

Award No. 5809

Docket No. 5681

2-N&W-CM '69

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Arthur Stark when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYES'
DEPARTMENT, AFL — CIO
(Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

That under the current agreement the Norfolk & Western Railway Co. be ordered to additionally compensate Painter J. Cartisano in the amount of five (5) hours at punitive rate for improperly using a Carman to perform Painter's work.

EMPLOYES' STATEMENT OF FACTS: Painter J. Cartisano, hereinafter referred to as the claimant, was regularly employed by the Norfolk & Western Railway Co. hereinafter referred to as the carrier, at Rook Car Shop, Rook Station, Greentree, Pennsylvania, with work week of Monday through Friday, rest days Saturday and Sunday, hours of 8:00 A.M. to 4:30 P.M.

On October 21, 1966, Painter J. Cartisano at Rook, Pa., car shop was available for work but was told to stay home by the general shop foreman, T. J. Wilson because the above day was Painter J. Cartisano's birthday. Foreman Wilson arbitrarily assigned other than the carman painter, namely, carman S. Unghajer, in place of Painter J. Cartisano who was available for work on that day to do lettering for identification and painting of the hand railing of diesel locomotive, Norfolk & Western 2044.

Painters at Rook shop have their own seniority roster and their own classification of work. The above work performed by Carman S. Unghajer was painter's work and should have been performed by a painter.

Claim was filed with proper officer of the carrier under date of November 15, 1966, contending that the claimant was entitled to five (5) hours at punitive rate, and subsequently handled up to and including the highest officer of the carrier designated to handle such claims, all of whom declined to make satisfactory adjustment.

The agreement effective August 30, 1955, as subsequently amended is controlling.

POSITION OF EMPLOYES: It is not in dispute that the claimants established have maintained seniority rights in the sub-division of painters in the carmen's craft in accordance with Rule 25 reading:

is not assigned any duties coming under the painters classification. Mr. Unghajer in his signed statement merely said that he performed painters work. He did not state that he was assigned to do the work nor that his supervisor was aware that he performed it.

After receipt of carriers reply and in conference with the general chairman on April 4, 1968 he produced a sworn statement dated March 7, 1968 signed by Mr. Unghajer indicating that he performed painters work on October 21, 1966. This cannot be accepted by the carrier as general foreman Wilson did not instruct Unghajer to perform work that is considered painters work. Any painting that might have been performed by Mr. Unghajer was of his own volition and was not assigned by the carrier.

It has been a long standing practice at Rook that in the absence of one of the two painters, a carman has been assigned to assist the remaining painter. Even though Unghajer did not perform any painters work on October 21, 1966, it is the carrier's position that he could have done so under the current agreement, particularly in accordance with Rule 90. Your board has ruled in Award No. 5303 as follows:

"Rule 74, emphasized by petitioner, does not require that an employee be experienced in any particular phase of Carmen's work. It is enough under Rule 74 if he has had four years experience as a Carman "painting, varnishing, surfacing, decorating, lettering" and the like, duties in which Easley had about forty years experience, are specifically referred to as Carman's work by Rule 75."

The portion of rule 75 quoted is the same as former Pittsburgh and West Virginia Rule 90. This clearly indicates a carman can perform painters work.

Even if the claim as presented by the employees on November 15, 1966 were justified, and the carrier asserts it is not, it would not be payable at the punitive rate as your board has ruled in numerous cases that the pro rata rate is the proper rate for work not performed — See Second Division Awards 4416, 2700, 2802, 2859, 2956, 2958, 3259 and Third Division Awards 7858, 7827, 9566 and many others.

The carrier has proven the following facts in this submission and again requests that the claim be dismissed or denied by your board:

1. It has not been handled in accordance with article V of the August 21, 1954 agreement.
2. There is no classification of work rule covering painters.
3. No work previously performed by a painter was performed or assigned to a carman.
4. Carman can perform painting in accordance with Rule 90 of the current agreement.
5. Even if the claim were justified payment for work not performed is not payable at the punitive rate.

FINDINGS: The Second 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 waived right of appearance at hearing thereon.

On Friday, October 21, 1966, Claimant J. Cartisano celebrated his birthday. As this was a contractual holiday for him, Mr. Cartisano, a Painter, remained at home. Petitioner asserts, and Carrier denies, that Carman S. Unghajer was assigned to perform Claimant's regular painting duties. It requests that Cartisano be appropriately compensated.

At the outset, however, Carrier contends that this Board is without jurisdiction to rule on the merits of the claim since Petitioner did not comply with applicable provisions of the August 21, 1954 Agreement. Article V, 1(b) of that Agreement provides that:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance, and the representative of the Carrier shall be notified in writing within that time of the rejection of his decision. Failing to comply with this provision, the matter shall be considered closed, but this shall not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, at any stage of the handling of a claim or grievance on the property, extend the 60-day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose."

The chronology of events, as related to the processing of the instant claim, is as follows:

November 15, 1966 — Written claim submitted by Local Chairman.

January 11, 1967 — Claim denied in writing by Foreman.

May 4, 1967 — Written appeal by General Chairman to Master Mechanic.

June 29, 1967 — Appeal denied in writing by Master Mechanic.

August 23, 1967 — Written appeal by General Chairman to Carrier's Vice President, Personnel.

October 16, 1967 — Appeal declined in writing by Vice President who noted, in part:

"As this claim has not been progressed in the usual manner and is in violation of Article V, 1(b) of the August 21, 1954 Agreement, it is considered closed."

Under V, 1(b) "The representative of the Carrier shall be notified in writing . . . of the rejection of his decision." In the case at hand, accordingly, Petitioner's representative was required to notify the Master Mechanic that his June 29, 1967 decision was rejected. This, evidently, was not done. Carrier's October 16th assertion, reiterated in its submission to this Board, that the Master Mechanic never received a rejection of his denial was not rebutted by Petitioner. Consequently, this Board has little choice but to dismiss

the claim on the grounds that, under V 1(b), "the matter shall be considered closed."

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1969.