Award No. 10247
Docket No. MW-9326

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Albert L. McDermott, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN 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 scaling, cleaning and painting the ceiling of the Waukegan Roundhouse to Carpenter forces instead of to painter forces;

(2) Painter Foreman A. Schimandle and Painters J. Zoran, E. Price, S. Malnarick, F. Armor, C. Minnich and W. Hileman each be allowed pay at their respective straight time rates for an equal proporationate share of the total man hours consumed by the carpenter forces in performing the work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the period November 12, 1953 to December 28, 1953, the work of scaling (removing loose concrete), cleaning and painting the ceiling of the Carrier's Waukegan Roundhouse was assigned to and performed by Carpenter Gang No. 2.

Carpenter and Painter forces are in separate and distinct seniority groups within the Bridge and Building Sub-department and are carried on separate seniority rosters.

The claimant Painter Foreman and Painters were available and could have performed the work described above had the Carrier so desired.

A claim was filed in behalf of the claimants requesting that they be allowed pay at their respective straight time rates for an equal proportionate share of the total man hours consumed by the Carpenter Forces because of the improper work assignment.

The Carrier is aware, however, that no matter how clear cut a case may appear to it, there always is a possibility of a sustaining award. In this event, attention is directed to the fact that none of the Claimants lost any work as a result of the manner in which the work in question was performed prior to December 4, 1953; and that Claimant Minnich was the only Claimant who failed to work subsequent to December 4, 1953; and that the second paragraph of Rule 62 restricts recovery "to the actual pecuniary loss resulting from the alleged violation". The Carrier submits that should a sustaining award be rendered, it should be consistent with the provisions of this rule.

All material data included herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF BOARD: Carrier assigned the work of scaling, cleaning and painting the ceiling of the Waukegan Roundhouse to carpenter forces. Claimants allege that such work was improperly assigned and should have been assigned to the painter forces.

Rule 4 of the Agreement provides that "seniority rights of all employes are confined to the subdepartment and group in which employed, except as otherwise provided herein."

The carpenter and mechanical helpers used to perform the work in question held seniority rights in Group 1 of the B&B subdepartment. The painters held seniority rights in the Painters' Group (Group 3), The painters were carried also on the Mechanical Helpers' Roster in Groups 1 and 2 and reverted back to this group in reduction of forces. The mechanical helpers were paid at the painters' rate of pay in the instant case.

In addition to a scope rule, the Agreement contains a classification of work rule.

Rule 56.I(f) provides in part:

> "Painters' work shall consist of all painting, glazing or decorating of all buildings . . . and all other painting in the Maintenance of Way Department."

The reference to scaling and cleaning does not negate the primary emphasis on painting. We believe the rule to be clear and unambiguous.

Paragraph (j) of Rule 56. I. affords protection to the employes of the B&B subdepartment from others in the performance of work prescribed under Rule 56. I. This paragraph, however, does not permit the Carrier to disregard the preceding paragraphs in the rule such as 56. I. (f) which provide that within the B&B subdepartment, certain groups of employes shall perform certain work. The work here was painters' work. It should have been assigned to painter forces not carpenter forces. The composite service rule is not controlling.

There are numerous awards of this Division which hold that a claim of this type is primarily to enforce the scope of the Agreement and where a violation occurs the Carrier must pay a penalty to the extent of the work lost.

On the other hand, we are faced with Rule 62 of the Agreement and with Award 7585 of this Division.

Rule 62 provides in part.

"Time claims shall be confined to the actual pecuniary loss resulting from the alleged violation."

We must follow Award 7585. There the dispute involved the same Agreement and the same parties. It was held that under Rule 62 payments are limited to the actual pecuniary loss suffered as a result of the violation. We so hold.

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

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1961.

DISSENT TO AWARD NO. 10247, DOCKET MW-9326

This award sustains a claim that the Carrier's Group 1 employes ("carpenters") in the B&B Sub-department can not properly do concrete painting even though it is an integral part of a concrete ceiling repair job.

In stating the basis for their decision, the majority have omitted the most essential paragraphs of the Classification of Work Rule, have only partially listed the seniority rights of painters, and have completely ignored the record on the vital issue of past practice.

An extract is quoted from paragraph (f) of the Classification of Work Rule (Rule 56 I) which defines painters' work, and it is said that this rule is clear. This, of course, is immaterial to the issue presented in this case because there has never been any question about the fact that painters' work was performed. The Carrier properly applied the Composite Service Rule and paid Group 1 helpers at the painters' rate of pay for this work before any claim was filed.

