

Award No. 9848

Docket No. MW-9052

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Frank Elkouri, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FORT WORTH AND DENVER RAILWAY 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 repairing Passenger Depot at Wichita Falls, Texas to a Contractor whose employes hold no seniority rights under the effective Agreement;

(2) Each Bridge and Building Department employe be allowed pay at their respective straight-time rates for an equal proportionate share of the total man hours consumed by the Contractor's forces in performing the work referred to in part one (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Beginning on February 13, 1956, the Carrier assigned to Contractor B. O. Howle, whose employes hold no seniority rights under the effective Maintenance of Way Agreement, the work of making certain repairs to the Passenger Depot at Wichita Falls, Texas. This work consisted of removing certain portions of old plaster from the high vaulted ceiling of the Depot; installing metal framework, which was hung from the existing joists, approximately eight (8) feet lower than the old ceiling, and installing a flat acoustical tile ceiling in this metal framework. This form of work is referred to by the Carrier as Armstrong Cork Company's "H and T" system of installation. A certain amount of painting work was also required. The employes of this Contractor completed this work on April 1, 1956.

The Organization was not contacted by the Carrier with respect to contracting this particular Maintenance of Way work to outside parties.

Bridge and Building Department employes were available and willing to have performed this work, had the Carrier so directed.

Claim as set forth herein was filed and the Carrier has denied the claim.

The Agreement in effect between the two parties to this dispute dated January 1, 1955, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

EMPLOYEES' POSITION: Rule 1 — Scope, reads:

"(a) The rules contained herein shall govern the hours of service working conditions, and rates of pay of all employes in the Maintenance

B&B forces were by the manufacturer's requirements barred from applying the acoustical ceiling material used. (See Carrier's Exhibit C). There was not employed in the B&B Department any employees skilled or rated as a plasterer. Moreover, part of the work performed by the contractor's forces was work wholly outside of the Scope Rule of the Maintenance of Way Employees' agreement, especially the electrical work. This Division has many times held that the Carrier was not obliged to use its employees on work they did not have the skill to economically or efficiently perform, as in the instant case. It is believed the Board will not reverse its position in this respect nor disregard the arguments advanced for contracting this work.

(b) This claim is for payment for work not performed by employees who were fully occupied and suffered no loss. The claim for pay is in the nature of an exaction for services not performed.

(c) There is no rule to support a claim for pay for work contracted under the conditions here present, and is, therefore, one which is tantamount to a request for imposition of a penalty. Such a penalty payment is not provided for under the current agreement with the Employees. It is stated in Third Division Award 7309, above referred to, that the assessing of a penalty where there is no specific rule to be used as a basis for such an award is an extremely drastic measure to be invoked "and one of doubtful legality."

For the ample reasons expressed, this claim is without support and should be accordingly denied, and the Carrier respectfully requests the Board to so hold.

Carrier affirmatively states that all data herein and herewith submitted have previously been submitted to the Employees.

(EXHIBITS NOT REPRODUCED)

OPINION OF BOARD: The present claim does not comply adequately with Rule 33 (a) of the Parties' Agreement, which Rule was taken literally from Article V, Section 1 (a) of the National Agreement of August 21, 1954. Decisions construing the requirement under the latter provision that claims be presented "by or on behalf of the employee involved", were summarized by this Board in Award 9248 as follows: "Some decisions hold that the claimants must be specifically named, while others hold that the claimants need not be specifically named so long as they are easily and clearly identifiable." Also see Awards 8526 and 9250.

The present claim is made for "Each Bridge and Building Department employee", thus the claimants are not specifically named; nor are they easily and clearly identifiable in this case. The claim must be dismissed.

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 Employees involved in this dispute are respectively Carrier and Employees 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 claim must be dismissed for reasons stated in Opinion.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 27th day of February 1961.