

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**THE CHICAGO, ROCK ISLAND AND PACIFIC
RAILWAY COMPANY**

(Joseph B. Fleming and Aaron Colnon, Trustees)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that B&B Painter William Kenney, Arkansas Division, be allowed the difference in pay between what he did receive at the pro rata rate and what he would have received at the time and one-half rate for time worked between the hours of 5:00 P.M. on March 21 and 1:00 A.M. March 22, 5:00 P.M. on March 22 to 1:00 A.M. March 23, 5:00 P.M. on March 23 to 1:00 A.M. March 24, 1946.

EMPLOYEES' STATEMENT OF FACTS: William Kenney is employed as a painter on the Arkansas Division, working regularly assigned hours from 8:00 A.M. to 5:00 P.M., with a one-hour lunch period. On March 18, 1946, he was notified that his starting time was changed from 8:00 A.M. to 5:00 P.M., effective March 21, 1946, continuing to and including March 23, 1946.

At the completion of the Saturday, March 23, 1946, shift, which terminated at 1:00 A.M. Sunday, March 24, William Kenney had completed forty-eight hours work in that week. His starting time was changed back to 8:00 A.M. effective March 26, 1946.

For time worked between the hours of 5:00 P.M. March 21 to 1:00 A.M. March 22, 5:00 P.M. March 22 to 1:00 A.M. March 23, and 5:00 P.M. March 23 to 1:00 A.M. March 24, 1946, William Kenney was allowed pay at the straight time rate.

Agreement between the parties is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rules 24 (a), 25 (a), 26 and 32 of agreement in effect between the Chicago, Rock Island & Pacific Railway Company and the Brotherhood of Maintenance of Way Employees, provide as follows:

"RULE 24. OVERTIME

(a) Time worked preceding or following and continuous with the regular eight hour work period shall be computed on actual minute basis and paid for at time and one-half rate, with double time computed on actual minutes basis after sixteen (16) continuous

regular starting time by giving the employees affected thirty-six hours notice. In the instant case, Painter Kenney's regular assignment was from 8:00 A. M. to 5:00 P. M. with a one-hour lunch period. He was instructed by his supervisory officer that on the dates referred to in the claim his starting time was changed to 5:00 P. M. and he was to work continuously until 1:00 A. M. It will be noted that this was only for March 21, 22, and 23, 1946. The rule contemplates changing "the regular starting time." Certainly the fact that William Kenney's starting time was changed for three days could, in no manner, be construed as a change in the regular starting time as is provided for in the rule. As previously stated, William Kenney's regular starting time is 8:00 A. M. Therefore, when the Carrier required him to perform service during overtime hours and on Sunday, there is no question but that he should have been allowed pay in conformity with the provisions of Rules 24 (a), 25 (a), and 26.

We are sustained in that, our position, by a number of awards emanating from your Board, particularly Awards Nos. 2973, 3055, 3056, and 3449.

CARRIER'S STATEMENT OF FACTS: Paint Gang No. 5, consisting of Foreman H. J. Howard and Painter William Kenney painted the freight house office at Memphis on the nights of March 21, 22 and 23, 1946. This gang was notified March 18, 1946 that the starting time of the entire gang would be changed effective 5:00 P. M., March 21, 1946 to permit the painting of the Memphis Freight House office at a time when the force therein was not on duty. Gang No. 5 worked from 5:00 P. M. to 1:00 A. M. March 21, 22 and 23, 1946.

POSITION OF CARRIER: An agreement between the Carrier and the employees of the Carrier represented by Petitioner bearing an effective date of May 1, 1938 is on file with your Board and is hereby made a part of this record. For the ready reference of the Board we quote below Rule 32 of the aforementioned agreement.

"RULE 32. CHANGING STARTING TIME

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, except as otherwise arranged between the employees and their immediate superior."

The material and relevant facts in this controversy are very largely recited in our statement of facts. As a part of the program of repainting of structures, Carrier repainted the office of the Memphis Freight House in March, 1946. It was not practicable to repaint this office during the normal daytime office hours and therefore, the painting had to be done after the office hours. Inasmuch as part of the painting was done by the spray process, to have painted it during the office hours would have resulted in operational difficulties as well as an impairment of the Carrier's service to its patrons and annoyance to employees. Therefore, on March 18, 1946 the required thirty-six hour notice as provided for in Rule 32 was given to Paint Gang No. 5 and they were instructed to change their assigned hours from 5:00 P. M. to 1:00 A. M. This was done and the gang worked from 5:00 P. M. on March 21 to 1:00 A. M. March 22; and from 5:00 P. M. March 22 to 1:00 A. M. March 23; from 5:00 P. M. March 23 to 1:00 A. M. March 24, 1946, in the painting of the Memphis Freight House office.

It is the position of the Carrier that inasmuch as the starting time of this entire gang was properly changed by the required notice in accordance with the provisions of Rule 32 of the agreement, the claimant does not have a just claim.

OPINION OF BOARD: The facts involved in this case are not in dispute. The claimant was a member of a regularly assigned B & B Painter Crew. The regular starting time for the work of this crew was 8:00 A. M. They worked until 5:00 P. M. with one hour for lunch. On March 18, 1946, the members of the crew were instructed to change their assigned hours to

begin at 5:00 P.M. and end at 1:00 A.M. beginning March 21, 1946. They were worked these hours for three days. The change in their hours was made in order that they might repaint the office of the Memphis Freight House and it was not practicable to repaint the office during the day time when the office employees were working therein.

Rule 32 of the current agreement between the parties is as follows:

"CHANGING STARTING TIME. 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, except as otherwise arranged between the employees and their immediate superior."

The Carrier insists that since the members of the crew were given 36 hours notice there was no violation of Rule 32. With this contention we cannot agree.

This rule only permits a change in **regular** starting time on the giving of 36 hours notice. It clearly does not anticipate that the crew can be required to do emergency work or night work for the convenience of the Carrier for two or three days under the claim that the regular starting time has been changed by giving 36 hours notice.

Here it is very evident that there was no intention to change the starting time permanently or to make the regular starting time of these men 5:00 P.M. The starting time was changed only for this one job for three days for the convenience of the Carrier. We see no reason why the Carrier should be permitted to so work these men at night for its convenience and to prevent interference with its day-time office workers and not pay the members of this crew overtime.

The claim of the Carrier here that the regular starting time of these men was changed for three days in order to do this night work is only a subterfuge to avoid the payment of the overtime rate.

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 facts disclosed by this docket are sufficient to sustain the claim.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of February, 1948.