The question submitted to us is whether it was a violation of the Agreement to permit carpenter forces to do the painting involved in the ceiling repair work, and in resolving that question it should be obvious that the im-

portant paragraph in the Classification of Work Rule is paragraph (d) which defines carpenters' work, rather than paragraph (f) which defines painters' work. Paragraph (d), like paragraph (f), is clear, but it is not mentioned in the Opinion of the majority. In unrestricted terms it provides that "carpenters" are:

> ". . . employes skilled in and assigned to . . . maintenance of buildings."

At page 38 of the record the petitioning organization states:

> "On the bottom of page 9, the Carrier asserts that the work in question was maintenance in every sense of the word. We agree whole-heartedly therewith. All painting work performed on this property is maintenance in every sense of the word. Painting work is designed, as the Carrier indicates on the bottom of page 9, to preserve and protect the building. That is the one and principal reason for which painting work is performed on this and other properties. Certainly, it is maintenance work, and there is no argument in that respect. We agree with the Carrier, as it states on page 10, that maintenance as used in this agreement also includes painting." . . .

Thus, in resolving this dispute we must proceed on the premise that under the clear terms of the Classificaton of Work Rule, the work here involved is both carpenter's work and painter's work. There is nothing unusual about this. There is no arbitrary rule that a defined class of work must be assigned to a single class of employes. "It must be borne in mind that classifications of employes may be made on trifling differences and for many different reasons." Award 6946 (Carter). We have many time recognized that rights of employes to particular work are governed by Agreement provisions and Carrier retains all inherent rights of management, including the making of work assignments, that are not contracted away. **Awards 6697** (Donaldson), **7031** (Carter), **8218** (Johnson).

The Organization cites Rule 2 (a), (b) and (c) (SENIORITY DATUM), Rule 4 (DEPARTMENT LIMITS), Rule 5 (a) (seniority restricted to Gary roster and Joliet roster), Rule 15 (a) (seniority rosters in each department by seniority group) and Rule 3 (seniority entitles employes to consideration for positions); and with respect to the cited seniority Rules the Organization states:

> "Clearly, it was the intent of the instant parties, when they negotiated and incorporated the afore-cited rules into the effective Agreement, to reserve the work of each respective seniority group within the Bridge and Building Sub-department to the employes holding seniority and employed in each respective seniority group."

No rule other than the Classification of Work Rule and the seniority rules just mentioned has been cited in support of the claim and hence our proper function is simply to determine whether the cited rules, when read in connection with all other rules of the Agreement, necessarily imply that painting of the type done in connection with this ceiling repair job cannot properly be assigned to employes holding positions in the carpenter class.

We should first note other provisions in the Classification of Work Rule itself. As we have said, paragraph (d) of that Rule (56 I) provides that carpenters' work includes building maintenance and the parties agree that the

painting involved in this claim was building maintenance. Hence, the ordinary meaning of the terms used in paragraph (d) supports the conclusion that carpenters as well as painters may do painting, where, as here, it is part and parcel of building maintenance.

Other provisions of Rule 56 I support this conclusion. Rule 56 is captioned "CLASSIFICATION OF WORK". Unlike many classification rules, Rule 56 I does not provide that the work of each class shall be performed exclusively by the employes holding positions in that class. Such provisions appear in some Maintenance of Way Agreements, but the parties to this Agreement did not adopt such a rule. To the contrary, they placed in their work classification rule as the final paragraph thereof the provision that "All work described under Rule 56 I shall be performed by employes of the B&B sub-department. . . ." How easy it would have been for the parties to have said "All work of each class described in Rule 56 I shall be performed by the employes in such class." If the parties had intended that result, they would have used appropriate language as parties to some Maintenance of Way Agreements have done. The obvious implication of the final paragraph of Rule 56 I requiring that all B&B work be assigned to employes in the B&B sub-department (with exceptions already established by independent Agreements) is that the definition and classification of work in the various paragraphs of the rule did not have the effect of creating exclusive rights to such work in the corresponding classes of B&B employes, for if such exclusive rights had been created by the mere definition and classification of work and the seniority rules, that final paragraph would have been unnecessary and utterly redundant. Any interpretation of other paragraphs in Rule 56 I which would render the last paragraph thereof ineffectual must be rejected in favor of a reasonable interpretation that gives purpose and effect to that paragraph.

