

Award No. 4085

Docket No. 3864

2-UP-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. — C. I. O.
(CARMEN)**

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated the current agreement, when on October 16, 1959 Gang Foreman Howard Jones ordered and insisted that Locomotive Carpenter Herman Stumpf paint the identification numbers on the ends of Locomotive tender tank.

2. That accordingly the Carrier be ordered to compensate locomotive Painter Lloyd Forcum for two hours and forty minutes at time and one-half the regular locomotive painter's rate of pay.

EMPLOYEES' STATEMENT OF FACTS: Lloyd Forcum, hereinafter referred to as the claimant, is employed as a locomotive (carman) painter in the roundhouse at Cheyenne, Wyoming, and has seniority as a painter as of 5-6-25 in the mechanical department at this point on the Union Pacific Railroad Company, hereinafter referred to as the carrier.

On October 16, 1959 the claimant, who works the first shift, had completed his day's work and gone home. Shortly after 3:30 P.M., the beginning of the second shift, Gang Foreman Howard Jones instructed Herman C. Stumpf, a locomotive carpenter who had just come to work, to stencil the numbers on both ends of tender tank No. 74. He did this after protesting to the foreman that it was painters' work.

Claim was presented to the carrier by the local representative October 21, 1959 in the amount of eight hours at time and one-half. This was declined by the carrier. On December 3, 1959 the claim was presented to the superintendent of motive power and machinery in the amount of a call, or two hours and forty minutes at time and one-half, in an effort to correct the situation and settle the claim on the property. On December 29, 1959 the carrier declined this offer. Further attempts, both in correspondence and conference, failed to

The subject stenciling work is not within the exclusive jurisdiction of painters in the carman's craft. The transfer of the involved work to other carmen under the subject circumstances was not an agreement violation. A denial award is indicated."

Accordingly, it should be clear that the claim can find no agreement support. Rule 31 has nothing to do with the claim and Rule 134 does not compartmentalize any work to be performed by carmen-painters as opposed to other carmen. The work there described can be performed by all carmen.

In addition, even if there were any ambiguity in the rules previously considered, past practice defeats the claim. The long-standing practice has been for carmen other than painters to do the work here in dispute at those times when an employe on the painters' seniority roster was not on duty. Painters have not exclusively performed such work in the past so as to support any demand to the work to the exclusion of all other carmen.

In fact, the specific work here in dispute, namely, the stenciling of locomotive tenders, has long been performed at Cheyenne by carmen other than painters during periods when there was no painter on duty. Painters have not exclusively performed such work.

Actually, stenciling is not painting in the well understood sense of covering a surface by brush or spray apparatus for preservative or decorative purposes. Stenciling, when the stencil is already cut and available, certainly requires no skill and is incidental to some other activity.

There is no provision in the applicable agreement which will support this claim. Evidence of past practice demonstrates that painters have not exclusively done the work in dispute.

The claim is without merit and should 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.

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

Rule 134, the Classification of Work rule, expressly includes

"painting, varnishing, surfacing, decorating, lettering, cutting of stencils and removing paint (not including use of sand blast machines or removing vats);"

and painters constitute one of the five separate subdivisions of carmen specified in Rule 31, the Seniority rule.

To paint is to apply paint to a surface for preservation, decoration, identification, etc. It is well known that for efficiency and uniformity in such painters' work as lettering, numbering and decorative designs, paint is often

applied with the use of stencils. Therefore, the cutting of stencils is sometimes a necessary preliminary to such painting, which presumably explains its association in Rule 134 with other work commonly performed by painters. Stencils may be used for other purposes than the performance of painters' work—for instance, in connection with other work, to record the date, place or other particulars concerning its performance, as in Award 3512. But certainly stencils are not so alien to the painting process that their use converts it into something else. The work in question clearly constitutes painting and that fact is virtually conceded by the Carrier's statement that it was because no painter was employed on the second shift that the work was properly done by another employee. If it were not considered painters' work, it would not need the lack of a painter to excuse its work by others.

This case is not analogous to Award 3512, for here the stencil was used to accomplish painting work, and not merely to record data concerning other work.

In the dispute on the property and before this Board it was alleged by the Carrier, and denied by the Organization, that by custom this work had been done by other carmen at Cheyenne when no painter was on duty.

But no evidence was submitted by either party until the Carrier's Rebuttal, to which it appended as exhibits three statements tending to support its contention. Having no other purpose, they should have accompanied Carrier's Ex Parte Submission to permit their rebuttal by the Organization. (Circular No. 1, adopted by the National Railroad Adjustment Board on October 10, 1934; Award No. 2374.) They do not constitute rebuttal, because there was no contrary evidence to rebut.

The Organization's objection to these statements must be sustained. Consequently, the Board cannot consider either their sufficiency to prove an established usage at Cheyenne, or the question whether such usage at one point can overcome an express Classification of Work rule, or such rule coupled with separate seniority rosters, as here.

This Division has repeatedly held that painter's work cannot properly be performed by employees not under the Carmen's Agreement when a painter is available. Awards 1269, 1799, 2214, 3405, 3406 and 3410.

The Carrier contends that these awards are not in point, since here the work was performed by another Carman. But as noted above, there are five carmen seniority lists, one of which is for painters only. Thus, they are entitled to protection against other carmen as well as against other crafts, and this Board has so held in Awards 1519, 2459, 3256 and 3410. Award 2459 pointed out that although there was "but one classification of work rule for carmen," there were "four seniority subdivisions in the carmen craft." It said: "Certainly those craftsmen have seniority preference to the performance of the work specified" in the classification of work rule "on the basis of the subdivision in which they hold seniority," where available.

The Agreement has been violated and Claimant is entitled to a call of two hours and forty minutes. Pay for time not worked is computed at pro rata rate.

AWARD

Claim sustained to the extent indicated in the Findings.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION**

**ATTEST: Harry J. Sassaman
Executive Secretary**

Dated at Chicago, Illinois, this 20th day of November, 1962.