Award No. 10358
Docket No. MW-9464

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Carl R. Schedler, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when it assigned other than B&B forces to repair doors in the shop cafeteria and in the Bulk Store Room and to build and install doors at the Paint Shop and at the Steel Shop, all at the Readville Shops and, in consequence thereof;

(2) B&B Foreman John Muirhead; B&B Carpenters Nicholas A. DiPolla, Gino C. Fachy, C. W. Stork, Charles Viscardy and Maintenance Helper Thomas J. Kingston each be allowed five (5) days' pay at their respective straight-time rates and B&B Painters W. Randall, Wm. H. O'Brien and J. M. Green each be allowed (1) day's pay at their respective straight time rates account of B&B work assigned to and performed by other forces on March 29, 30 and April 12, 13, and 14, 1955:

(3) B&B Foreman John Muirhead; B&B Carpenters Charles S. Allen, George B. Otis, Gino C. Fachy, James M. Costello and Maintenance Helper Thomas J. Kingston each be allowed eleven (11) days' pay at their respective straight-time rates and B&B Painters Wm. H. O'Brien, J. M. Green and W. Randall each be allowed two (2) days' pay at their respective straight-time rates account of B&B work assigned to and performed by other forces on April 21, 22, 27, 28, 29 and May 3, 4, 5, 6, 9, and 10, 1955.

EMPLOYES' STATEMENT OF FACTS: Maintenance of Way B&B employes have historically and traditionally performed work in connection with building, installing, repairing and painting of doors, etc.

duces fabricated items such as doors, not only for the shop itself, but for other facilities on the system.

In evidence of this long standing practice, there is attached report to the undersigned from Chief Mechanical Officer Hales dated August 17, 1956 (Exhibit A). A further example is letter to Mr. Perry, predecessor of the undersigned, from the then General Mechanical Superintendent dated November 13, 1945, concerning similar maintenance work at Van Nest Shop, the system facility for rebuilding electric locomotives and multiple unit electric cars (Exhibit B).

The record is clear that the items questioned in this proceeding have by custom and practice been recognized for many years as outside the purview of the Agreement.

And the schedule itself specifically recognizes such customs and practices. Rule 53 is the classification rule defining the duties of the various positions included in the scope rule. At its conclusion the definitions are all made subject to the following:

"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."

It thus appears the parties have made provision in the language of the schedule to encompass the very situation now appealed to this Board. The guiding principle is work "heretofore performed" by employes represented by the organization. Since the record is clear the operations the subject of this claim have not been so performed, the result must be:

Claim denied.

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

OPINION OF BOARD: The Carrier assigned Mechanical Department personnel to do the work outlined in this claim. The Organization herein asserts that the work should have been assigned to the Maintenance of Way Bridge and Building employes employed by the Carrier. In support of its contentions, the Organization relies on Rule 53 in the Agreement and the "General Understanding" between the parties dated February 24, 1954, and certain decisions by the Third Division. Interestingly enough the Carrier relies on Rule 53 and the "General Understanding", and certain other Board decisions in support of its denial of this claim.

The Carrier also relies on the assertion that the established past practice of having this work done by Mechanical Department employes has been established for many years. The record indicates rather clearly that this Organization has not recognized or agreed to any such past practice for this type of work at this facility to be performed by Mechanical Department employes. The record discloses when work of this kind and extent has been performed at other facilities of the Carrier, this Organization has grieved and the Carrier has paid the B&B employes who would have done the work.

For a past practice or custom to ripen into an Agreement it must have been clearly understood and clearly adopted by both parties for a long period of time as recognized by their mutual acquiescence. It is our opinion that the evidence in this record does not support the past practice theory relied on by the Carrier.

Rule 53 outlines the work to be performed by Maintenance of Way employes and we think it adequately covers the work complained of herein. The Agreement sets forth the kind and type of work to which it is applicable, and the members of this Organization customarily and traditionally do that type and kind of work. The Carrier's reliance on the "General Understanding" is without merit because it did not invoke the conference requirement but proceeded unilaterally to assign the work to the Mechanical Department employes. It is our opinion that there is no merit in the Carrier's argument that the words "heretofore performed" as used in the "General Understanding" constitutes a waiver of the work normally and usually performed by Maintenance of Way employes. We believe that had the Organization intended to give up work traditionally performed by its members, it would have insisted on more definitive and specific language.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of February 1962.