Award No. 10189
Docket No. MW-8428

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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 the roof of a packing house at Colton, California to a contractor whose employes hold no seniority under the effective Agreement.

(2) That each employe assigned to B&B Gang No. 3, during the time the work referred to in part (1) of this claim was performed 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.

EMPLOYES' STATEMENT OF FACTS: The Carrier owns a building located at Colton, California which it leases to the United Citrus Growers.

Under the provisions of the lease, the responsibility for the maintenance and repair of the aforementioned building rests with the Carrier.

On February 18 and 21, 1955, the Carrier assigned the work of repairing the roof of this building to a General Contractor whose employes hold no seniority rights under the provisions of this Agreement.

The work consisted of applying roofing paper, using hot asphalt as an adherent to an area of approximately 5500 square feet. The contractor's employes consumed a total of 106 man-hours in the performance of the work described above.

The work was of the nature and character usually and customarily performed by employes holding seniority in the Bridge and Building Sub-Department.

The claimant Bridge and Building employes were available, fully qualified, and could have performed the work described above had the Carrier so desired.

The Agreement violation was protested and the instant claim filed in behalf of the claimants.

"(b) Pile driver, ditching, hoisting engineers, steam crane operators (other than those employed in the Mechanical Department), steam shovel engineers, cranemen, firemen, and miscellaneous equipment operators.

"(c) Drawbridge tenders, drawbridge deckmen, drawbridge helpers and drawbridge sweepers.

"(d) Pumping engineers and pumpers (fuel oil and water).

"(e) Truck drivers.

"(f) Foremen and assistant foremen of terminal, section, extra gang, yard, construction, work train, gravel pit, quarry and powder gangs, and all employes coming under the supervision of such foremen.

"(g) Crossing watchmen, crossing flagmen, tunnel watchmen, bridge watchmen, miscellaneous watchmen, and lamptenders.

"(h) Track welders, grinder operators, and their helpers.

"(i) Employes in Timber and Tie Treating Plants except stationary engineers and stationary firemen."

That rule, as will be noted, merely names the classes of employes whose rates of pay, hours of service and working conditions are governed by the rules of the current agreement. It does not make any reference to work or to the specific duties that may be required by those classes of employes, nor does it set forth in any manner the duties that will be reserved to or that will be exclusively performed by the classes of employes named. Obviously the Scope Rule does not support the claim presented in this case.

As evidence that the carrier is within its rights in contracting the work in question on the building leased to the United Citrus Growers and that there is no basis for the claim presented, attention is directed to Award No. 4783 of this Division.

CONCLUSION

Carrier asserts that it has conclusively established that the claim in this docket is entirely lacking in either merit or agreement support; therefore, requests that said claim be denied.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute. The carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

OPINION OF CLAIM: On February 18 and 21, 1955, the roof of a Carrier owned packing house at Colton, California, located on railroad property but leased to the United Citrus Growers — was repaired by employes of the Service Roofing Company who hold no seniority under the effective Agreement. 106 man hours were used to do the work.

The Organization claimed that under the Scope Rule such work belonged to it. The Carrier, in denying the claim, stated that the building was not used for railroad purposes and, therefore, repair and maintenance work could be performed by other than railroad employes. The Carrier also maintained that the building in question was under the control of another department—namely, the Land and Lease Department.

The Organization also contended that the lease provisions made the Carrier responsible for all building repair and maintenance work. The Carrier did not deny that it was responsible for such work.

On the property the Organization cited a number of instances where prior maintenance jobs had been performed by B & B employes on the building in question. The Carrier's "past practice" counter claims were inadmissible because they were not raised on the property.

In support of its position, the Carrier cited many awards but none of them was factually identical with the instant case.

The Carrier maintained that Award 4783 overruled Award No. 1610 and was, therefore, controlling. It is to be noted that the factual situations in those awards are different. In Award 1610 the Carrier assumed responsibility for all repairs and maintenance work, whereas in Award 4783, the lessee was responsible for such work. In Award 9602, it was not stated whether the lessee or the Carrier was responsible for the maintenance and repair work.

We hold that the above cases are dissimilar and that Award 4783 does not overrule Award 1610 nor is it controlling.

It is true that the Scope Rule does not specify the job duties that adhere to each classification enumerated thereunder. However, it cannot be successfully argued that specific job duties are not attached to each classification. Such classifications could not have been determined without grouping or relating specific job duties to each classification. Furthermore, if specific job duties did not adhere to each classification, the Scope Rule would be meaningless.

There is no doubt that the work performed by the employes of the Service Roofing Company is work covered by the Scope Rule and work that is customarily performed by employes of the Maintenance of Way Department. Furthermore, there were Organization Employes available and qualified to perform the work in question.

In Award 4701 Referee Robertson held that ". . . the Carrier may not with impunity, contract out work the performance of which is of a type embraced within one of its collective agreements with its employes."

> "The burden of establishing an exception to the rule is on the Carrier and we do not believe that is has been met."

> ". . . mere practice alone is not enough to establish exceptions to work clearly embraced by the Scope Rules."

In Award 1610, which factually closely parallels the present case, Referee Blake held:

> "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 carrier' is beside the question. The building was owned by it and painted by it. Under the facts the paint job clearly comes with the purview of the scope rule of the agreement."

In Award No. 7961 Referee Lynch held that:

"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 (sic) 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."

As for the Carrier's contention that the building was under the control of another department—namely, the Carrier's Land and Lease Department—such a shallow contention can hardly be given serious attention. All departments are under the dominion and control of the Carrier and subject, therefore, to the Carrier's instructions and orders.

It is our conviction that the Organization's position is sound and supported not only by the record but also by the prior sound, well reasoned decisions of this Board cited above.

After a careful and objective study of the record and all other pertinent data, we find the controlling factor in this case is—that the Carrier had the sole authority to determine how and by whom the work was to be done. Consequently, it was incumbent upon the Carrier to see that the existing contractual Agreement was not violated. This the Carrier failed to do.

Accordingly, we must and do conclude that the Agreement was 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 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November, 1961.

DISSENT TO AWARD 10189 — DOCKET MW-8428

The Award of the majority in this case is in error on several counts. In the first instance, it fails to recognize and apply the doctrine evolved from Awards 1610, 4783 and 9602.

Award 1610 involved the painting of a grain elevator owned by the carrier but leased to a grain company. The decision turned on the question of the wording of the lease as to whether the lessee or the lessor carrier was obligated to make the repairs. The award in that case expressly ignored the issue of whether the grain elevator involved was "used in the operation of the carrier."

Award 4783 correctly held:

> "* * * We think the mere fact of ownership of property by the Carrier is not sufficient ground for claim by the Organization of 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 claim was denied.

Award 9602 involving the same carrier, the same organization and the same Scope Rule as involved in Award 10189, followed Award 4783 and denied the claim saying —

> "* * * where a carrier owns property used not in the operation and maintenance of its railroad, but for other and separate purposes, such property is outside the purview of the agreement."

The majority in its Award 10189 is in error in not following the correct precedent established by Award 9602. It does not overrule the decision in Award 9602, but merely recites that the record in Award 9602 does not reveal the provisions of the lease as regard to responsibility for repair work. Since Award 9602 did not concern itself with the provisions of the lease, the basis of rejection of that award by the majority here is erroneous.

The Carrier's evidence of past practice submitted in this case was rejected because it was not presented to the Organization on the property. Having said this, the majority has precluded the citation of this Award in any future case where evidence of past practice was in fact timely presented.

/s/ D. S. Dugan
/s/ P. C. Carter
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ T. F. Strunck