Award No. 8093
Docket No. MW-7708

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 assigned the work of constructing a material platform and storage bins in the Upholstery Shop, Washington, Indiana, to Shop Craft Employes (Car Department Mechanics and Welders);

(2) Maintenance of Way Carpenters Carl English, Ernest C. Hudson and William E. Webber each be allowed pay at their respective straight-time rate for an equal proportionate share of the total man-hours consumed by the Car Department Mechanics account of the violation referred to in part (1) of this claim;

(3) Maintenance of Way Welder Fred J. Dugger be allowed pay at his respective straight-time rate for an equal number of man-hours as were consumed by the Car Department Welder, account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Carrier desired to have a material platform and storage bins erected in the Upholstery Shop, Washington, Indiana, for the storage of materials used therein. These structures were built by employes of the Car Department, consisting of Mechanics and a Welder. There is no dispute between the parties as to the amount of hours involved in completing this project, it being agreed that the Car Department Mechanics worked a total of one hundred and twenty (120) hours and the Car Department Welder worked a total of twenty-six (26) hours. The aggregate man-hours consumed were one hundred and forty-six (146).

This platform and bins were constructed by using twelve (12) pieces of six (6) inch used boiler flues and posts anchored to the floor by welding one-half (½) inch by twelve (12) inch square boiler plates to the bottom of the posts and fastened with one-half (½) inch lag screws. The frame work was constructed by welding angle irons and "T" irons together. The project is twenty-eight (28) feet in length, nine (9) feet in width and is seven and one-half (7½) feet high.

Claim was filed in behalf of Maintenance of Way employes account Shop Craft employes performing this work and the Carrier, under date of

The Carrier submits that Rule 1 (c), the "Classification" rule, appearing in the Maintenance of Way Agreement is wholly inapplicable to support the claim. That rule deals in terms of "* * * the construction and maintenance of railroad structures, * * *."

There is at least tacit admission on the part of the organization that Rule 1(c) is without application to support the claim.

The Carrier submits that (b) 6 (a) of the Scope Rule is equally without application to support the claim. The case at hand does not relate to the performance of "repair" work of any kind. Moreover, the Carrier has demonstrated that (b) 6 (b) of the scope rule of the agreement specifically states that "This Agreement (the Maintenance of Way Agreement) does not apply to: * * * the following work when performed by other than B&B forces: * * * Maintaining and painting material bins and tanks within store rooms or oil houses."

The Carrier next refers this Division to Rule 138 of the Carmen's Special Rules appearing in an agreement between this Carrier and System Federation No. 30, Railway Employes' Department, A. F. of L., revised September 1, 1926 as reprinted May 1, 1940. That rule has been quoted in full hereinabove.

There is essential agreement between the parties to this dispute that the work made subject of complaint is in fact an operation belonging within the domain of the Car Department. To assign this work to Maintenance of Way forces would, in effect and in fact, be removing work from under the scope of one agreement and placing it under the scope of another agreement. Plainly, the work here, the subject of complaint, properly falls within an application of Rule 138 of the Carmen's Special Rules of the Shop Crafts' Agreement. The Carrier asserts that this Division has no authority to take any action that would, in fact, remove work from under the scope of that agreement.

For example, in Award No. 1272, this Division with Referee Hilliard, stated in part: "* * * with practical unanimity, the decisions of this Division have been to the effect that where work within the involved agreement remains to be done, as here, it is subject thereto, and must be performed by the class of employes to which the agreement applies, * * *."

The Carrier submits that the foregoing presentation conclusively demonstrates that the work, subject of complaint here, does not fall within the scope rule or within the application of any other rule in the Maintenance of Way working agreement.

In view of the above and 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: Initially we must deal with point raised by Carrier in its ex parte submission, that

> "A period of nearly two and one-half years has expired between the date of the Organization's letter stating unwillingness to accept the Carrier's declination and the date of the Organization's request upon the Carrier to submit the claim jointly to this labor tribunal.
>
> "The Carrier suggests that the foregoing record presents a serious question as to whether or not there has been seasonable handling of this claim."

Organization's reply to the point states:

> "The fact that the Railway Labor Act prescribes no time limits in which to progress claims to this Board has been so repeatedly

stated by this and other Divisions of the Railroad Adjustment Board that citation of awards is unnecessary. And the Carrier recognized that fact because, within 30 days of May 22, 1953, this Carrier served a notice on this Organization that it proposed to:

> " 'Establish a rule or amend existing rules so as to provide time limits for presenting and progressing claims or grievances.'

"That proposal was disposed of by an Agreement negotiated and signed on August 21, 1954 wherein a claim and grievance rule to become effective as of January 1, 1955 was agreed to and which stipulated in part that:

> 'The following rule shall become effective January 1, 1955:
>
> * * * * *
>
> 2. . . . in the case of all claims or grievances on which the highest 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 of this rule for an appeal to be taken to the appropriate board of adjustment . . .' "

Organization's notice to this Division of its intent to file an ex parte submission in support of this dispute being dated June 24, 1955, it is well within the time limit set by the above quoted agreement. We hold the dispute is properly before this Division. Award 7959.

