

Award No. 3040

Docket No. MW-3085

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

- (a) That painter R. Fratoni shall be classified and paid as Assistant Foreman Painter while assigned as inspector of paint work performed by contractor from September 1, 1942 to February 3, 1943; and that painter D. W. Hart shall be classified and paid as Assistant Foreman Painter while assigned as inspector of paint work performed by contractor from October 21, 1942 to January 25, 1943.
- (b) That R. Fratoni and D. W. Hart shall be paid the difference between what they received as painters 78 and 81 cents per hour respectively and that which they should have received as Assistant Foreman Painters, 86 cents per hour, during the periods in question.

JOINT STATEMENT OF FACTS: During the maintenance season 1942 to 1943, the Carrier engaged outside contractors to paint buildings, bridges, and other structures. Rosario Fratoni and Daniel W. Hart were assigned to individually inspect the paint work performed by the contractors on the several jobs. In that assignment, each of them was responsible for seeing to it that the paint work was properly performed on the job that they were assigned to inspect and to report to their Foreman and to the Supervisor B&B of the nature of the work and of the progress made on each of the paint jobs. They were paid painters' rates.

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: As stated in Joint Statement of Facts, during the maintenance season of 1942-1943, the Carrier engaged outside contractors to paint buildings, bridges and other structures on its property. Since this work was performed by outsiders, the Carrier deemed it expedient to assign some reliable experienced regular employe of the Carrier who was qualified to determine if paint work was properly performed to in a manner supervise the work performed by the contractor in order to make sure that the work was properly performed and in conformance with specifications. An employe thus assigned rendered service in a supervisory or at least semi-supervisory capacity.

As will be observed from the Statement of Claim, claimant R. Fratoni was assigned and engaged in the capacity of inspector or supervisor of contract paint work from September 1, 1942 to February 3, 1943. Claimant D. W.

Hart was similarly assigned from October 21, 1942 to January 25, 1943. Working in these assignments, these two claimants were required to examine the work of the contract painters to make sure that their work was properly performed and in accordance with specifications. Since the Carrier furnished the contractor all material required in connection with the work, it was the further duty of the claimants to keep check on and see to it that the contractor was at all times supplied with needed materials. The claimants thus engaged reported regularly either to their foreman or the Supervisor of Bridges and Buildings.

There can be no question but that the services thus rendered by the two claimants were that of an employe in an assistant supervisory capacity—that of an assistant foreman. Yet, while thus engaged, the claimants were paid as painters. Schedule Rule 46 reads:

“When an employe is used on work paying a higher rate for two (2) hours or more, he will be paid the higher rate for the time so engaged.

“If assigned to a lower rated position, when such assignment is not brought about by reduction in force, or on request of or through fault of such employe, the rate will not be reduced.”

This rule provides that when an employe is used on work paying a higher rate for time so engaged. Messrs. Fratoni and Hart were, as above pointed out, engaged in a classification of work ranking higher than that of a painter for a considerable period of time. Accordingly, we maintain, as claimed, that R. Fratoni and D. W. Hart shall, in conformity with Rule 46, be paid the difference between what they received as painters and that which they should have received as assistant foreman painters during the period involved, in conformity with the claim. Firmly believing in the justification of this claim, we respectfully request that it be allowed.

It is hereby affirmed that all data herein submitted in support of our position have heretofore been presented to the Carrier and is hereby made a part of the question in dispute.

Opportunity for oral presentation and argument is desired.

POSITION OF CARRIER: The claim of the Committee in this case is that these two men should be paid foreman's rate because they were assigned to inspect work done by outside contractors. There is nothing in the rules which provides any special rate or any extra pay for a paint inspector. The only rule under which the Committee can possibly claim payment is the first paragraph of Rule 46 which provides:

“When an employe is used on work paying a higher rate for two hours or more, he will be paid the higher rate for the time so engaged.”

As stated above, there is no higher rate provided in the Agreement or otherwise for inspectors' work. The Committee, however, claims that in this inspectors' work the men were performing the duties of a foreman. In this the Management disagrees. The job of a foreman is to supervise the work of his men, keep time reports and in general be with his gang all the time to see that the work is done, and done properly, and that the time is properly kept.

The work done by Fratoni and Hart was in no way foremen's work or assistant foremen's work. They did not supervise any men; they had nothing to do with providing materials; they had nothing to do with keeping time checks or time slips. They merely inspected the work of the outside contractors to see that it was done according to specifications. They were not used in any way as foremen or assistant foremen in this connection.

OPINION OF BOARD: The claim charges and the joint submission confirms that from September 1, 1942 to February 3, 1943, the Claimant Fratoni, and from October 21, 1942 to January 25, 1943, the Claimant Hart, classified

as Painters, were assigned to inspect and make reports relative to paint work being performed by contractors.

Rule 46 provides that: "When an employe is used on work paying a higher rate for two hours or more, he will be paid the higher rate for the time so engaged."

The Agreement contains no classification or rate of pay for Paint Inspectors; though there are Foremen and Assistant Foremen, who are rated higher than Painters. The Petitioner urges that the Claimants are entitled to be paid at the rate applicable to the Assistant Foremen classification, because they did no painting and were required to make reports to their Foreman and the B & B Supervisor.

It seems clear to us that the function of Foremen and Assistant Foremen is primarily to direct and supervise the work of other employes. The Claimants performed no such duties. This precludes us from giving the Claimants the benefit of the Assistant Foreman classification. Whether there should be a classification for Inspectors, rated higher than Painters, is a matter of contract. We cannot assume to make a contract for the parties. The claim must be denied upon the basis of a lack of proof.

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 parties waived oral hearing thereon;

That the carrier and the employes involved in this dispute are respectively carrier and employes 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of December, 1945.