

Award No. 12775

Docket No. MW-12460

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Hamilton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DELAWARE AND HUDSON RAILROAD CORPORATION**

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

(1) The Carrier violated the Agreement when it assigned Carpenter Albert Fountain to perform the work of painting storm windows on the Freight House at Plattsburg, New York on October 13, 14 and 16, 1959; on which dates Painter Charles F. Girard was furloughed and available.

(2) Painter Charles F. Girard be allowed nineteen (19) hours of pay at the Painter's straight time rate account of being deprived of the prior right and opportunity of performing the painting work referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Carpenter Albert Fountain is assigned to a Bridge and Building gang on the Champlain Division which works under the jurisdiction and supervision of B&B Foreman George Plude. Painter Charles F. Girard, who had also been assigned to that same gang, had been furloughed therefrom and was in such furloughed status on October 13, 14 and 16, 1959, on which dates there were no painters actively assigned to this B&B composite gang.

On October 13, 14 and 16, 1959, the Carrier assigned Carpenter Albert Fountain to paint storm windows on the Freight House at Plattsburg, New York instead of recalling Painter Charles F. Girard to perform such painting work. Painter Girard was furloughed on said dates but was available and willing to perform this painting work which Carpenter Fountain consumed nineteen hours in performing.

The subject claim was timely and properly filed and progressed at all stages of procedure, with each respective claim handling officer declining the claim because of an alleged practice of permitting carpenters in a "composite gang" to perform painting work, completely ignoring the fact that this B&B gang ceased to be a composite gang when Painter Girard was laid off thus leaving the gang without any painters. Carpenters on this gang have performed painting work in the past but only when one or more painters were

- (4) The employes assigned to Bridge and Building Gang No. 1 be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by Section Gang No. K-8 in performing the work referred to in part (1) of this claim."

The claim in Case 11.51 MW was settled on the property based on the fact that carpenter's work had in fact been performed by Trackmen. The settlement allowed the trackmen involved the difference between trackmen's rate of pay already allowed, and the higher carpenter helper's rate; it also allowed all members of B&B Gang No. 1 one hour's pay at pro rata rates for work not performed. The settlement made by the carrier and accepted by the organization, included payment of one hour at pro rata painter's rate to the present claimant, Painter Charles F. Girard, for what was claimed to have been, and was, work properly assigned to carpenters.

The existing practice as to the assignment of work to B&B Painters, Carpenters and Carpenter Helpers in this gang has been in effect since 1943. During the period of over ten years between 1943 and May 13, 1954, no claim or protest whatsoever was filed, although this practice was in effect during all of the intervening years. Since 1954, there have been sporadic claims, involving only a very small minority of the occasions when B&B carpenters performed painting work or vice versa.

This practice, extant since 1943, has been acquiesced in by the employes, see Exhibits A through D attached, and by their organization as proven in Case No. 11.51 MW.

In previous discussions of this and the comparable cases, the Organization has contended that the carrier is attempting to accomplish a rules revision by interpretation rather than by negotiation. All that the carrier is contending is that the agreement be interpreted, as it concerns this B&B gang on the Champlain Division, in the same manner as the carrier, the organization representatives, and the employes themselves have interpreted it since 1943.

(Exhibits not reproduced.)

OPINION OF BOARD: In this claim, Carrier had assigned certain painting work to a Bridge and Building carpenter. The Claimant, a Bridge and Building Painter, was furloughed at the time.

The Carrier defended its actions on the theory that this was actually a composite gang. It is the opinion of this Board, however, that when the painter was furloughed, and there were no painters remaining as members of the crew, the gang could no longer be considered as composite.

The Board further agrees with the Brotherhood's contention, that a denial award would effectively permit the Carrier to eliminate the painter classification, in violation of the agreement.

The Board considers Award 10026, also between these same parties, as precedent for this award, and hereby approves said award as controlling in this case. The claim is sustained.