

Award No. 1070

Docket No. 986

2-IC-CM-'45

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Richard F. Mitchell when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (CARMEN)**

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1. That under the controlling agreement the carrier unjustly dealt with Freight Carman Painter H. R. Dawson in compensating him for his services at 88 cents per hour on June 12, 14, 15 and 16, 1943.

2. That in consideration of the aforesaid, the carrier be ordered to additionally compensate Freight Carman Painter H. R. Dawson for his services on June 12, 14, 15 and 16, 1943, the difference between the pay he was allowed and the rate of 95 cents per hour which he should have been paid.

EMPLOYEES' STATEMENT OF FACTS: At Paducah, Kentucky, the carrier regularly employs both locomotive carmen painters and freight carmen painters. The applicable rates for locomotive painting is 95 cents per hour and for freight car painting it is 88 cents per hour.

Freight Carman Painter Dawson, the claimant, was assigned to paint the locomotive derrick, which job was completed in four days, June 12, 14, 15 and 16, 1943. For this service he was paid 88 cents per hour.

The carrier has declined to adjust this dispute.

The controlling agreement is dated, effective April 1, 1935.

POSITION OF EMPLOYEES: The current agreement of Carmen Special Rules, contains Rule 127, classification of work which reads in part as follows:

"Carmen's work shall consist of building, maintaining, dismantling, . . . painting, upholstering, and inspecting all passenger and freight cars, both wood and steel, planing mill, cabinet and bench carpenter work . . . , painting, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including use of sand blast machine or removing vat); all other work generally recognized as painter's work under supervision of the Locomotive and Car Departments"

Rule 149, of the current agreement reads in part as follows:

"The following are the agreed to minimum hourly rates of pay and constitute the least which will be paid to the various classifications of employes covered by this agreement, existing higher rates will be preserved:

if it is necessary to remove the old paint, it is done by sand blasting. There is no lettering, the numbering being applied by stenciling. There is no varnish applied.

Decisions covering classification of work performed by locomotive and coach painters and that performed by freight car painters, as decided by the United States Railroad Administration, Railway Board of Adjustment No. 2, state the work of locomotive and coach painters to be the applying of varnish, lettering, surfacing or decorating. Painters not engaged in this work are classed as freight car painters.

Decisions DC-171, FB-276, FB-281, MR-353, MY-437, JY-603, 904, 1054 and 1099.

The current conception and application of the applicable rules has not been subsequently altered by interpretation or practice nor has the organization presented prior protest relative to the application of these rules or notified the carrier they desired a change therein. That a practice of many years standing is controlling in such circumstances is pointed out in Third Division Award No. 1397 and Second Division Award No. 1011, both being cited in the carrier's letter of May 24. In addition to these, your attention is called to Third Division Award No. 1435 in which the Referee states:

"Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing for conclusion which is considered determinative, that no course is open for a judicial pronouncement other than that the claim be denied."

It is the position of the carrier that the evidence of record has conclusively established the fact that the rate of pay applied to the work performed by Mr. Dawson is proper and correct, that the classifications of freight car and locomotive painters were sanctioned by the United States Railway Administration as set forth in General Order No. 27, its Supplements, Addenda, Amendments and Interpretations, that the differential in the rates was established thereunder and that the limits of the work of each class have been clearly defined in the several decisions of Railway Board of Adjustment No. 2 cited hereinabove. These classifications are preserved and perpetuated by the current rules agreement and by past practice as substantiated by submitted exhibits. There have been no subsequent awards, under any duly authorized board, which have set aside these definitions. Therefore, in the absence of any negotiated change in the existing rules agreement, the claim of the employes must be denied.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

At Paducah, Kentucky, the carrier regularly employed both locomotive carmen painters and freight carmen painters. The agreement provides that locomotive carmen painters who paint passenger cars and locomotives will receive \$1.04 per hour, while freight car painters receive \$0.97 per hour. Claimant, Freight Car Painter Dawson, was assigned to paint a wrecking outfit derrick. He was paid the rate of \$0.97 per hour. The claim is that he should have been paid the rate of \$1.04, which is the rate paid locomotive carmen painters. The current agreement specifically provides the rate to be

paid for painting a freight car. It specifically provides the rate to be paid for painting a locomotive, but there is no mention as to what rate shall be used for painting a wrecking derrick. The current agreement not having any specified rate for painting a wrecking derrick, the rate that should be paid is the one that the carrier has been paying and the employes have been accepting over the period that this agreement has existed. Clearly, then, past practice of what the parties have agreed as the rate that should be paid is controlling. There is a dispute between the parties as to what the past practice has been. If it has been the past practice to pay a freight car painter when he painted a wrecking derrick at the rate provided for locomotive painters then the claim will be allowed; if, however, the past practice has been to pay a freight car painter when he painted a wrecking derrick the freight car painters rate, the claim will be denied. The claim will be remanded for settlement in accordance with this award.

AWARD

Claim remanded.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 15th day of May, 1945.