



Award No. 19152
Docket No. MW-16813

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul C. Dugan, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CHICAGO, MILWAUKEE ST. PAUL AND PACIFIC
RAILROAD CO.**

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

(1) The Carrier violated the Agreement when, during the month of July, 1965, it assigned other than Bridge and Building Department employes to prepare and paint the floor of the Electrical Shop Building at Milwaukee, Wisconsin. (System Case No. D-1550/37)

(2) B&B employes H. J. Greenwald, J. F. Mueller, S. L. Kacner, F. J. Vidmar, A. C. Schultz, A. C. Sandberg, J. E. Vachon, M. N. Machalk, J. Weiner, J. T. Tronson, F. R. Fischer, R. A. Frohm, C. A. Zuege, P. W. Ziarkowski, J. T. Ingham, C. V. Burdohan, J. A. Sanders, J. R. Pape and G. A. Thelen each be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours consumed by other than B&B forces in the performance of the work referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: During the month of July, 1965, the Carrier assigned or otherwise permitted Locomotive Department employes at Milwaukee, Wisconsin to prepare and paint the floor of the Electrical Shop Building at that location. Said employes were utilized for such work as follows:

"Dates Worked	No. of Men	Hours per Man	Total Hours
7-13	8	8	64
7-14	9	8	72
7-15	11	8	88
7-16	10	8	80
7-19	8	8	64
7-20	7	8	56
7-21	9	8	72
7-22	8	8	64
7-23	1	8	8
			568"

The work is of the nature and character that has been customarily and traditionally assigned to and performed by the Carrier's Bridge and Building Sub-department employes.

The claimants who were working and headquartered at Milwaukee, Wisconsin, and who had prepared and painted the same floor on other occasions were readily available, willing and qualified to have performed the work, had the Carrier so desired.

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated September 1, 1949, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: The instant claim, for reasons that will be fully explained in "Carrier's Position", has not been properly handled by the Organization in accordance with the provisions of Article V of the Agreement of August 21, 1954, Section 3 First (i) of the Railway Labor Act and/or Circular No. 1 of the Board, therefore, the instant claim is barred.

The instant claim involves the question of preparing and painting the floor of the Electrical Shop Building at Milwaukee, Wisconsin which, by the claim which they have presented, the employees are contending is work exclusive to Maintenance of Way Employees, but which, in fact, is not work exclusive to employees within the scope and application of the Maintenance of Way Agreement as the Carrier will establish in its "Position".

It is significant that each of the named claimants with the exception of J. T. Ingham, who was absent during the period the alleged violation occurred, i.e., July 13-16 absent on sick leave; July 29-23, 1965 absent on vacation, and, therefore, is not under any circumstance a proper claimant, were fully employed and under pay on each date claimed. In fact, during the period the alleged violation occurred, i.e., July 13 through July 25, 1965, the claimants, with the exception of J. T. Ingham, worked, in addition to their normal eight-hour day, a total of 185½ overtime hours.

Attached hereto as Carrier's Exhibits are copies of the following letters:

Letter written by Mr. S. W. Amour, Vice President Labor Relations, to General Chairman L. E. Joslin, under date of March 7, 1966
..... Carrier's Exhibit "A"

Letter written by Mr. S. W. Amour, to Mr. L. E. Joslin, under date of June 16, 1966..... Carrier's Exhibit "B"

(Exhibits not reproduced.)

OPINION OF BOARD: The Organization contends that Carrier violated the Agreement when it permitted Locomotive Department employees to prepare and paint the floor of the Electrical Shop Building at Milwaukee, Wisconsin during the month of July, 1965.

Carrier, at the outset, raises a procedural question, claiming that the claim handled on the property and the claim progressed to this Board by the Organization are not the same claim and thus this claim should be dismissed for failure to conform to the provisions of Article V of the August 21, 1954 Agreement, Section 3 First (i) of the Railway Labor and/or Circular No. 1 of this Board.

We find that there was not a substantial variance or material change from the claim handled on the property and the claim submitted to this Board which would have misled Carrier so as to have prevented it from preparing a proper defense to the claim, and thus Carrier's contention in this regard is without spirit and must be denied.

Concerning the merits of this dispute, the Organization has referred us to Award No. 8508 and more recent Award Nos. 18852, 18950 and 19034 of this Board involving the same issue and the same parties to this dispute, and under the principle of "start decisis", we find that the issue before us has already been decided and thus Carrier violated the Agreement in this instance when it permitted Locomotive Department employees rather than B&B painters to paint the floor of the Electrical Shop Building at Milwaukee during July, 1965.

Concerning damages, the record discloses conflict between the parties herein as to whether or not Claimants, with the exception of Claimant J. T. Ingham, who was on vacation, were all fully employed on the dates in question. The organization denies that they were fully employed and Carrier alleges that they were fully employed and under pay on said dates. Neither party to this dispute offered proof as to whether or not the Claimants were working on the dates in question, thus this Board is unable to resolve the conflicting assertions, and thus we will dismiss the claim as to damages. Claimant J. R. Ingham, who on vacation and not available for said work is not entitled to any compensation.

Representatives of the Employees who performed the work in dispute, Railway Employees Department, System Federation No. 76 were notified but chose not to participate in the dispute.

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

That the Agreement was violated in accordance with the Opinion.

AWARD

Part (1) of the Statement of Claim is sustained.

Part (2) of the Statement of Claim is dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April 1972.

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