Award No. 7389
Docket No. MW-6044

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Raymond Cluster, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) That the Carrier violated the Agreement when it permitted an employe holding no seniority under the effective agreement to perform painting work in the Carrier's Scranton Passenger Station on dates subsequent to March 13, 1950;

(2) That the senior Painter on the Carrier's Pennsylvania Division be allowed pay at his straight time rate for a number of hours equal to what was consumed in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier owns a passenger station at Scranton, Pennsylvania, portions of which are leased or rented to individuals or concerns other than the Carrier.

The Carrier has sole jurisdiction over this passenger station and is required to maintain, repair and decorate the various offices as part of its rental agreement with the respective occupants. The Carrier contends that all general maintenance on the leased portion of the passenger station is under the jurisdiction of the Carrier's Real Estate Department.

Under date of January 12, 1950, the Carrier addressed a letter to Section Foremen Churchill, Jones, Berardi and Neutts, that the interior of Room 24 of the Carrier's Scranton Passenger Station was in need of painting and that the estimated cost was $26.54 for material and $90.00 for labor.

All Painters on the Carrier's division herein involved were furloughed on the date of the above notice, some of them having accepted employment as Crossing Watchmen during their furlough.

The necessary and required painting was offered to each of the furloughed Painters with the condition that they would perform the painting work for the estimated $90.00 lump sum plus $26.54 for material and that the work would be performed at night. They were further advised that acceptance of the work and conditions attached thereto would require them to suspend work from their duties as Crossing Watchmen.

CARRIER'S STATEMENT OF FACTS: A janitor washed the side walls and ceilings in the offices occupied by the Division Freight and Passenger Agent, also the walls in the corridors and lavatories, all of which are located on the second floor of the Scranton Passenger Station.

POSITION OF CARRIER: The question to be resolved in this case is whether or not Carrier was in error in permitting a janitor to wash the walls and ceilings in certain offices of the Scranton Passenger Station. The second floor of this station is occupied, in part, by the offices assigned to the Carrier's Division Freight and Passenger Agent. Adjacent to these offices are corridors and lavatories. Other space on this floor is leased to private industries.

In addition to taking care of the ground floor which comprises a waiting room, ticket office and baggage room the janitor assigned to the Scranton Passenger Station also services all the remaining offices in the building which are used by the Carrier. In the routine course of his work, the janitor washed the walls and ceilings of the corridor and lavatories, all of which are on the second floor. It has been a part of the duties of such employes to do this cleaning through the years. Ticket Agent J. McNulty, located at the Scranton Ticket Office in Scranton Station since 1908, has declared that during all that period the janitors performed this work (Exhibit "A"). There is also attached, marked Exhibits "B", "C" and "D", statements of employes who have worked at the Scranton station for a number of years as janitors and station helper, wherein they declare that the duties of their positions required the washing of walls and ceilings in that building.

All of the equipment used is that which is commonly associated with the work of a janitor, i. e., sponges, soap, water, pail, and ladder. Such cleaning is the ordinary cleaning work usually performed by janitors and it was not for the purpose of painting since no painting was done.

Carrier had a similar claim before the Board in Docket MW-5136 and Award No. 5345 issued thereon decreed that the work, similar to that performed in the instant claim, was merely part of the operation of cleaning and such work did not encroach upon the scope rule of painters.

We respectfully request that claim be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the Committee and made part of the particular question in dispute.

(Exhibit not reproduced)

OPINION OF BOARD: The record in this case demonstrates an unfortunate disregard by both parties of their duty under the Railway Labor Act to maintain agreements and to settle disputes, and a reliance instead upon technical maneuvering. On January 12, 1950, the Track Supervisor wrote to four section foremen stating that the interior of a room in the passenger station in Scranton, occupied by the Atlantic Commission Co., Inc. was in need of painting. Further, that the work came under the Carrier's Manager of Real Estate, who had obtained an estimate of the cost of the necessary painting. Further, that it was desired that "the work be done nights by contracting one of our **employes**". (Emphasis added.) The note went on to list the names of furloughed painters who were working as crossing watchmen on the particular section and to ask if any of them was interested in doing the work at a contract price of $90.00.

Although this memorandum is reproduced by the Claimant in the record, nowhere is it even stated that any reply was made or that any queston was

raised with the Carrier as to the propriety of contracting out the work in the proposed manner. It is stated that no furloughed painter would accept the contract in lieu of performing the work under the provisions of the effective agreement. However, there is no indication that this position was made known to Carrier either orally or in writing.

Subsequently, the Carrier contracted the work to one of its employes, a janitor, who performed it at night after work for the contract price of $90.00. The work was done in April, 1950. Claimant thereafter filed a claim that Carrier violated the Agreement when "it allocated certain work, commonly recognized as Painter's work, to an employe other than an employe holding seniority on the Painters Roster." In the statement of facts appended to this claim, it is recited that painting work was performed in the Scranton station by a janitor, and that the work consisted of washing, cleaning and painting.

