Award No. 10768

Docket No. MW-9554

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert J. Ables, 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 and/or otherwise permitted other than B&B forces to repair a door at the Locomotive Shop, Readville, Massachusetts, and to make repairs to a canopy near the Lye Vat at the Readville Shops and, in consequence thereof:

(2) B&B Foreman John Murihead, B&B Carpenters George B. Otis, James M. Costello, Gino C. Fachy and Maintenance Helper Thomas J. Kingston each be allowed sixteen (16) hours' pay at their respective straight time rates account of B&B work assigned to and performed by other forces on October 31 and November 1, 1955;

(3) B&B Foreman John Murihead, B&B Carpenters C. W. Stork, C. L. Allen and Maintenance Helper Thomas J. Kingston each be allowed eight (8) hours' pay at their respective straight time rates account of B&B work assigned to and performed by other forces on November 3, 1955.

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

On October 31, 1955, and November 1, 1955, the Carrier assigned and/or permitted Mechanical Department employes, who hold no seniority rights under the effective Agreement, to repair a door at the Locomotive Shop, Readville, Massachusetts. Sixteen hours' time was consumed by the Mechanical Department Forces in the performance of this work. On November 3, 1955, these same Mechanical Department employes were assigned and/or permitted to make repairs to a canopy near the lye vat at the Locomotive Shop, consuming eight hours' time in the performance of this work.

Maintenance of Way B&B employes were available, qualified and willing to have performed this work.

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.

(Exhibits not reproduced.)

OPINION OF BOARD: The issue in this dispute is whether or not certain carpentry maintenance work performed by Mechanical Department Employes at Carrier's repair shops was in accordance with practice on the property such as to constitute an exception to work reserved to Maintenance of Way Employes under their agreement.

The facts are not in dispute. On October 31, and November 1, 1955 Mechanical Department Employes repaired a door at the Locomotive Shop, Readville, Massachusetts. On November 3, 1955 these same employes repaired a canopy near the lye vat at the Locomotive Shop.

Rules applicable to the issue are the Scope Rule of the Maintenance of Way Employes, Rule 53 which classifies and defines the various work reserved to such Employes coming within the purview of the Scope Rule, and a Memorandum of General Understanding, which provides that:

> "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."

There is no dispute that the character of the work involved is within the scope of the Maintenance of Way Employes' Agreement. The Carrier argues, however, that it has maintained a Shop Maintenance Force at its heavy repair shop for many years to make repairs of the type concerned here. Because of this the Carrier maintains that a practice has been established to permit other than Maintenance of Way Employes to do this work. The Memorandum of General Understanding is cited as support for this position.

The Employes disagree that such a practice has been established and argue, in any event, that the practice cannot change the specific provisions of the Classification Rule which reserves this work to them. In addition, they cite three instances where the Carrier has paid time claims of Maintenance of Way Employes for work done at repair shops of the Carrier by employes not covered by the agreement.

In **Award** 10730, we said that the rule itself; history, past practice; the importance, notoriety and length of time of the current practice; and the degree of acceptance or acquiescence of the opposite party are all factors to be considered in judging how far practice goes to make or break a rule.

In this case it is undisputed that the kind of work involved is reserved to Maintenance of Way Employes. The Carrier argues, however, that an exception applies because of the practice to use a Shop Maintenance Force for running maintenance work in the shop area. At the time involved, three Carpenters and one Pipefitter, Machinist, Mason and Mason Helper were assigned to this Shop Maintenance Force. The Carpenters were off the Carmen's roster and the others were off rosters which bear their name. Because Carpenters under the Carmen's Agreement made the repairs involved the Carrier introduced their agreement quoting Rule 107, in part:

'Classification of Work

> Carmen's work shall consist of building, maintaining, dismantling (except all-wood freight and passenger train cars), painting, upholstering and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work, pattern and flash making **and all other carpenter work in shops and yards, except work generally recognized as bridge and building department work;** . . .' (Emphasis Carrier's.)

The point stressed by the Carrier is that a Maintenance Force has been in being for many years and the work of the group included making repairs such as involved here.

We do not agree with the Carrier that it has made a case for the required exception.

There is nothing inconsistent with the Carrier having a Maintenance Force and the claim of the Maintenance of Way Employes that the particular maintenance work involved was reserved to them. Certainly, work requiring the skills of a Machinist or Pipefitter, for example, could be maintenance work while at the same time not be within the scope of the claimants' agree-

ment. Similarly, carpentry work could be for maintenance purposes and not be covered by the Maintenance of Way Agreement. Any of the work identified under the Carmen's Agreement would be in this category. The Maintenance work which carmen could not perform, however, was carpenter work which was generally recognized as bridge and building department work. This work is specifically excepted from the Carmen's Agreement. On the other hand, this work is specifically included in the B&B agreement. Hence, there can be confusion as to who has the contractual right to do the general carpentry work to repair a door or a canopy.

Only the most firm practice to the contrary could upset this rule. Numerous prior awards cited by the Carrier turned on a finding that the work in dispute was not reserved to one craft by the rule involved or because of conflicting practice under an ambiguous rule. In the dispute here, however, the Classification Rule for Bridge and Building Carpenter's work includes among other things: "Cutting, fitting and joining together all woodwork on, in, or about buildings . . ." This rule specifically reserves the work involved here to B&B Employes. The only way the Carrier's position could be sustained is to show that practice within the meaning of the Memorandum of General Understanding constitutes an exception to the work so reserved. This has not been demonstrated. Therefore, it is concluded that neither the rule itself; history; past practice; or the importance, notoriety and length of time of the current practice support the Carrier's position in this dispute with respect to this particular maintenance work. It can be shown also that the Employes did not acquiesce in any practice of the Carrier to assign other employes to do general maintenance work by reference to the three time claims paid by the Carrier to Maintenance of Way Employes. Whatever else these claims show they demonstrate convincingly that they were not indulging any practice of the Carrier inimical to their interests.

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 7th day of September 1962.