

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILWAY
COMPANY**

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

1. That the Carrier violated the agreement by not paying to Clayton Koontz the rate of pay in effect for Painter Foremen, for services rendered by him during the period September to December, 1946, inclusive, and May to November, 1947 inclusive;

2. That Clayton Koontz be reimbursed for the difference in compensation received at the rate paid him and what he should have received at the Foreman Painter's rate.

EMPLOYEES' STATEMENT OF FACTS: Clayton Koontz holds seniority rights with the Carrier as Pumper.

During the period September to December, 1946, Koontz was assigned to supervise a crew of two men engaged in painting bridges and signs along the right of way. He worked the following number of hours:

Month of	September	—	154	hours
" "	October	—	222	"
" "	November	—	192	"
" "	December	—	194	"

For the above hours of services rendered by Koontz, the Carrier paid him at the rate of 94½ cents per hour. At this time the effective rate of pay for a Painter Foreman was \$1.21½ per hour.

During the period May to November, 1947, Koontz was assigned to supervise a crew of two or three men engaged in painting bridges and signs along the right of way. He worked the following number of hours:

Month of	May	—	136	hours
" "	June	—	162	"
" "	July	—	214	"
" "	August	—	200	"
" "	September	—	222	"
" "	October	—	220	"
" "	November	—	48	"

At no time has Mr. Haniford cited any rule of the current agreement in support of the claim. If there is no rule in the agreement supporting the claim, then there is no basis for the claim.

The General Chairman, in his letter of December 15 attempts to justify the claim by saying "His work orders come directly from his immediate Supervisor, and not from another Foreman;" there is nothing unusual in this, for orders may flow from Mr. Hill, or any other officer, directly to an individual who is not a foreman, but because they do so flow, it does not make the individual a foreman. He says, also, "the welfare and responsibility of men in addition to the care of equipment and material are his direct responsibilities;" to this it can be said that Mr. Koontz was not made responsible for the welfare and responsibility of men, each individual was responsible for his own welfare, and each individual, including Mr. Koontz, was, naturally, expected to give consideration to the welfare of his companions; "the care of equipment and materials" was the responsibility of all men who were working together, they were not the sole responsibility of Mr. Koontz to any greater extent than were they the sole responsibility of any other of the men as individuals. And, lastly, Mr. Haniford says "he maintains time performance sheets for a crew of men", this was the one and only argument advanced by Mr. Haniford, in his letter of November 1, in support of the claim, and he has advanced the same argument continuously throughout his correspondence. In the first place, there was no "crew of men", there were only three or four. In the second place, the recording of the time by one person was a simple matter and involved not more than ten minutes per day. Furthermore, Mr. Koontz was willing to perform this small service. Each man could have been required to record his own time and mail it to the time-keeper, it was merely in an endeavor to simplify the handling that Mr. Koontz was asked if he would handle this. The recording of a few items of time certainly constitutes small basis upon which to convert a position to that of a foreman.

As Mr. Haniford was advised in my letter of January 6, a painter foreman must be familiar with the mixing of paints so the colors will harmonize when the mixing is completed. Mr. Koontz is not qualified to do this. A painter foreman must know how to construct scaffolding to insure the safety of the men under him. Mr. Koontz is not qualified to do this. While these are perhaps, the two most important requirements in a painter foreman, there are numerous other requirements in connection with the duties, knowledge and skill of a painter foreman, some of which Mr. Koontz may possess, some he may not possess.

The Carrier submits:

- (1) The claim is outlawed under Rule 18 (g)
- (2) There has been no violation of the agreement, and none has been claimed by the organization.
- (3) The service alleged to have been performed by claimant is not the work of a foreman.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant held seniority as a pumper when the claim before us originated. Due to the increased use of Diesel locomotives and the consequent decrease in the use of water, Claimant was permitted to perform painter's work on bridges in the vicinity of Harrodsburg. The evidence shows that the Carrier's supervisory officer directed Claimant to employ two or three men to engage in the painting of signs and bridges, a fact which the Carrier denies. Claimant took these employes to and from work by motor car or truck, he being paid mileage for the use of the latter. He filled out the time reports and he laid the men off when their services were no longer required. He supervised the work of the others working with him. He first received the pay of a painter's helper. It was subsequently increased to that of painter. It is evident that Claimant was performing the work of a painter foreman and was entitled to pay as such under the provisions of the controlling Agreements. They provide:

"An employe working on more than one class of work four (4) hours or more on any day will be allowed the higher rate of pay for the entire day. When temporarily assigned by the proper officer to a lower-rated position, his rate of pay will not be reduced."

Art. V, Sec. (o), Agreement of March 1, 1928.

"An employe working on more than one (1) class of work, four (4) hours or more on any day, will be allowed the higher rate of pay for the entire day. When less than four (4) hours are worked, he will be paid at the higher rate for the actual time worked. When temporarily assigned by the proper officer to lower rated positions, when such assignment is not brought about by a reduction of force or request or fault of such employe, the rate of pay will not be reduced." Rule 39, Agreement of April 1, 1947.

The Carrier asserts that Claimant was never designated as a foreman and that he was not qualified to be one. The record is clear that Claimant was never promoted to the position of foreman. Even if we assume that he lacked the qualifications necessary to hold such a position, it cannot prejudice the Claimant in the present case. His claim is grounded on the proposition that he was directed to and did perform the duties of a foreman and consequently, under the rules cited, he should be paid the foreman's rate, whether or not he was actually a foreman or qualified to become such.

The record shows that Claimant worked on this position from September to December 1946, and May to November 1947. The current Agreement bearing date of April 1, 1947, contained the following provision:

"Grievances or claims shall be made within ninety (90) days from the date of the occurrence on which the grievance or claim is based. Decisions by subordinate officers and appeals shall be promptly made." Rule 18 (g).

No such rule was contained in the previous Agreement which became effective March 1, 1928. The contention that Claimant performed the work of a foreman was first made on November 1, 1947. Carrier contends that Rule 18 (g) operates to cut off all claims originating prior to August 1, 1947, and that the present claim, if allowed, must be limited to the 90 days immediately prior to the time claim was first made. No saving provisions appears in the new Agreement. Consequently, the claim is valid for the period commencing 90 days prior to November 1, 1947, to that extent the claim is maintained.

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 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 Agreement was violated.

AWARD

Claim sustained from and after August 1, 1947.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 3rd day of December, 1948.