The claim failed of settlement on the property and Claimant filed an ex parte submission with the Board based on the contention that the work in question was covered by the scope rule of the Maintenance of Way Agreement and could not be contracted out. Carrier's submission does not meet this contention, but deals solely with the question of whether certain washing and cleaning done in the room during working hours could properly be done by the janitor. In its oral statement made after receipt of Claimant's submission, Carrier took the position that the painting work done by the janitor was never the subject of the claim on the property and was never a subject of discussion at any time during the processing of the claim prior to its submission to this Board. This contention is supported by reference to the fact that the claim referred to work done by an "employe" whereas the janitor at the time he did the painting was not an "employe", but a contractor. This use of the word "employe", plus a reference to washing and cleaning, caused the Carrier to think that only the washing and cleaning work done by the janitor in his employe status as janitor was involved in the claim.

Claimant states that throughout the handling of the claim on the property, the Employes contended that the work in question was the contracted-out painting. Further, that Carrier discussed the claim on this basis by stating that it was privileged to contract out the work, since it was under the Real Estate Department, and also made the same argument to the Claimant in writing.

It is hard to convceive that Carrier's representatives handling this claim were unaware that the work involved was the painting of the room by the janitor. The contention that the reference in the claim to the janitor as an employe somehow eliminated any claim for the work done by him as a contractor is hyper-technical and cannot be sustained. The Carrier itself used the word "employe" in the same sense in its original memorandum, cited above. The work, according to the memorandum, was to be contracted to an employe. Similarly, the reference to washing and cleaning does not negate the primary emphasis on painting. It must be concluded that the claim was discussed on the property, at least on some occasions, on the same basis as it was presented in Claimant's submission, and that Carrier's present technical defense is an afterthought.

Turning to the merits of the dispute, the question is whether painting the room in the Scranton station leased by the Carrier to the Commission Company was work that could not be contracted out, but had to be assigned to painters under the Maintenance of Way Agreement. And there is the further question of whether, even if the work does belong to painters, Claimant's failure to protest the contracting-out in the face of a clear notification of Carrier's intent to do so, bars a money award in this case.

Claimant states that Carrier is required to maintain, repair and decorate the various offices in the station as part of its rental agreement with the respective occupants. Carrier does not deny this statement and does not submit a copy of the lease. In fact, Carrier barely discusses the point at all, having chosen to rely on the technical defense discussed above. The only statement made by Carrier on the point is that "the room at Scranton Passenger Station which was painted was leased to the Atlantic Commission Company and was not used for the business or operation of the railroad."

In this case, there is no question that the work done—painting—was work covered by the scope rule of the Maintenance of Way Agreement. There is no dispute that the general maintenance of the station involved, including painting, belonged to employes covered by that Agreement. Carrier apparently had the responsibility for painting the particular office involved here, since it, not the lessee, contracted for the work. Two Awards involving somewhat similar situations have been cited by the parties. The first, Award 1610, involved the painting of a grain elevator leased in its entirety to a grain company. It was held in that Award that if Carrier had the obligation to do the painting, the work belonged to its employes. Carrier, as here, did the contracting; also, as here, the lease was not in evidence. The claim was sustained. Award 4783 involved the repair of the roof over that portion of a warehouse leased by the Carrier to a grain and feed company, which maintained a manufacturing operation therein. The lease specifically provided that the lessee should make repairs. The Board there decided that the test was whether the leased property was used in the operation or maintenance of the railroad. Finding that the leased warehouse was used for other purposes, the Board held the work of repairing the roof not to be under the Agreement, and denied the claim.

We do not think the lease of one room in a passenger station is sufficiently comparable either to the lease of an entire elevator or a substantial part of a large warehouse, to make either of the cases cited completely controlling in this one. However, the situation in this case is more similar to that in Award 1610, since in neither case does it appear that the lessee undertook to perform maintenance and repair of the leased premises. In our view, the location of the office in the passenger station and the responsibility of the Carrier for its maintenance as well as the general maintenance of the station as a whole, leads to the conclusion that the painting of the office is work reserved to painters under the Maintenance of Way Agreement. Paragraph (1) of the claim is therefore sustained.

Under the peculiar circumstances of this case, however, we do not feel that a money award is justified. The question of whether the work could be contracted out was sufficiently in doubt for Carrier to believe in good faith that it could be done. It gave notice of its intention to do so to both the local and general chairman. It offered the work to painters before it attempted to get anyone else for the job. If the Organization felt that the proposed procedure was a violation of the Agreement, it should have put the Carrier on notice before that time. Based upon the above facts, and specifically upon the fact of the prior notice by the Carrier to the Organization, we find that paragraph (2) of the claim should be denied.

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 has been violated.

AWARD

Paragraph (1) of the claim is sustained.

Paragraph (2) of the claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 27th day of July, 1956.