Award No. 5227
Docket No. MW-5156

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) That the Carrier violated the Agreement by assigning to a contractor the work of making certain repairs to the depot at Fort Dodge, Iowa, which work was started on or about November 10, 1948;

(2) That all B&B employes on the MC&FD District be now paid at their pro rata rates for a number of hours equal to the number of hours worked by the contractor's forces in the performance of the work referred to in part (1) of this claim; such number of hours to be divided equally among those employes involved.

EMPLOYES' STATEMENT OF FACTS: At Fort Dodge, Iowa, the Carrier has a two story brick depot on the corner of North 12th Street and Central Avenue. This depot faces west on North 12th Street with a frontage of approximately ninety (90) feet. It has a wing built on the north side running east along Central Avenue of brick construction that is approximately two hundred and fifty (250) to three hundred (300) feet long and about twenty-nine (29) feet wide. It also has a wing on the south side running east that is approximately twenty-five (25) feet long and about sixteen (16) feet wide. This small wing on the south is used as a baggage room and has no basement. The rest of the entire building has a basement under it. The first thirty feet or so, from the south side and to the front of this depot is used as a waiting room and offices. The rest of the building is leased out to private industries for the purpose of storing merchandise, etc. Prior to November 10, 1948, a fire started in the basement under the rear of the Agent's office, damaging part of the building.

The nature of the repair work necessary to remodel the building included, i. e., renew a large portion of the roof, renew floor joists between basement and first floor; plank flooring where the private industries stored their merchandise; renew windows, frames and sash throughout most of the building; renew stairs leading to second story (these ready cut from the factory); renew doors in the waiting room; repair doors in the rooms used by the private industries where they back up with trucks to load and unload their merchandise; plaster the agent's office; lower the ceiling about forty-two (42) inches and apply celotex tile in the waiting room and clerk's room; repaint the waiting room, agent and clerks rooms. These rooms were damaged mostly by smoke and water, hence the repairs and cleaning work necessary.

In the dispute now before the Third Division, the Petitioner has not only failed to specify the nature of the work which was performed by contractor's force in alleged violation of the effective Agreement, but has also failed to specify the dates on which such work was performed, the number of man-hours worked by contractor's force, names of the specific B&B employes in whose behalf claim is made, and the specific rule or rules of the Agreement alleged to have been violated, as well as the manner in which violated. In this connection, reference is made to Award 2568, in which it was held by the Third Division that:

> "A claimant who comes before this Board assumes the burden of presenting some consistent theory, which, when supported by the facts, will entitle him to prevail."

It is the Carrier's contention that this claim should be dismissed by the Third Division as result of Petitioner's failure to comply with Sections 2 (1) Second and 3 (i) of the amended Railway Labor Act.

However, if the Third Division should elect to hear and decide this dispute, it is the position of the Carrier and the evidence is replete that claim should be denied for the following reasons:

1. Claim is not specific as to nature and extent of work performed by contractor's force in alleged violation of Agreement.
2. Claim is not specific as to dates and number of man-hours of work performed by contractor's force.
3. Claim is not specific as to names of claimant employes in the Bridge and Building Department.
4. Work performed by contractor's force was either not covered by or was excepted from the scope of the current Maintenance of Way Agreement.
5. Work in dispute was performed by contractor in conformance with past practice.
6. The Carrier was not fully equipped to perform the work with its own forces.
7. The Carrier had no available employes who were capable of performing the work.
8. Carrier's B&B employes on the MC&FD District were otherwise engaged during the period work in dispute was performed by contractor's force.
9. Claim is for duplicate compensation not specifically provided by the rules.
10. Failure of Petitioner to present and to support by facts any consistent theory which might entitle him to prevail.

Exhibits "A" to "D", inclusive, attached hereto and made a part hereof as if fully set forth herein.

(Exhibits not reproduced.)

OPINION OF BOARD: A portion of Carrier's freight and office building at Fort Dodge, Iowa, was damaged by fire. In repairing the same it was necessary to perform electrical work, plastering, carpentry, masonry, glazing and painting. Carrier contracted with a General Contractor to repair the damage. Employes file claim as indicated asserting a violation of the Scope Rule of the applicable Agreement.

