

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dudley E. Whiting, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

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

(1) That the Carrier violated the agreement by assigning to B&B Carpenters painting work at Des Moines, Iowa, on December 23 and 24, 1946, instead of assigning B&B Painter Harold Gress;

(2) That claimant Harold Gress be paid in full for twenty (20) hours at his painter's rate of pay because of the Carrier's violation of the agreement as specified in part (1) of the claim.

EMPLOYEES' STATEMENT OF FACTS: On December 21, 23 and 24, 1946, Mr. Harold Gress, West Des Moines, Iowa had the status of a furloughed painter and held seniority that would entitle him to return to work as a painter when forces were increased. On December 21, 23 and 24, 1946 he was temporarily employed by the Carrier in its Store Department performing general store duties at a rate of pay less than his regular rate as painter.

During the three days in question the B&B Carpenters were assigned by the Carrier to perform painter's work at East 24th Street, Des Moines, Iowa.

This action by the Carrier was held to be in violation of the effective agreement between the Carrier and this Brotherhood, by General Chairman C. G. Fisher who protested the assigning of painter's work to B&B carpenters and made claim for such time consumed painting.

The Carrier recognized the validity of the claim and agreed to reimburse Gress for the twenty (20) hours' time consumed by the B&B carpenters while painting, less the amount paid him for other services on those dates.

The Carrier then forwarded a pay draft to Gress in the gross amount of \$3.12 stating that this was the amount due him because his time was computed at the Store Department employees' rate instead of the painter's rate on December 21, 23 and 24, the dates B&B carpenters performed painter's work at East Des Moines

The amount paid Gress was held to be incorrect by the Organization and claim was again made for the twenty (20) hours time consumed by the B&B carpenters while performing painter's work, in order to reimburse Gress in full for being deprived of the opportunity to work in his class.

Moines, was released account reduction of force effective November 30, 1946. In addition to other days, he worked as a material handler in the Des Moines Store Department of this carrier on December 21, 23, and 24, 1946.

General Chairman Fisher presented a claim to the Division officers for twenty hours in favor of Harold Gress which he reported was the amount of time spent by the B&B Carpenters in painting the aforementioned water box protection at East 24th Street in Des Moines on December 21, 23, and 24, 1946.

The Superintendent allowed the claim for the difference between the rate of pay of material handler and that of B&B Painter for the hours spent by the B&B Carpenters on December 21, 23, and 24, 1946 in painting the water pipe protection box. The pay rate of a B&B Painter at that time was \$1.03½ per hour and the pay rate of the material handler in the Store Department was \$.90½ per hour. The Claimant was erroneously paid 24 hours at \$.13 (the difference between the rates) instead of being paid 20 hours at that amount.

General Chairman Fisher in his letter of March 12, 1948 to the carrier's Manager of Personnel contended that no deduction should have been made for the earnings which Mr. Gress received while working in the Store Department on the dates in question.

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, as revised, is on file with your Board and is made a part of this record

It is the position of this carrier that inasmuch as Mr. Gress could not have worked in two places at the same time, he would be properly paid the difference between the pay rate of material handler for the twenty hours on the dates in question and the pay rate of a B&B Carpenter. That is, Mr. Gress could not have performed the service of B&B Painter for the 20 hours required to paint the box on December 21, 23, and 24, 1946 and also on the same dates, during the same hours, perform services of material handler. The work of painting the boxes was performed during the hours that Claimant Gress worked as a material handler.

We respectfully petition the Board to deny the claim.

OPINION OF BOARD: The only question involved in this case is the amount of money due to claimant since the Carrier admitted the violation of the agreement and paid the claimant \$3.12 being the difference between the effective painter's rate and the rate of pay for which he was working. The Organization contends for payment at the painter's rate for twenty hours.

The Carrier's position is based upon the theory that compensation for actual wage loss is the appropriate relief to claimant for its violation of the agreement in the assignment of work. The Organization's position is based upon the theory of a penalty for the violation of the agreement.

In our recent Award No. 4571 we pointed out that our decisions had consistently adopted the penalty theory rather than the compensation for wage loss theory in the absence of any contractual provision thereon, and that the appropriate penalty for the improper assignment of work is the rate of the regular occupant of the position to which it belonged if he had performed the work. That decision involved the propriety of awarding pro rata rate or penalty rate for the violation but since the theory mentioned has been consistently adopted in those and other types of cases, it would be most inconsistent for us to revert to the other theory in this case in the absence of any contractual provision thereon.

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 Carrier violated the agreement.

AWARD

The Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois this 18th day of October, 1949.