Turning now to the seniority rules, the second and third paragraphs of Opinion of the majority state:

> "Rule 4 of the Agreement provides that 'seniority rights of all employes are confined to the subdepartment and group in which employed, except as otherwise provided herein.'
>
> "The carpenter and mechanical helpers used to perform the work in question held seniority rights in Group 1 of the B&B subdepartment. The painters held seniority rights in the Painters' Group (Group 3). The painters were carried also on the Mechanical Helpers' Roster in Groups 1 and 2 and reverted back to this group in reduction of forces. The mechanical helpers were paid at the painters' rate of pay in the instant case.' "

These statements fail to tell the most important part of the story with respect to the seniority rights of painters. The omitted part of the story which was repeatedly directed to the attention of the majority in the handling of this case is disclosed in the following rules of the controlling Agreement:

Note to Rule 4, Group 3, and letter of understanding October 22, 1949:

> "It is understood that . . . Painters in Group 3 holding seniority as of October 17, 1941, or prior to that date, shall have seniority as Mechanical Helpers in Groups 1 and 2, Bridge and Building Subdepartment as of October 17, 1941, and that Painters in Group 3 having seniority as painters as of a date subsequent to October 17,

1941, shall hold seniority as Mechanical Helpers in Groups 1 and 2, Bridge and Building Sub-department, as of the date of their seniority as painters."

Rule 6 (a):

"Except as provided in paragraphs (b) and (c) of this rule, vacancies or new positions will be filled first by employes holding seniority in the group and rank in which the vacancy or new position occurs; if not so filled, they will be filled **by qualified employes in succeeding lower ranks in that seniority group** in accordance with Rule 8. In the event that vacancy or new position is not so filled by employes in the seniority group in which it occurs, then it will be filled **by qualified employes from other seniority groups** in the respective sub-department desiring it before employing new men. **Employes so assigned will retain their seniority rights in their respective groups from which taken."**

Rule 13 (a):

". . . When an employe has seniority rights in more than one group, he may when affected by a force reduction exercise his seniority rights to enable him to hold the highest pay-rated position to which his seniority rights entitle him."

The whole case of the clamants here is based on claimed inferences that allegedly arise as a result of establishment of separate seniority classes for painters and carpenters; yet a thoughtful analysis of the applicable seniority rules reveals that this claim runs contrary to the seniority principles consistently espoused in our awards; and the necessary result of assigning the claimants instead of the carpenters to do the maintenance work here involved would have been to furlough a senior man in the B&B Sub-department and retain a junior man.

The seniority rules of this Agreement are so designed as to protect the employment rights of painters when the painting is done by carpenter forces. Painters are given a seniority date as helper in Group 1 which is the same as their date as a painter, and they may exercise their Group 1 seniority to obtain carpenter positions and continue to hold their seniority in both carpenter and painter classes. The most logical reason for such complete seniority rights of painters in Group 1 is that the parties intended to protect the employment rights of painters and yet permit Carrier to handle the painting through employes holding positions in Group 1. We see the proper application of these rules in the instant case. When the claimants completed the regular schedule of painting they had been working on for the season, all but one were able to displace junior men, some of them in Group 1; and the one man who could not displace was necessarily junior in seniority in the B&B Sub-department to the helpers who were working on the refinishing of the roundhouse ceiling at Waukegan, otherwise he could have displaced one of them for he was given a helper seniority date in Group 1 the date that he established a date as painter in the B&B Sub-department. Instead of protecting rights of the senior qualified man, as should be done, the majority here would have a junior man retained while a senior man was furloughed.

The failure of the majority to fully state the seniority rights of painters may be due to conduct of the labor member during argument of the case in panel. The Labor member insisted that although painters are assigned helper

seniority dates in Groups 1 and 2 when employed as painters, they must relinquish their rights as painters whenever they exercise their helper seniority and obtain a carpenter position and that under Rule 15 setting up separate seniority rosters a man is precluded from holding seniority in both the carpenter class and the painter class. When his attention was directed to Rules 6 (a) and 13 (a) which clearly indicate that seniority rights shall be retained by an employe going from one Group to another, the labor member insisted that he had been advised by the former General Chairman on this property and he knew that a man could not hold seniority on both the painters' seniority roster and the carpenters' seniority roster. He further stated that if the rosters had been placed in evidence they would have substantiated his statement. A subsequent check of the seniority rosters has proved the Labor Member's statements to be in error; for example, the senior man on the Gary painters' roster (Group 3 C painters) is also the number two man on the carpenters' roster (Group 1 D carpenters); there are only twelve men on this painters' roster and the first, second, third, fifth, seventh, and ninth all hold seniority as carpenters and are high on the carpenter roster (of course, this means that these senior and more experienced painters are able to hold positions as carpenters with a higher rate of pay than the painter rate, and consequently Carrier would be unable to assign painting to these senior painters if it could not do so while they hold carpenter positions). On the Joliet roster E. P. Nordstrom not only appears on both the painter roster, Group 3, and the carpenter roster, Group 1, but also on the crane operator roster, Group 6, all of which is inevitable in view of the clear provisions of Rules 6 (a) and 13 (a).

