Award No. 7959
Docket No. MW-7571

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE BALTIMORE AND OHIO RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it required or permitted employes holding no seniority under the effective Agreement, to paint the scaffolding structure in the Carrier's Car Yards in Washington, Indiana;

(2) Bridge and Building Painter George R. Taylor be allowed forty (40) hours pay at his straight-time rate because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On May 27, 1937, George R. Taylor established seniority rights as a Painter in the Maintenance of Way and Structures Department. Subsequently, he has performed service in such a Class and was so employed by the Carrier during the month of August and September, 1950.

The Carrier, on August 26, 1950, assigned an employe of another Craft, Carman Painter Delbert McLemore, to paint spot identifications on a structure in the Car Yards, Washington, Indiana.

Again on September 2, 3 and 4, 1950, four (4) other Carmen Painters were assigned by the Carrier to paint standard spot identifications on posts and edges of the permanent scaffolding (a structure) on the unit repair track.

There are four (4) unit car tracks at this particular point of work location, each averaging about 1100 feet in length. Above each of these car tracks and on each side thereof, there are two permanent scaffolds used to support permanent platforms. These platforms each consist of stationary planks varying from two to three inches in thickness, one edge of which was painted a certain color for a distance of approximately two hundred and fifty to three hundred feet. The edge of each separate section of these platforms were painted a different color, and the supporting posts were painted the same color as the edge of each platform. The purpose of painting this permanent scaffolding in various colors was for the convenience of Car Department Employes in expediting their work, just as the permanent scaffolding was constructed and maintained by Maintenance of Way Employes for the same purpose.

remains to be done, as here, it is subject thereto, and must be performed by the class of employe to which the agreement applies. * * *."

The Carrier asserts that the painting of standard spot colors in freight car units has no greater significance than any other practical system of spot or location identification. The result achieved by the painting of standard spot colors would in no way differ from, let us say, a numerical, alphabetical or similar code system of spot identification.

The utilization of color identification is widely recognized in many industries. This type of identification is principally used in designating the nature of work to be performed and the types of material. It is not a maintenance function when used in this manner and has never been construed in such fashion. Probably the most recognized use of color identification is the painting of bar stock. The ends of such metal bar stock are colored depending on the size, type, and nature of the stock and are stored accordingly. This example offered by the Carrier of color identification is intended merely to apprise this tribunal of the fact that such color identification is widely used in industry because of its simplicity and its ready adaptability to recognition and understanding. This example further illustrates the manifest incongruity in the Organization's contention that such a system could be construed as a maintenance function.

The painting of spot color identifications has no preservative or maintenance function; what was done in this particular instance was done solely because of a change in operation from reconditioning to heavy repairs on transportation equipment.

The Carrier now directs the Division's attention to Rule 67(a) of the then effective agreement between the Employes represented by the Brotherhood of Maintenance of Way Employes and this Carrier, which agreement was made effective April 17, 1930. Rule 67(a) appeared on Pages 20 and 21 of that agreement and read in full as follows:

> "(a) Bridge, Building and Structural Work—Work requiring the skilled use of tools customarily used in such work as carpentry, painting and glazing, tinning and roofing, plastering, bricklaying, paving, masonry, concreting, construction and maintenance of coaling stations, bridge construction and repairs, steel bridge and scale erecting and repairing, **and such other work as is required in the construction and maintenance of railroad structures."** (Emphasis added.)

The Carrier directs this Division's attention to the emphasized portion of the above quoted rule. The emphasized portion of Rule 67(a) is clear and unambiguous. It is to be noted that in order for any type of work to be considered within the scope of the Maintenance of Way Employes' Working Agreement relative to Bridge and Building work it must be work required in "the construction and maintenance of railroad structures."

In the foregoing paragraphs of this Carrier's position it is clearly established that the work performed served no other purpose than a method of work identification. The fact that the complained of work was "painting" does not ascribe to it a maintenance function.

The Carrier submits that the foregoing presentation conclusively demonstrates that the work complained of herein does not fall within the scope rule of the Maintenance of Way Working Agreement.

In view of the above and in view of all that is contained herein, the Carrier requests this Division to find this claim as being one without merit and to deny it accordingly.

OPINION OF BOARD: At the outset we must deal with two questions raised by Carrier. Carrier points out that the date of its last correspondence

with Organization respecting the claims was October 13, 1951; that nothing further was heard from the Organization until March 28, 1955 when Organization filed the claim with this Division and gave notice of its intent to file an ex parte submission in support thereof.

Carrier observes "nearly four years" have expired in the interim; "some serious question may arise * * * as to whether or not there has been seasonable handling of this claim".

We must, however, agree with the Organization that this claim is properly before us under Article 5-2 of the Agreement of August 21, 1954, a portion of which reads as follows:

> "* * * in the case of all claims or grievances on which the highest designated officer of the Carrier has ruled prior to the effective date of this rule, a period of 12 months will be allowed after the effective date (January 1, 1955) of this rule for an appeal to be taken to the appropriate board of adjustment * * *".

The second point raised by Carrier is the third-party issue, as follows:

> "It is the position of the Carrier in this dispute that the work performed about which dispute and complant has now been made falls directly within an application of Rule 138 of the Carmen's Special Rules.
>
> "The Carrier asserts that this Division cannot properly or lawfully assume jurisdiction over the matter for the reason there has been no proper joinder of interested parties."

Carrier cites numerous Awards and opinions which it believes supports it position. Organization likewise quotes many Awards and other documents which it believes supports its positon.

We are inclined to follow the Awards cited by Organization, Awards 7387, 7047, 7048 and 7409 among others, and declare this Board "now has jurisdiction over the only necessary parties to this proceeding and over the subject matter. * * * Therefore we proceed to consideration of the merits."

In Carrier's Car Department, Washington, Indiana, there are four unit car tracks averaging 1100 feet in length with two rows of permanent scaffolding to each track. This scaffolding consists of 5-inch boiler flues set in concrete, supporting a two-plank platform.

It is Carrier's contention that for at least 25 years Carmen at this location have painted standard spot colors on the posts and on the edges of the scaffolding as well as corresponding colors on spot system signs. The purpose was to indicate the type and nature of the reconditioning or repair to be performed at the several locations. Carrier contends this particular spot color system is a purely Car Department feature.

It is the Organization's contention that "it cannot be honestly denied that the disputed work required the skilled use of a tool customarily used in painting work or that it was performed on a railroad structure, maintained and constructed by Bridge and Building employes. The Employes further contend that the Rule specifically includes work requiring the skilled use of certain tools, regardless of the purpose for which it is performed on the structure."

Organization notes that the scaffold in question was constructed by B and B forces "and the same forces thereafter maintained and repaired this scaffold."

We must agree with Carrier that Rule 67(a), upon which Organization relies, "cannot be read in any of its parts without the principal and con-

trolling expression 'required in the construction and maintenance of railroad structures'. It is insufficient that the work performed simply require 'the skilled use of tools'. It is necessary that the concluding condition that the work is 'required in the construction and mantenance of railroad structures' also be present."

While the record is silent on the point we assume, because Organization asserts it "maintained and repaired the scaffold", that it applied such paint as is normally required as a preservative.

We, therefore, conclude that the painting of standard spot color identification on the posts andd edges of the scaffolding, done in this instance, as Carrier asserts, solely because of a change in operation from reconditioning to heavy repairs on transportation equipment, was not painting required in the construction or maintenance of the structure in question.

A denial award is, therefore, in order.

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 not been violated.

AWARD

Claim (1) and (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 13th day of June, 1957.