

Award No. 1519

Docket No. 1450

2-B&O-CM-'52

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1—That under the current agreement the carrier improperly assigned Carman Painters Helpers V. J. Frano and A. L. Vardy to work as carmen painters on April 15, 22, 23, 29, 30; May 6, 7, 13, 20, 21, 27, 28, and June 3 and 4, 1950.

2—That accordingly the carrier be ordered to compensate Carman Painters Michael Mancusco and George H. Kohler in the amount of eight (8) hours pay each at the time and one-half rate for each day involved above.

EMPLOYEES' STATEMENT OF FACTS: Carmen Painters Michael Mancusco and George H. Kohler, hereinafter referred to as the claimants are employed by the carrier at DuBois, Pennsylvania with a work week Monday through Friday, rest days Saturday and Sunday. On April 15, 22, 23, 29, 30; May 6, 7, 13, 20, 21, 27, 28 and June 3 and 4, 1950, the carrier assigned Carmen Painter Helpers V. J. Frano and A. L. Vardy, whose work week is Monday through Friday, rest days Saturday and Sunday, to perform carmen painters' work of painting locomotive cranes at DuBois shops paying them carmen painters' rate of pay at time and one-half. There is one seniority roster covering painters at DuBois in the locomotive and car departments, which is affirmed by copy of 1950 seniority roster submitted herewith and identified as Exhibit A, and when the carrier elected to have the aforesaid work performed on the above dates they did not call or notify the claimants, who were available to work on these Saturdays and Sundays.

The case was handled from bottom to top with carrier officials designated to handle such affairs, who all declined to adjust this dispute.

The agreement effective September 1, 1926, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: It is submitted that under Rule 29, reading in part as following:

"None but mechanics or apprentices regularly employes as such shall do mechanics' work as per special rules of each craft . . ."

the work of painting these locomotive cranes is the work of carmen painters as evidenced by that part of Rule 138 reading in pertinent part as follows:

precise methods on which this matter was being handled. Quite the contrary, the conclusion is strong, however presumptive, that they were fully aware as to the basis on which the action was being taken.

CARRIER'S STATEMENT AS TO THE NATURE OF THE CLAIM:

The carrier submits that the claim as made is basically defective. The substantive nature of the wage claims made here on behalf of the two claimants, Mancusco and Kohler, indicates that they are seeking a measure of penalty compensation based on OVERTIME rate of pay. Part (2) of their claim specifies " * * * That accordingly the Carrier be ordered to compensate Carman Painters Michael Mancusco and George H. Kohler in the amount of eight (8) hours pay each at the time and one-half rate for each day involved above."

The carrier submits that the wage claims as now made may not properly be upheld before this Division. This Division has held that the right to perform some specified service is by no means the equivalent of having actually performed such work under an overtime rule.

Without prejudice, therefore, to any statement made above as to the merits of this claim, and the carrier has conclusively demonstrated that there are none, the carrier proposes to discuss this point in light of the Awards of this Division.

This Division's Award No. 1268 involved a dispute between System Federation No. 100, RAILWAY EMPLOYEES DEPARTMENT, A. F. of L. (Firemen and Oilers) and the Erie Railroad Company. In that particular dispute claim was submitted for a measure of penalty compensation based on eight hours at the time and one-half rate. Referee Adolph E. Wenke participated in that Award. In his findings he held in part as follows:

" * * * this claim should be sustained at the pro rata rate only. While it is true that if claimant had performed the work on his day off his rate would have been time and one-half, however, the penalty rate for depriving an employee of work is the pro rata rate of the position."

Award No. 1269 of this Division involved a dispute between System Federation No. 6, RAILWAY EMPLOYEES DEPARTMENT, A. F. of L. (Car-men) and the C.R.I. & P. Railroad Company. Claim in that dispute was submitted for five hours on behalf of two claimants at the time and one-half rate of pay. This Division with the same referee rendered decision in that case holding in part:

" * * * this claim should be sustained at the pro rata rate only. While it is true that if claimants had been called to perform the work, their rate would have been time and one-half, however, the penalty rate for depriving an employee of work is pro rata rate of the position."

Based on the findings of this Division in these Awards, the carrier submits that the claim made here is basically defective and cannot be sustained.

Based on all that has been recited hereinabove the carrier respectfully requests this Division to find these claims as being without merit and to deny them accordingly.

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.

The parties to said dispute were given due notice of hearing thereon.

The carrier's contention that the employes of the Carmen's Craft from one department have never participated in the distribution of overtime accruing in another department, and that confinement of overtime to employes in the department in which it accrues is in accordance with an understanding between a local chairman of the Carmen's Organization and the local management at the station involved in the instant claim, is not controlling since the carmen painters in the Locomotive and Car Departments at DuBois are on one seniority roster.

The work involved in the instant case should have been performed by carmen painters on the DuBois seniority roster and the overtime distributed among them equally as provided in Rule 8 of the controlling agreement. The record is clear that the carrier attempted to have regularly assigned carmen painters in the Locomotive Department perform the specific work involved but disregarded the carmen painters in the Car Department. Thus there was a violation of the agreement but, considering all the circumstances in the instant case, the claim for compensation is disallowed without prejudice to other or future cases.

AWARD

Claim 1 sustained.

Claim 2 disposed of per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 5th day of February, 1952.