Turning now to the past practice issue. In addition to omitting reference to significant portions of the Classification of Work Rule and the Seniority rules, the Opinion of the majority is conspicuously silent on the important subject of past practice. The record discloses that any doubt which ever could have existed as to the right of Carrier to assign painters' work to "carpenter" forces has long since been resolved by the consistent past practices of the parties.

The first significant fact regarding practice is that in the only specific instance of record when the roundhouse ceiling was renovated, as was done in this case, such work was admittedly done by B&B Employes in Group 1 and not by painters in Group 3. The Organization's clear admission of this fact appears in the record at page 41, last paragraph, where the Organization states:

> "Under argument III, the Carrier refers to an alleged past practice. It refers to what it contends as a 'concrete example' which occurred in 1931. We believe, however, that ancient history is not in issue in this case. In 1931, the Brotherhood of Maintenance of Way Employes was not even active on this property. Secondly, 1931 predates the effective date of the subject agreement and of Rule 56 I by some fifteen years. Furthemore, the practice alleged by the Carrier, which supposedly occurred in 1931, is directly in conflict with the provisions of Rule 56, and all practices in conflict with Rule 56 were summarily abrogated upon the negotiation and consummation of that rule."

We regard this as a frank admission that prior to the adoption of Rule 56 I it was the practice for Carrier to assign work of the specific type involved in this claim to employes in Group I rather than painters. There is nothing in Rule 56 I which is inconsistent with the perpetuation of the practice;

in fact, the necessary implication of the whole Rule is that such practice will be continued and that the only restriction placed upon Carrier's inherent right to make work assignments in the B&B Sub-department is that all work mentioned in Rule 56 I must be assigned to employes of the B&B Sub-department.

Referring to Carrier's general allegation (page 28) that, except for regular painting programs, painting work is generally done by B&B Employes other than painters, the Organization makes a statement at page 43 which is of controlling significance on the past practice issue because of the admission that is implicit in the partial denial. The Organization states:

> "Carrier's contention on the bottom of page 13 that painters perform only work covered by their regular painting program is a misstatement and it is also a gross misstatement when the Carrier contends that all other road painting on structures has been done by carpenters, mechanical helpers, water service mechanics, and their mechanical helpers, and by signalmen. **The facts are that a terminal gang is maintained at East Joliet and that it is often sent to various points on the Joliet Division by truck to perform painting work as it is needed on the various structures.**"

The emphasized portion of the Organization's reply can only be regarded as an admission that at all points on Carrier's lines except for the Joliet Division Carrier's statement that all painting other than that done by paint gangs during assigned painting programs is now and since the Agreement was adopted has been consistently done by employes other than painters. Furthermore, in view of the weak statement that a terminal gang at East Joliet "is often" sent to other points on the Joliet Division, the Organization has not denied that other employes do such painting on the Joliet Division as well. It must therefore be taken as an admitted fact of record that at all times subsequent to the adoption of the current Agreement, the consistent practice has been to assign painting work to B&B Sub-department employes in Group 1 whenever Carrier has deemed such procedure advisable. This practice is clearly consistent with all express provisions of Rule 56 I and other provisions of the Agreement, and consequently if it would ever have been possible to deduce from the combined effect of seniority rules and other provisions cited by the Organization a conclusion that the parties intended to restrict Carrier in the assignment of painting work to employes in Group 3 of the B&B Sub-department, such conclusion would now be precluded by the practical interpretation which the parties themselves have placed upon the Agreement by the practice that has been adhered to during the several years immediately following adoption of the Agreement in 1945. RESTATEMENT OF THE LAW OF CONTRACTS, Section 235 (e), **Award 8207** (McCoy).

It is thus apparent that the claim runs contrary to the express provisions of paragraph (d) of Rule 56 I because that rule states that building maintenance is carpenters' work and all parties agree that maintenance included painting; the claim runs contrary to the last paragraph of Rule 56 I which provides that Carrier shall assign all classes of B&B work to B&B employes but conspiciously does not provide that work of each class shall be assigned to employes assigned in the same class. The claim runs contrary to the generally accepted principles of seniority in that the necessary and immediate result of giving the work involved to claimants would have been to furlough a senior man and retain a junior man in the B&B Sub-department; and the claim runs contrary to the interpretation which the parties themselves

placed on their Agreement for many years following the adoption of the rules involved.

That portion of the decision holding that **Award 7585** is controlling on the issue of damages is obviously correct, but since this claim is invalid and should have been denied in its entirety, the question of damages should never have been reached.

For the reasons stated, and others mentioned in the record, the award sustaining the claim is wrong and should be considered an improper attempt to amend the Agreement by administrative fiat.

We dissent.

G. L. Naylor

F. J. Goebel

O. B. Sayers

R. A. De Rossett

R. E. Black