Award No. 9674

Docket No. MW-8271

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

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

1. The Carier violated the Agreement when it assigned the work of washing walls and woodwork at stations between New Rochelle and Greenwich to other than its Maintenance of Way Department Painters during September and October, 1954;

2. Each Painter Foreman and Painter holding seniority as such on the seniority district in which the work referred to in Part (1) of this claim was performed, be allowed pay at their respective time and one-half rates for an equal proportionate share of the total man-hours consumed in the performance of the Painter's work referred to in Part (1) of this claim.

EMPLOYES" STATEMENT OF FACTS: During the months of September and October, 1954, the Carrier assigned the work of washing walls and woodwork at stations between New Rochelle and Greenwich, to Clerical Department employes, who hold no seniority rights under the effective Maintenance of Way Agreement. This work was performed during hours outside of those comprehended in the regular daily assignment of Maintenance of Way Painting Forces, who, therefore, were readily available and could have performed this work.

The Carrier's B&B Painting Forces have performed similar work in the past.

Claim was filed in behalf of B&B Painter Foremen and B&B Painters holding seniority as such on the seniority district in which the work was performed. The Carrier has declined the claim.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Scope of the effective Agreement, reads as follows:

ceeding was instituted to mandatorily require this Division to give notice to the organization involved in the case, other than that which had given notice of its intention to file a submission. The only issue therefore which was settled by the Supreme Court was whether such intervention by legal proceedings at that stage was warranted.

The question presented here is different. The Division will have docketed the case and will have before it the submissions of the parties and can intelligently determine whether the rights of other employes, another organization, or a second agreement is in issue. Carrier submits that that is the case and that under earlier decisions of this Division the case should be dismissed except as the Clerks' organization is notified of the proceedings by action of this Division and given opportunity to present its case and be heard.

Assuming without conceding that the Board has jurisdiction, it is the situation that the claim should still be denied on the merits. Janitorial work of the character involved here is customarily performed by different employes of different crafts. Except as it is incident to a repainting or redecorating program, the station and office forces normally maintained for cleaning and maintenance do such work on Carrier's property. The recent decision in Third Division Award 7105 is a convincing example and is pertinent here. In that case the Clerks' organization filed claim which was sustained in the decision referred to that the use of employes of an outside contractor to wash and wax floors at an office building maintained by the Carrier in Boston, Massachusetts, was a violation of the Clerks' schedule.

The Board has reached similar conclusions in other awards. In Award 4345 two track laborers were assigned to clean the ceilings and walls in the Roadmaster's office. Claim of B&B Painters that they were improperly deprived of the work was denied on the basis that the tools used to accomplish the work were of a character more commonly associated with the work of janitors or charwomen than painters.

In Award 5914 Signal Department employes were assigned to remove screens, wash windows and erect storm sash on certain roadway buildings. The claim of B&B forces to the work was denied on the basis it was of a character not exclusively contracted to any particular craft.

In accordance with the above decisions Carrier submits the instant claim should be denied, except as it is dismissed for lack of jurisdiction.

All of the facts and arguments used in this case have been affirmatively presented to Employes' representatives.

OPINION OF BOARD: The claim is that the Carrier violated the Agreement in 1954 when it assigned the work of washing walls and woodwork at stations between New Rochelle and Greenwich to other than Maintenance of Way Department Painters. The work was done by employes of the Carrier under the Clerks' Agreement.

Final denial on the property was on the ground that the Organization had failed to establish the exclusive prerogative of painters to perform such duties and that for many years employes under the Agreement with the Brotherhood of Railway Clerks have been used on such work. Third party notice has been given that Brotherhood.

