Award No. 7961
Docket No. MW-7596

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS

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

(1) The Carrier violated the effective Agreement when they assigned the work of making repairs to Building occupied by the Anheuser Busch Brewing Company at Houston, Texas to a General Contractor whose employes hold no seniority rights under the provisions of this agreement.

(2) The employes holding seniority in the Bridge and Building Department on the South Texas District each be allowed pay 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: The Carrier owns a warehouse building, located within the confines of the right-of-way lines at Houston, Texas, which is leased to and occupied by the Anheuser Busch Brewing Company.

In November of 1952 the Anheuser Busch Brewing Company requested the carrier to perform certain repair and exterior painting work on the aforementioned building.

Following the receipt of the above referred to request, the Carrier instructed Bridge and Building Foreman J. O. Schubert to survey and estimate the cost of the requested repair and painting work. Foreman Schubert did as directed and advised the Carrier that his estimate of the cost of the repair and painting work was $2150.00.

In January of 1953, the Carrier's District Engineer instructed the Assistant District Engineer to obtain bids from two or three reputable contractors to perform the above mentioned work.

Commencing on or about March 2, 1953, the work of making repairs, interior plastering and exterior painting, to the above referred to Building was assigned to and performed by a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

asserts its right to this Board is unreasonable, and not within the purview of the provisions of the Railway Labor Act, and said claim should be denied. We are in accord with Award 4941, Carter Referee."

August 21, 1954, the Organization agreed claims would be progressed to the Third Division, National Railroad Adjustment Board, within **nine** months after declination or be barred.

In this claim the Organization waited too long after April 10, 1953, when claim was unequivocally declined, to appeal to the Third Division, National Railroad Adjustment Board, and the Carrier respectfully requests that the claim be denied because the time waited by the Organization in asserting appeal is unreasonable, and not within the purview of the provisions of the Railway Labor Act.

As previously shown, the building involved in this dispute is used by private industry and is not used in the transportation services of the Railroad. In other words, the building is not a part of the Railroad or its facilities used in its business as a common carrier.

Inasmuch as the building is not a part of the Railroad, or used in the Railroad's activities, it is not a part of the Maintenance of Way Department or the Bridge and Building Department.

The working agreement, No. DP-173, **does not cover work of repairing this building,** as the scope of the agreement is limited to employes in the Maintenance of Way Department of the Railroad, and the building not being used as a part of the Railroad places it beyond the scope of the working agreement.

All data submitted in support of Carrier's position have been heretofore submitted to the employes or their duly authorized representatives.

The carrier requests ample time and opportunity to reply to any and all allegations contained in the Brotherhood of Maintenance of Way Employes', System Committe's and Employes' submission and all pleadings.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company of Texas expressly denies each and every, all and singular the allegations of the Brotherhood of Maintenance of Way Employes, System Committee of the Brotherhood, and Employes.

For each and all of the foregoing reasons, the Railroad Company respectfully requests the Third Division, National Railroad Adjustment Board, deny said claim, and grant said Railroad Company such other relief to which it may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: An outside contractor, employed by Carrier, on March 2, 1953 engaged in a program of repairs, interior plastering and exterior painting on a warehouse, owned by Carrier and located within the confines of the right-of-way lines at Houston, Texas. This building is leased to and operated as a warehouse and distribution center by the Anheuser-Busch Brewing Company. It is averred by Organization, and not denied by Carrier that the repairs were requested by the tenant and were, therefore, the obligation of Carrier.

Organization charges that Carrier's Bridge and Building Department employes were available to do this work and had performed similar work on this building in the past.

Organization further charges that work within the Bridge and Building Department had not theretofore been assigned to outside forces "without

negotiations and agreement with" the Organization, and quotes from correspondence between it and the Carrier in support of its claim.

Carrier defense is that this building was not operated by it in connection with its transportation service, and "said building was not used in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage or the handling of property transported by a railroad", that it was not in its Maintenance of Way and Structures Department; that under the ICC system of accounting regulations it is listed as "lands and buildings not used in transportation operations."

Carrier further observes the Company using and operating the property is not a "Carrier"; that persons engaged in the disputed repair work were not employes as defined by Section 1, Fifth, of the Railway Labor Act, and that during the time repairs were being made all employes in the B&B Department on the South Texas Division were fully and gainfully employed "on the position which they had bid as a result of their seniority, and worked all time to which they were entitled to work under the provisions of their individual contracts of employment" with Carrier.

At the outset, we must treat with a question raised by Carrier that the instant claim is barred under the provisions of Article 24, Rule 2, reading as follows:

> "Claims of employes which may arise under this Agreement shall not be subject to monetary recovery unless presented within sixty days from the date of events or circumstances on which the claim is based."

It is Carrier's argument that the repairs complained of were contracted under date of March 1, 1953. Carrier's Exhibit "A" shows Organization filed its claim under date of March 18, 1953 for some repair and painting performed "during the early part of March". Organization's filing was well within the sixty days' limitation of Article 24, Rule 2.

