Award No. 7306
Docket No. MW-7209

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned the work of renovating and removing old finish and refinishing the benches in the Waiting Room, Central Station, Memphis, Tennessee, to a general contractor, whose employes hold no seniority rights under this Agreement;

(2) The employes holding seniority in the Paint Department on the Memphis Terminal each be paid at their respective straight-time rates of pay for an equal proportionate share of the total man hours consumed by the contractor's forces in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning on August 21, 1952, forces of an outside contractor were engaged in renovating work consisting of removing old finish and applying new finish to the benches in the Waiting Room of the Carrier's "CENTRAL STATION" at Memphis, Tennessee.

All of this work was performed within the confines of the "CENTRAL STATION", and, as of September 8, 1952, five of the contractor's forces had each worked four days and four of the contractor's forces had each worked six and one-half days on this project, consuming a total of 368 man-hours.

The work had not been completed and was still in progress on September 8, 1952.

The Carrier's Maintenance of Way painter forces have heretofore been assigned to and performed work of a precisely similar character at this station and at other Carrier-owned stations on the property.

Claim was accordingly filed and progressed in the usual manner on the property. Carrier has declined to allow the claim.

The Carrier has not contracted with the Maintenance of Way organization for the performance of any painting work on fixtures, furniture, equipment, or appurtenances not a part of the way or structures. The benches in Carrier's Central Station at Memphis, Tennessee, are movable furniture not a part of a building; therefore, the Organization has no contractual rights to refinish those benches. There is no basis for the claim, and it should be denied.

All data in this submission have been presented to the Employes and made a part of the question in dispute.

(Exhibits not reproduced)

OPINION OF BOARD: Beginning August 21, 1952, the refinishing of the benches in the Waiting Room of the Carrier's Central Station in Memphis, Tennessee, was performed by an outside contractor. The work was done on the premises and was completed September 9, 1952. On previous occasions this work has been performed by the Maintenance of Way painter forces at this station. And at numerous other stations of the Carrier comparable work has been performed by Maintenance of Way employes for a considerable period of time.

However, the Carrier cites at least ten previous instances from 1937 to 1952, where comparable work was contracted out at other of its stations. Therefore, it is claimed that the job of refinishing waiting room benches is not and has not been exclusively reserved to the painters covered by the Maintenance of Way Agreement.

The Scope Rule of the Agreement lists twelve specific exceptions, not to be included in the Maintenance of Way and Structures Department.

Rules 1 and 2, which deal with Seniority, are as follows:

> "Rule 1. Seniority begins at the time the employes' pay starts.
>
> "Rule 2. Seniority rights of all employes are confined to the sub-departments in which employed. Sub-departments are defined as follows:
>
> 1. Track Department
> 2. Bridge & Building Department
> 3. Paint Department
> 4. Pumpers
> 5. Watchmen, and Gatemen or Signalmen."

Our attention is also called to Second Division Award 1656, which held that the work of the Bridge and Building Department, "would not, in the absence of agreement or practice, include the painting, varnishing or otherwise maintaining of furniture and equipment not attached to the building." Since the benches involved in the instant case are not attached to the building, the Carrier contends that this work does not belong, exclusively, to the Maintenance of Way employes. Third Division Award 4610 is also cited to the effect that work on "office furniture or equipment" is not reserved to Maintenance of Way employes.

We think that customers' benches in a station waiting room are hardly to be classed with office furniture, whether attached or unattached to the building. Office furniture, we agree, is not a part of any building to which it may be assigned temporarily. Office furniture, even when attached to the floor, is likely to be in a state of hiatus at any time. But waiting room benches, whether firmly secured or standing loose upon a concrete, tile or terazzo floor, are as much a part of the station as the counters where tickets are sold, the partitions between offices, or even the station platforms. We

think these are a part of the building; and where there are regularly assigned painters whose duty it has been to perform the work of refinishing these benches, we think they are still entitled to that work under the provisions of the Agreement. The prevailing practice, both at this station and at most of the other stations of the Carrier, has been to assign this work to the Paint Department covered by Rule 2, cited above.

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 violated.

AWARD

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 23rd day of April, 1956.

DISSENT TO AWARD NO. 7306, DOCKET NO. MW-7209

This Award and its accompanying Order trespass on the face of justice for the following reasons:

(1) The conclusion expressed by the majority that the prevailing practice has been to assign the disputed work to the Paint Department ignores the fact that repairs made to the seats in the waiting room included replacing some five square feet of oak veneering in kind as well as replacing numerous pieces of molding, which molding required a special machine to form. Such repairs have not been assigned to the Paint Department.

(2) The authority of this Board, as conferred by statute, is limited to the interpretation of or application of agreements concerning rates of pay, rules and working conditions. It was not and cannot be shown that a violation of rules calls for payment to each employe holding seniority in the Paint Department of Memphis Terminal in equal proportionate shares of the total man-hours consumed by the contractor's forces in performing the disputed work. If the majority could show that such a payment were provided for in the rules, it would amount to a penalty. A contract provision for a penalty disproportionate to the damage experienced is wrong, per se (Williston on Contracts, par. 777, p. 2184). Therefore, in the so-called interpretation of the rules here, this Award not only injects a penalty which is wholly absent from the rules, but that very penalty would be unenforceable even if provisions therefor were present in the rules.

This Board, in the experience of its First Division, has adhered in a long line of Awards, all cited in this proceeding, to the proposition that claimants must have lost work in order to make out a case for recovery. This Division in subsequent **Award No. 7309** denied a claim for a disproportionate penalty and stated, in part:

> "The assessing of the penalty claimed would be an extremely drastic measure to be invoked and one of doubtful legality under the rules of the Agreement, as no specific rule can be used as a basis for such an award."

By the instant Award, the Carrier is ordered to pay a bonus amounting to a penalty in equal shares to a number of unnamed employes. In **Republic Steel Corp. v. Labor Board,** 311 U. S. 7, the Supreme Court said, speaking of a labor statute directed to the same general purposes as the Railway Labor Act:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' "

Being limited to the adjudication of disputes growing out of the interpretation or application of Agreements, this Division has no discretion, at all, to "devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act."

This Award and those few with which it apparently seeks to conform are beyond the realm of interpretation and show the need for a complete response to lawful jurisdiction.

/s/ **J. F. Mullen**
/s/ **W. H. Castle**
/s/ **R. M. Butler**
/s/ **C. P. Dugan**
/s/ **J. E. Kemp**