

Award No. 13373
Docket No. MW-13348

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, on October 3, 4, 5, 6, 7, 10, 11, 20, 21, 25 and 26, 1960, it assigned B&B Painter England to work during overtime hours from 6:30 A.M. to 8:00 A.M. and compensated him therefor at straight time rates.

(2) The Carrier further violated the Agreement when, on the same dates set forth in Part (1), it required B&B Painter England to suspend work between 3:00 P.M. and 4:30 P.M. of his regular assignment.

(3) Because of and for each day of the violation covered by Part (1) of this claim, the Carrier shall pay Claimant England one and one-half hours' pay at the half time rate of his position.

(4) Because of and for each day of the violation covered by Part (2) of this claim, the Carrier shall pay Claimant England one and one-half hours' pay at the straight-time rate of his position.

EMPLOYEES' STATEMENT OF FACTS: The Claimant holds a regularly assigned painter's position with the hours of service fixed by bulletin as from 8:00 A.M. to 4:30 P.M. with a thirty (30) minute noon meal period from 12 Noon to 12:30 P.M.

During the month of October, 1960, the gang to which the Claimant was assigned was engaged in work on Eads Bridge. The material being applied by the gang could not be properly applied if the outside air temperature was below 55 degrees until it was heated.

Instead of heating the material during regular working hours, the Carrier instructed the Claimant to report earlier than the rest of the employees in the gang in order to heat the material and have it ready for application when the gang commenced work each day. The Claimant did exactly what he was instructed to do and reported for work at 6:30 A.M. and quit work at 3:00 P.M. on the dates listed in the Statement of Claim.

The carrier's actions were in accordance with the agreement and the claim of the organization should be denied in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant holds a regularly assigned painter's position with hours of service fixed as from 8:00 A. M. to 4:30 P. M. with a thirty (30) minute noon meal period from 12:00 noon to 12:30 P. M. During the month of October, 1960, the gang to which Claimant was assigned was engaged in work on Eads Bridge. The material being applied by the gang could not be properly applied, if the air temperature was below 55 degrees, until it was heated. Instead of having the material heated during the time following Claimants' regularly assigned starting hour, 8:00 A. M., Carrier gave the Claimant England 36 hours' notice instructing him to report for work at 6:30 A. M., October 3, and quit work at 3:00 P. M. in order that the material might be heated and ready for application when the gang commenced work each day. This continued through October 26, 1960.

It is the contention of the Claimant that Carrier could not properly change the starting time of Claimant's regularly assigned position merely by giving 36 hours' notice as was done in the instant case.

Carrier contends to the contrary that Claimant was duly notified of the changed starting time in accordance with Rule 28 (a) of the Agreement which reads as follows:

"(a) For regular day service, the starting time will not be earlier than 6:00 A. M. and not later than 8:00 A. M. and will not be changed without giving the employees affected thirty-six (36) hours' notice."

It is urged by the Carrier that the only restriction placed on the Carrier by this Rule is that Carrier is limited in giving the employee or employees affected at least 36 hours' notice.

Petitioner has asserted that the Rule does not permit Carrier to separate an individual employee from the "gang" to which he has been assigned and change his starting hour to a different time than that to which the rest of the gang is regularly assigned. We are not impressed with this reasoning.

What we are concerned with, however, is whether the right given to Carrier by Rule 28 (a) was an absolute right to change the regular starting time of an employee whether or not the work to be performed was part of the work of his regular assignment or whether the work to be performed was of a permanent or temporary nature.

It has been contended by Carrier that an interpretation of a rule of this nature should not tend to prohibit Carrier from changing the starting time of the position of an employee unless the rule contained the specific language "regular assignment" as opposed to "for regular day service" as contained in Rule 28 (a) of the Agreement. Carrier, however, has conceded in the record that "the assigned hours of the painter force are from 8:00 A. M. to 4:30 P. M., Monday through Friday." Claimant of course is included in the "painter force". From the conduct of the parties herein we must conclude that it was intended that only the starting time of Claimant's regular assignment could be changed by 36 hours' notice as provided for in Rule 28 (a). It could be changed permanently on 36 hours' notice where the work

remained the same without resort to the bulletining procedure. It does not anticipate that changes could be made in Claimant's assignment purely on a temporary basis for one purpose. There are past awards of this Board supporting this position.

In Award 3784-Swaim, the rule involved read as follows—"Regular assignments will have a fixed starting time and the regular starting time will not be changed without at least thirty-six (36) hours' notice to the employees affected . . ." The facts briefly in that case were that it was not practicable to repaint this office during the normal daytime office hours and Carrier wanted the painting done after office hours. The whole crew was notified of a change in starting time—were given 36 hours' notice. There, as here, Carrier urged there was no violation as the crew was given 36 hours' notice in accordance with the agreement. It was stated there that it was evident there was no intention of changing the starting time permanently. In sustaining the Claim it was said the starting time was changed for only one job. This award was followed in Award 4109-Parker. It was indicated as far as the result was concerned whether the temporary work was for three days or twenty-five days didn't make any difference. See also Award 3055-Carter and Award 3449-Douglas. By reason of the change in starting time Claimant was required to suspend work between 3:00 P.M. and 4:30 P.M. of his regular assignment.

In the light of all the facts disclosed in the record we are not inclined to adopt Claimant's theory that the action of the Carrier was for the purpose of absorbing overtime. We are more inclined to the viewpoint that such action was the result of a bona fide but erroneous construction of Rule 28 (a) of the Agreement. Nevertheless, Claimant must be compensated because he was deprived from performing his work on his regular assignment.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

The Agreement has been violated.

AWARD

Claims (1) and (3) denied.

Claims (2) and (4) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1965.

**STATEMENT OF CARRIER MEMBERS
AWARD 13373, DOCKET MW-13348
(Referee Hall)**

This award is correct in ruling that there was no violation of the rule against suspending work for the purpose of absorbing overtime; but we respectfully submit that it is erroneous in ruling that Rule 28 (a) precluded Carrier from changing Claimant's starting time "on a temporary basis for one purpose." We dissent to the latter ruling for neither Rule 28 (a) nor any conduct of the parties fairly indicates that such a restriction was intended.

**G. L. Naylor
R. A. DeRossett
W. F. Euker
C. H. Manoogian
W. M. Roberts**