The record includes a letter of September 18, 1943 from R. L. Pearson, then Carrier's Vice-President in charge of Operating, Maintenance and Engineering, to the General Chairman stating as follows:

> "Your letter of February 11, 1943 and conference of February 19, Railroad Docket 3411 — protest against the non-use of furloughed men in the New York District for the work of cleaning the waiting room at Bridgeport Station. Specifically it was claimed that six furloughed painters in the New York District should have been used in the period between January 4 and 20, 1943 and that they should be paid because of not having been so used.
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> The work involved in this complaint consisted of cleaning the waiting room at the Bridgeport Passenger Station and which cleaning necessitated washing and painting.. In order to inconvenience the public as little as possible and which necessitated getting the work done in the shortest possible time, the work was performed by the forces of a contractor who had men experienced in that type of work and the necessary equipment with which to do it.
>
> The practice in respect to the performance of such work has not been entirely uniform. It has been the practice to contract for cleaning at the larger stations. At some of the smaller places, stations have been washed by our regular forces. With the existing situation as to manpower it is not always possible to organize a gang of qualified men which would have been necessary on a job of the size of that to be done at Bridgeport and within the limitation of the time in which it had to be done.
>
> For work of the character comprehended by our agreement and as usually performed by our own forces we should make every reasonable effort to have it so performed. Where it is found impracticable to do this, the carrier would then be justified in having work essential to meet its requirements performed by outside forces.
>
> At the time this work was done it appears that there were furloughed painters on the New York District. Claim for pay on behalf of six of them has been made for the period between January 4 and 20. Who these six were, whether they were available and qualified has not been shown. Based upon the limitations which I have specified, I am sustaining the principle of the claim. I am not sustaining, however, any lost time payments for six unnamed men for who no showing has been made as to availability or qualifications."

That instance differed in two respects from this one. The "cleaning there in question consisted of both "washing and painting", and not merely of washing, as in this case. Furthermore, it was performed by a contractor's forces and not by the Carrier's employes covered by another agreement. The Vice President conceded that the Carrier "should make every reasonable effort" to have such work performed by its own forces, but held that if that were found impracticable the Carrier should be entitled to have it performed by outside forces. He concluded by "sustaining the principle of the claim" so far as it affected qualified furloughed employes available for the work.

In accordance with that conclusion the parties entered into a Memorandum of Agreement on February 24, 1954, providing as follows:

"(a) When it may be desired by the Railroad Company that work covered by the Agreement of September 1, 1949 be performed by parties other than those coming under the scope of the Agreement, the Chief Engineer, or his designated representative, will confer with the General Chairman, or his designated representative, and endeavor to reach an understanding. If an agreement is not reached and the Carrier proceeds with the performance of work by other than employes covered by the Agreement, the employes may handle as a dispute under the procedural rules of the Agreement and the Railway Labor Act.

When work covered by paragraph (a) is to be performed by parties other than those coming under the scope of the Agreement, such action will not result in the furloughing of regular assigned employes."

While the Carrier did not attempt to negotiate an understanding, the Memorandum provides only that if there is no understanding and the Carrier proceeds with the work "by other than employes covered by the agreement, the employes may handle as a dispute under the procedural rules of the agreement and the Railway Labor Act".

Rule 53, the "Classification Rule", lists as Painter's Work:

"Cleaning, painting, refinishing and glazing on all bridges, buildings, signs and other structures."

and as Painter Foreman's Work:

"Supervising the above work."

Rule 53 adds the following as a "General Understanding":

"This classification of work rule is predicated upon conditions and practices as in effect on this property. It does not add anything to the work which these forces have heretofore performed on this property or take away from them work which they have heretofore performed."

Thus the extent of cleaning work belonging to painters is a matter of past practice. Unfortunately, although practices are disputed, evidence of practice is almost entirely lacking and consists mainly of self-serving declarations and general statements of no real probative value.

But the record shows, by means of undisputed allegations and otherwise, that janitors are included under the Clerks' Agreement with Carrier and that at small outlying stations job descriptions of janitors and others are used interchangeably for pay and other purposes. Apparently the job classifications in the Clerks' Agreement do not specify the janitors' work and in the absence of evidence we assume that it consists of the work normal to such positions. According to Webster's New International Dictionary a janitor is "one having the care of a building, offices, etc.". That care normally includes cleaning of at least the kind involved here, which consists of washing but not painting as in the 1943 incident mentioned above. Consequently, we must conclude in this state of the record that the claim has not been established.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of December, 1960.