Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32422
Docket No. MW-32145
98-3-94-3-285

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned carmen to perform Bridge and Building Subdepartment work (painting the walls, engine pits, tanks, bathroom, lunch room and locker room) in the St. Paul Roundhouse at St. Paul, Minnesota beginning February 3 through 26, 1993 and continuing, instead of assigning B&B Subdepartment forces to perform said work (System File C-32-93-C060-01/8-00130 CMP).

(2) The claim as presented by General Chairman M. S. Wimmer on March 19, 1993 to Division Manager D. J. Hansen shall be allowed because said claim was not disallowed by Division Manager D. J. Hansen within the required sixty (60) day time limit set forth in Rule 47.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Messrs. C. E. Phillips, S. H. Strandlof, S. J. DeJarlais, C. McKay, L. B. Diersen and R. J. Bartels shall each be compensated at their respective straight time and time and one-half rates of pay for an equal proportionate share of the total number of man-hours expended by the carmen in the performance of the work in question."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

As Third Party in Interest, the Brotherhood Railway Carmen, Division of Transportation Communications International Union was advised of the pendency of this dispute, but it chose not to file a Submission with the Board.

By claim dated March 19, 1993, the Organization asserted that during the period February 3 through February 26, 1993, three Carmen at the Carrier's Shoreham Shops were improperly used to paint various areas of the St. Paul Roundhouse. That claim further stated that 96 straight time and 202 overtime hours were expended by those employees. According to that claim, "[t]his claim is to be considered continuing in nature until such time as the dispute is resolved. Additional dates and hours will supplement this file as they become available." The claim was sent to the Carrier by certified mail and was received on March 20, 1993.

By letter dated March 30, 1993, the Organization referenced the earlier claim which "was to be considered continuing in nature until such time as the dispute is resolved" and further stated that ". . . you were advised that additional dates and hours worked by . . . [the Carmen] would be subsequently supplied as they became available."

By letter dated May 24, 1993, the Carrier's Division Manager referred to the letters of March 19 and 30, 1993 and denied the claim.

The allegations in the March 19, 1993 letter must be sustained as presented. Rule 47(1)(a) states in pertinent part:

"... Should any such claim or grievance be disallowed, the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employe or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances."

The Carrier's May 24, 1993 disallowance of the March 19, 1993 letter which had been received by the Carrier on March 20, 1993, exceeded the 60 days permitted in Rule 47(1)(a). There is no discretion in the negotiated words "shall, within 60 days from the date same is filed, notify whoever filed the claim . . . of the reasons for such disallowance" and "[i]f not so notified, the claim . . . shall be allowed as presented. . . ." [emphasis added]. No matter how we feel about the merits of the claim, the Board has no authority to change the language of Rule 47. The fact that the Organization stated it would update the Carrier concerning additional hours does not relieve the Carrier from the very mandatory language of the Rule. We therefore have no choice with respect to the hours claimed in the March 19, 1993 letter. Because the claim was not timely denied, those hours must be paid as requested.

However, Rule 47(1)(a) does not make the sustaining of the March 19, 1993 allegations precedential ("If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances"). We can therefore address the merits of the supplemented allegations in the Organization's March 30, 1993 letter.

The Organization has not carried its burden on the supplemented allegations found in the March 30, 1993 letter. The Scope Rule does not reserve painting work exclusively to the Organization's members and the record does not establish that the Organization's members have historically performed this type of work. See Third Division Award 27880 between the parties ("Without an express reservation of work guaranteed to them by contract, the Organization was obligated to show that its members have historically performed the work"). On the contrary, the Carrier has shown that its Carmen have performed similar painting. Third Division Award 27762 between the parties and Awards cited therein (Carmen painting portions of buildings at different locations).

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 21st day of January 1998.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 32422, DOCKET MW-32145
(Referee Benn)

The Board correctly found that the Agreement was violated when the Carrier failed to answer the claim within the time limits set forth within the Agreement and a limited concurrence is in order. The fact that there was a supplemental amendment to the initial claim should not have distracted the Majority from applying the proper precedent in this case. However, the Majority held:

> "The Organization has not carried its burden on the supplemented allegations found in the March 30, 1993 letter. The Scope Rule does not reserve painting work exclusively to the Organization's members and the record does not establish that the Organization s members have historically performed this type of work. See Third Division Award 27880 between the parties ('Without an express reservation of work guaranteed to them by contract, the Organization was obligated to show that its members have historically performed the work'). On the contrary, the Carrier has shown that its Carmen have performed similar painting. Third Division Award 27762 between the parties and Awards cited therein (Carmen painting portions of buildings at different locations)."

There are two (2) errors in the Referee's statement cited above. First, the issue of the work not being reserved to the Maintenance of Way employes is patently wrong. If the Majority would have taken the time to read the Organization's submission, it would have been hard to miss the fact that beginning on Page 3 and continuing through Page 8 we laid out the history of this dispute **on this property** under the applicable Agreement. There have been six (6) awards rendered concerning aliens to the Agreement being

assigned the work of painting the Carrier's bridges, buildings and structures rather than assigning such work to Bridge and Building (B&B) employes. The final award on the subject was Award 19152 rendered on April 22, 1972, which held:

> "**OPINION OF BOARD**: The Organization contends that Carrier violated the Agreement when it permitted Locomotive Department employes to prepare and paint the floor of the Electrical Shop Building at Milwaukee, Wisconsin during the month of July, 1965.
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> * * *
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> Concerning the merits of this dispute, the Organization has referred us to Award No. 8508 and more recent Award Nos. 18852, 18950 and 19034 of this Board involving the same issue and the same parties to this dispute, and under the principle of 'start (sic) decisis', we find that the issue before us has already been decided and thus Carrier violated the Agreement in this instance when it permitted Locomotive Department employes rather than B&B painters to paint the floor of the Electrical Shop Building at Milwaukee during July, 1965."

In the final award cited above (Award 19152), the Board held that the principle of "*stare decisis*" is applicable when the Carrier assigns the work of painting to other than employes of the B&B Sub-department.

The issue had been resolved and insofar as the Organization was concerned it was a settled issue. Then, without any notice, Carrier unilaterally violates the edict of the Board that the work belongs to the Maintenance of Way employes and assigned the work at issue here to Carmen. To justify its decision, the Majority commits its second fatal error.

Rather than applying the precedent established by the Board, under the principle of **stare decisis**, the Majority applied the precedent applicable to the SOO Line Maintenance of Way Agreement. In cases involving painting on the SOO Line side, under the SOO Line Agreement, there was some evidence of Car Shop employes performing such work in the past. Hence, if this case arose on the SOO Line side, where the SOO Line Agreement was applicable, the Majority's findings would have been harder to discredit. That is clearly not the case here. That precedent as cited by the Majority, however, is only applicable on the SOO Line side of the Carrier's property, not the Chicago, Milwaukee, St. Paul and Pacific side of the property. Inasmuch as the Board had determined in 1972 that the work is reserved to the B&B employes, the Majority's decision here is not grounded in sound reasoning and is worthless as precedent. We submit that the Majority erred when it denied the supplemental claim based on improper precedent. Therefore, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member