We also note Carrier's claim that its final denial of this claim was made April 10, 1953, while Organization's notice of intent to file an ex parte submission in support of its claim was dated May 12, 1955. Carrier avers this lapse of time "is unreasonable under the provisions of the Railway Labor Act as interpreted in Awards 4941 and 6229 of the Third Division".

We must and do agree with the Organization that the Agreement of August 21, 1954 between the parties provided in Article V, Section 2 as follows:

> "* * * except that 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 * * *."

We, therefore, conclude this claim is properly before us in the light of the language of the parties themselves, quoted above.

With respect to Carrier's defense that the building is in no way related to its primary function as a Carrier, as outlined in more detail above, a lease between Carrier and lessee—if one existed—is conspicuous by its absence. As we did in Award 7389, we therefore conclude Carrier apparently had the responsibility for making the repairs in question since it, not the lessee, contracted for the work.

But with respect to Carrier's general defense and the several Awards, court decisions and other data cited, one such citation is a decision of the Interstate Commerce Commission "In the matter of Regulations Concerning the Class of Employes and Subordinate Officials to be Included within the term

'Employe' under the Railway Labor Act—Elevator Starters and Operators, and Information Clerks, Hudson & Manhattan Railroad Company", reported at 245 ICC 415. We quote a portion thereof:

> "The elevator operators and starters and information clerks (Carrier points out the Hudson and Manhattan owned several buildings which were not used for or in the operation of the railroad) do not perform any work or service directly or remotely connected with the Corporation's Carrier activities, or with any equipment or facilities used in connection with the carriage of passengers or commodities, or with any work, clerical or otherwise, arising out of or incident to the railroad's operation."

Despite Carrier's protestations of the building being in no way connected with its functions as a Carrier, and its use by lessee as part of its merchandising and distributing business we cannot consider this building in the nature of an investment made by Carrier solely for financial return, such an investment in prime mortgages. Construction by Carrier of this building and leasing it in the manner it has brings it a two-fold return: a return on its investment in the form of rentals and a return in the form of traffic for its lines, which is the prime source of any Carrier's revenue.

After a careful review of the many Awards cited by the parties we believe that the following excerpt from Award 1610 (Blake) covers the circumstances in this case:

> "It is asserted by the Organization that the Carrier contracted the work of painting of the elevator in North Kansas City. This assertion carries the necessary implication that the Carrier paid for the work done. The Carrier nowhere categorically denies the assertion nor its implication. It temporizes with the issue throughout its defense—saying '* * * That the Elevator is not a part of the carrier operated property, but is leased to a Grain company and the Carrier has nothing to do with its operation and maintenance, hence painting thereof does not come within the purview of the Maintenance of Way Department Agreement.' The conclusion contained in the above quotation may or may not be justified—depending on the terms of the Carrier's lease with the Grain Company. If, under the terms of the lease, the lessee covenanted to do such maintenance work as painting, it might well be contended that the job did not come within the purview of the scope rule. On the other hand, it may be that under the terms of the lease the Carrier was obliged to paint the elevator when need be. Since it has not seen fit to introduce the lease in evidence and has not denied the assertion that it contracted the work, we cannot escape the conclusion that it did, in fact, contract the paint job and did pay for it. The fact that the elevator was leased and was not 'used in the operation of the Carrier' is beside the question. The building was owned by it and painted by it. Under the facts the paint job clearly comes within the purview of the scope rule of the agreement."

In view of the record here made we must and do conclude that the agreement has been violated and a sustaining award is 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 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

Claim sustained.

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.

DISSENT TO AWARD NO. 7961, DOCKET NO. MW-7596

Under the Railway Labor Act, as amended, the function of this Board is to interpret agreements between the parties. It is significant that Award 7961 is not based upon any agreement between the parties to this dispute, but, on the contrary, is based upon conclusions of the majority herein concerning provisions of a lease between the Carrier and the Industry, copy of which admittedly is not in the record, covering building which are not used by Carrier in connection with its function as a common carrier. In support thereof, the majority quotes an excerpt from Award 1610 (Blake) covering a basis of rule which subsequently was repudiated by this Division.

In Award 4783 (Carter), this Division held as follows concerning Award 1610, supra:

> "Here the lease, including lessee's convenant to repair is contained in the submission and we might rest our decision here on the precedent reasoning in Award 1610, but we are unwilling to follow its basis of rule. We think the mere fact of ownership of property by the Carrier is not sufficient ground for claim by the Organization of the application of contract rights thereon. The common business of the Carrier and Organization is railroad operation, and it is to that business and the property employed in that business alone, that their Agreements apply. Where property is so used no lease or other device should exclude the operation of the Agreement thereon, and where a Carrier owns property used not in the operation or maintenance of its railroad, but for other and separate purposes, such property is outside the purview of the Agreement. The leased warehouse here involved was leased and used for purposes excluding it from the Agreement.

The right to lease carrier owned buildings is controlling and not the terms of the lease. Awards of this Division, including Award 1610, recognize Carriers' right to contract with lessees to do maintenance work in such circumstances. Consequently, no sound basis exists for distinguishing cases in which Carriers contract with others to do so.

For this and other reasons Award 7961 is in error and we dissent.

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