispute, dated August 1, 1938, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Subsequent to June 18, 1948, when the claimants in this instant case protested the assigning of the disputed work to the employes in the Reclamation Plant at Palestine, Texas, the Carrier has violated the Scope Rule of the effective agreement which reads as follows:

cluding this Carrier, may call for some adjustments, but they should be brought about by negotiation and agreement. Sustaining the present claim would leave the situation in a state of confusion, for it could not be said how far the ruling could be extended. In view of the long existence of the present practices, the Petitioner's apparent acquiescence therein, coupled with the Agreement and the Wage Scale attached thereto, we are of the clear opinion that the situation existing on the Carrier's property, illustrated by this claim, is one calling for negotiation and agreement, and that this Board does not possess the power to make a change in the existing agreement, such as sustaining the Claim would involve. We therefore hold that there has been no violation of the Agreement, and the claim is denied.'"

In addition to the above quoted excerpts from Third Division Awards, the Adjustment Board has in several other Awards (First Division) recognized the principle emphasized in the above Third Division Awards with respect to a practice prevailing long periods of time going unchallenged by the Employes, viz:

No. 5476	No. 11287
8169	12005
9033	12116
10411	

In the case under consideration the practice forming the basis for this claim prevailed over a period of more than thirty years, during which time no protest thereto was made by the Maintenance of Way Employes, although, admittedly, the practice was well known and generally recognized by all parties concerned. Furthermore, during this period of more than thirty years six agreements, including the current agreement, were negotiated by the Carrier and representatives of the Maintenance of Way Employes: viz: December 16, 1919, July 1, 1921, September 16, 1923, October 1, 1926, March 1, 1928 and August 1, 1938. In none of the negotiations of the above agreements was any question raised by representatives of the Maintenance of Way Employes with respect to the work now forming the basis for this controversy. Certainly their silence over this long period of time can only be recognized as an acquiescence by the Maintenance of Way Organization in the practice over a period of more than thirty years. Paraphrasing the "Opinion of Board" in Award 2436 referred to above—the failure of the parties to deal directly with this practice in subsequent agreements and its recognition by the parties for more than thirty years furnishes convincing proof that its abrogation was never intended.

In light of all the facts and circumstances surrounding this case, together with the Findings of your Board in previous similar situations, it is clearly evident that the contention and claim of the Employes in the case under consideration is without justification, merit or basis and should accordingly be denied.

OPINION OF BOARD: In 1917, the Carrier established a reclamation plant at Palestine, Texas, and manned it with Shop Craft employes, a group outside the scope of the Maintenance of Way Agreement. Since its establishment, cattle guard A frames, telephone booths and boxes, and roadway and station signs have been made at this plant. It is the contention of Bridge and Building employes who are under the Maintenance of Way Agreement, that this work belongs to them exclusively. The Carrier contends that the work has been performed by both classes of employes for a period of 31 years and that neither group has the exclusive right to perform the work.

The agreement between the Shop Craft employes and the Carrier contains a classification of work rule which describes carmen's work in part as follows: "Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight train cars), painting, upholstering and inspecting

all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work; pattern and flask making and all other carpenter work in shops and yards, except work generally recognized as B&B Department work; . . . " It will be observed that the exception does not spell out the work included within it, but, on the contrary, excludes from the Shop Craft Agreement work generally recognized as B&B work. The Maintenance of Way Agreement contains no classification of work rule. It includes the hours of service and working conditions of the employes named therein. Consequently, the work reserved to B&B employes under the Maintenance of Way Agreement is that which is historically and customarily performed by that group. The work is not spelled out and does not specifically include the making of cattle guard A frames, telephone booths and boxes, and roadway and station signs. The issue here posed must be determined, therefore, by ascertaining if the making of cattle guard A frames, telephone booths and boxes, and roadway and station signs, is work generally recognized as B&B work.

The record shows that a part of this work has been performed by employes under the Shop Craft Agreement since the Reclamation Plant was constructed in 1917, and a part performed by B&B employes. It is clear that the Agreement provisions here involved do not purport to define the work of B&B employes and that evidence is required to determine the work that is intended to be included within them. The interpretation which the parties have placed upon the Agreement with reference to this work in the past, furnishes a controlling guide as to what was intended. Neither group has performed or claimed the work exclusively for the past 31 years. Each has performed some of it and each has acquiesced in such performance by the other. In determining whether the work is generally recognized as B&B work on this railroad, we are obliged to say that it is not so recognized as B&B work exclusively. The parties by their mutual interpretation of the applicable rules, have recognized the right of each to perform the work and, likewise, they have recognized that neither group has the exclusive right to. We adhere to the interpretation which the parties themselves have made. It has become the fixed contract of the parties which can be changed by negotiation but not by this Board. No basis for an affirmative award exists.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of November, 1950.