The first portion of the Carrier's submission is devoted to a contention that the claim should be dismissed because the claim was not progressed

through the lower steps in the grievance procedure on the property. The record does reveal that the claim was handled in the first instance by the General Chairman with Carrier's Vice President. However, at no point, prior to submission to this Board did the Vice President refuse to consider the matter because the grievance had not been progressed through the usual appeal procedure. We believe that adherence to prescribed procedure is salutary and do not condone indiscriminate departure therefrom. However, in this instance, in that the Carrier's Vice President fully discussed this matter with the General Chairman, never asserting during his handling thereof on the property that it was not properly before him, we conclude that that procedural defect was waived. The matter is, therefore, properly before this Board for determination.

The Scope Rule of the applicable Agreement provides that it shall govern the hours of service of all employes in the Maintenance of Way and Structures Department. The seniority rule provides for the confinement of seniority to sub-departments, one of which is the Bridge and Building Department consisting of different groups. The classifications of B&B Foremen, Assistant Bridge & Building Foremen, Bridge & Building Carpenters, Painter Foremen and Painters are found in such groupings. In defining grade classifications, the Agreement states that an employe assigned to construction, repair, maintenance or dismantling of buildings, bridges or other structures (except iron or steel work), including the building of concrete forms, erecting false work, etc., or who is assigned to miscellaneous mechanic's work of this nature, shall constitute a Bridge and Building carpenter and/or mechanic. In the same rule the Agreement states that an employe assigned to cleaning or preparation incidental to mixing, blending, sizing, applying of paint, calcimine or white wash or other wood preservatives, either by brush, spray or other methods or glazing, shall constitute a painter.

When these rules are applied to the employes' detailed description of the work here involved (which description is not adequately refuted by the Carrier), the obvious conclusion is that with the exception of the electrical, the work was of a type embraced within the Scope of the Agreement. The fact that there was a small amount of masonry and plastering work included does no violence to this conclusion. This, because it is indicated from the description of the carpenter classification that, although the major skill required of that craft may be of the type commonly associated with the carpentry trade, to some extent a composite of the building trades' skills is expected in the individual working in said classification, not necessarily sufficient to handle a large project involving the need for specialized skill in trades other than carpentry.

Carrier, in defending its action herein, places considerable reliance on the following quoted letter Agreement which was entered into between the Carrier and Employe Representatives on the day following the effective date of the Collective Bargaining Agreement:

> "It is agreed that in conformance with past practice the Carrier will not contract any work in the Maintenance of Way and Structures Department that it is fully equipped to perform with its own forces and has available employes who are capable of doing the work."

The question of specialized equipment is not involved here. The tools required in the performance of the work obviously were not of a highly specialized type but more or less the usual hand tools used by the building craftsmen, hammers, trowels, paint brushes, perhaps troughs and ladders and other equipment which should normally be found in any Bridge and Building Department. It is manifest that in the execution of the above mentioned letter Agreement employes have admitted that there was a practice of contracting work which the Carrier is not fully equipped to handle with its own forces and does not have available employes who are capable of doing the same. To that extent a limitation has been engrafted upon the Scope Rule.

The matter of capabilities in the Bridge and Building employes because of the amount of masonry and plastering involved in this particular project has been disposed of above. Thus, the final question to be decided in connection with the disposition of the claim is availability.

As to the question stated in the last sentence of the preceding paragraph, the record is barren of facts upon which to base a proper determination, the Employes having merely repeatedly asserted that Carrier's employes were available and the Carrier denying the same because the B&B forces were otherwise engaged. The latter is not necessarily a true test of availability. The claim will, therefore, be remanded to the property for the parties themselves to resolve this question. If unable to agree thereon the matter may be re-submitted to this Board with a full statement of facts pertinent thereto.

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 claim should be remanded to the property for treatment in accordance with foregoing Opinion of Board.

AWARD

Claim remanded as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon,
Acting Secretary.

Dated at Chicago, Illinois, this 26th day of February, 1951.