Carrier also raises the "due notice" issue. This was disposed of by this Division with the same referee here sitting in Award 8079, which we now hold applicable here. Carrier's objection is rejected for the reasons set forth in that award.

The parties are in agreement that a total of 146 manhours were required for the construction of a material platform and storage bins in Carrier's Upholstery Shop at Washington, Indiana. The work was performed by a Car Department Welder and Car Department Mechanics.

The Scope Rule of the applicable agreement provides that the Agreement's rules shall

> "govern the hours of service and working conditions of all employes in the Maintenance of Way and Structures Department * * *."

Organization asserts that "positions and work of 'carpenter' class and 'welder' class are subject to the rules of the effective agreement and therefore they are so included within the Scope Rule."

Organization states further:

> "Referring to the Scope Rule herein quoted, the employes desire to call attention to section (b), sub-section 6 and paragraph (b) hereof reading:
>
> '(b) This agreement does not apply to:
>
> "6. The following work when performed by other than B&B forces:
>
> "(b) **Maintaining** and painting **material bins** and tanks **within store rooms** or oil houses." ' "
>
> (Emphasis theirs)

Organization, therefore, claims "the fact is inescapable that the employes have agreed, under the present Scope Rule, that certain work may be performed by other than B and B Forces and among such work that could be so performed, was the **maintenance** and painting of **material bins** and tanks **within store rooms** or oil houses. The work herein involved * * * was that of **constructing** a material platform and material storage bins and not work as to maintaining the bins. Hence, once the bins have been constructed, and properly so by Maintenance of Way B&B and Welding employes, then the Carrier, with certain restrictions, would have the right to maintain such structures." (Emphasis theirs)

In its rebuttal to Organization's position, here set forth, Carrier "submits that this rule scarcely in and of itself is adequate to assign work of this nature to employes coming within the scope of the Maintenance of Way contract. By its very reference, this rule is negative in character. It is not a positive assertion that certain work automatically belongs to employes coming within the scope of the Maintenance of Way Agreement. * * * Carrier has established conclusively that in point of fact there is no other rule appearing in the Maintenance of Way Agreement that would assign the work in question to employes coming within the scope of that agreement. As the Carrier has already shown, the work that was done at Washington, Indiana, was the same kind of work that had always been done by Car Department employes."

If we are to accept Carrier's position at its face value, namely that "the work, subject of complaint here, does not fall within the scope rule or within the application of any other rule in the Maintenance of Way working agreement," then why did the parties here involved take the trouble of specifically excluding from the same agreement the maintenance and painting of material bins within storerooms?

The contracting parties explicitly excluded "maintenance and painting" —nothing else—of material bins within storerooms.

Nowhere in this record does Carrier claim that the structure here involved is not a "material bin."

We must and do, therefore, agree with argument on behalf of Organization here petitioning that it is "a cardinal rule of agreement and contract construction that where an exception is specifically and expressly set forth, no others may be implied."

A sustaining 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 was violated.

AWARD

Claims (1), (2) and (3) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of October, 1957.

DISSENT TO AWARD NO. 8093, DOCKET NO. MW-7708

In respect of the majority's election to follow Award 8079 in dealing with the "due notice" issue herein, the undersigned make the dissent to that Award a part of this dissent on that issue.

Award 8093 also is in error on the merits because it is based on erroneous assumptions, first, that the platform herein is a material bin, and second, that the platform and bins herein are a structure.

The majority states:

> "Nowhere in this record does Carrier claim that the structure here involved is not a 'material bin'."

It was unnecessary for the Carrier to make such a claim in respect of the "platform" because nowhere in the record was it even alleged to be a "material bin". On the contray, the claim itself as well as the record distinguishes between the platform and the bins involved herein.

Furthermore, the platform and bins herein do not constitute a structure as contemplated by the Maintenance of Way Agreement. The term "structure" is defined by Webster as,—

> "(2) Something constructed or built as a building, a dam, a bridge."

Obviously, the platform and bins herein are not a structure as so defined. As a matter of fact, the record shows that they are not in any manner attached to the shop building in which they are located and consequently are not an integral part thereof.

The majority also states:

> "The contracting parties explicitly excluded 'maintenance and painting'—nothing else—of material bins within storerooms."

Inasmuch as the Agreement contains no rule which includes the construction of such facilities, there was no requirement on the contracting parties to explicitly exclude "construction" thereof. Accordingly, such omission from the exception did not have the effect of incorporating such work in the Agreement and the majority herein erred in so holding.

Award 8093 also is in error because it disregards past practice. The Carrier stated at many places in the record that, in the past, such facilities have always been constructed by Carmen. The Employes did not refute these statements.

For the above reasons we dissent.

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