NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21592

THIRD DIVISION Docket Number MW-21232

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Norfolk and Western Railway Company (Lake Region)

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

(1) The Carrier violated the Agreement when it used a roundhouse foreman and one other roundhouse employe to construct a small building at Bellevue, Ohio for use as an office by the roundhouse foreman (System File MW-BVE-74-4).

(2) B&B Foreman L. D. Wise and B&B Carpenter L. E. Weaver each be allowed 24 hours' pay at their respective straight-time rates and 12 hours at their respective time and one-half rates because of the violation described above.

OPINION OF BOARD: The central question of this case involves an interpretation of Rule 52 (b) of the applicable agreement which provides in pertinent part:

> "All work of constructing, maintaining, repairing and dismantling buildings, lodges, turntables, water tanks, walks, platforms, highway crossings and other similar structures, built of brick, stone, concrete, wood or steel, and appurtenances thereto, shall be performed by employees of the Bridge and Building Department ..." (emphasis added)

The question is in dispute presumably because the object made does not fit precisely within the rule definition. It is undisputed that it was fabricated by Mechanical Department employees as a small wind break or work booth made of wood and metal to permit a foreman to gain protection inside the roundhouse from wind and drafts caused by the opening of doors for the entrance and exit of locomotives. The booth is free standing in that it is not attached to the basic roundhouse structure and, presumably, it could be moved from place to place (by crane). It does include electrical and telephone connections however. Within the structure there is a desk, shelf, chair and clock permitting the occupant to utilize it as a small office. The dimensions are four feet wide by five feet long and seven feet high. In summer time the door is detached and it is reinstalled in winter weather.

Neither the use of this booth, nor the need for it, nor appointments inside are controlling of the question before us. The exceptions contemplated by the rule (not quoted above) are conceded to be inapplicable. In addition, we do not believe we may look to past practice or custom until we are satisfied the plain wording of the definition under the rule does not cover the work in question. See Award 17569 (Rohman).

It is the Carrier's contention, to the contrary, that the petitioner must prove by a preponderance of the evidence that the work involved must have been historically, customarily and usually performed exclusively by he who claims it and cites awards in support thereof. We have reviewed these awards and they are not persuasive with respect to this case where the rule specifically describes the work reserved to the craft. By its terms Rule 52(b) contemplates exclusivity for Bridge and Building employees and unless it can be said the work is not within the description provided, it would appear to be their work. See Award 18628 (Ritter). The rule description employs general terms although a number of specific structures are listed. Even if we assume this booth cannot be described as a building, it can be considered covered as an "other similar structure" and "appurtenance thereto" insofar as it was constructed as a four-sided structure with roof, window and door. The structure involved electrical and telephone connections and it cannot be claimed it is completely "free standing". Moreover, it is built of wood or steel, materials covered by the definition.

We believe the petitioners have met the burden of proof here. The exchange of correspondence between the parties on the property served to accomplish two results: (1) described the structure in question with considerable detail (including photographs); and (2) established that the work had been performed by others than the Bridge and Building employees. We conclude the structure falls within the broad definition of Rule 52(b) and that work is the exclusive work of the Bridge and Building employees. It follows that a prima facie case was made. It remained for the Carrier to develop its counter position that the work was not the exclusive province of this craft. See Award 6063. The Carrier has not met this burden and we must sustain Claim (1).

In considering Claim (2) it remains to determine the proper measure of damages, if any, here. The exchange on the property reflects conflict as to the time involved. As indicated in statement of claim, the organization alleged that a total of 72 hours was devoted to this construction by two men including 24 hours on Saturdays or Sundays. The remaining 48 hours were accomplished on days other than Saturdays and Sundays.

The Carrier argues the measure of damages for a violation here is the actual loss suffered by the injured party. The Claimants were not deprived of work during their normal work weeks and on this basis suffered no actual loss. The Carrier also asserts that premium rates rather than pro rata rates could not be applicable for time not worked insofar as it would involve the assessment of a penalty. The Petitioner cites awards that urge that this work was in the nature of overtime work and as such should be considered a continuation of the work being performed. We do not reach these arguments in this case.

We are informed that the normal off days of the Claimants, who are senior Bridge and Building employees, was on Saturday and Sunday. There is no evidence that the Mechanical Department employees who performed the work had similar off-days although the work scheduled produced by the Organization indicates the rate paid on Saturdays and Sundays is at the time and one half (premium) rate. It follows that we cannot determine from this record that the work necessarily was performed or would have been performed by Bridge and Building employees on premium time at overtime rates.

For this Board to decide the question of the appropriate remedy it must rely upon the factual showing established on the property as to the number and quality of hours (premium or non-premium) required to perform the work. Here we find only allegations and assertions. Albeit, these are repeated and even argued, they cannot be considered evidence within the awards of this Board. See Award 21268 (Lieberman); Award 20218 (Blackwell); and Award 20620 (Sickles). We cannot engage in speculation or conjecture as a basis for a remedy. It follows that we must conclude, on this record, that petitioners have not met their burden of proof to establish the basis for a money award and Claim (2) must be denied.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence finds and holds:

That the parties waived oral hearing;

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.

A W A R D

As to Claim (1) sustained.

As to Claim (2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1977.