



Award Number 17312

Docket Number MW-17845

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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

- (1) The Agreement was violated when all positions in the paint gang at Gary, Indiana, were abolished effective at the close of the work period on December 16, 1966, (Bulletin 3852) and were then re-established effective December 19, 1966, (Bulletin 3854). (System file BG-4-66/TM-4-66).
- (2) The paint foreman and painters assigned to the above mentioned Gary paint gang each be allowed pay at their respective straight rates for the hours between 7:30 A.M. and 3:30 P.M. and, in addition thereto, be allowed pay at their respective overtime rates for all work performed during the hours between 4:00 P.M. and 12:00 midnight for each day they were required to work the hours set forth in Bulletin No. 3854."

EMPLOYEES' STATEMENT OF FACTS: The claimants were regularly assigned to their respective positions on the Gary paint gang. Their regular assigned hours were from 7:30 A.M. to 4:00 P.M. including a thirty minute meal period.

On December 2, 1966, the Carrier issued Bulletin No. 3852 reading:

"No. 3852

December 2 1966

To All B&B Subdepartment Employees, Gary Division

To be posted at All Bulletin Boards

Effective at the close of the work period on December 16, 1966, all positions in Paint Gang, Gary, will be abolished.

/s/ **R. V. DANGREMOND**
Division Engineer, Gary

RFB	WRC (2)
DLW	EHP
EB	PHV
RVD (28)	JDS
BFR (2)	VHC"

time until the beginning of the next regular shift, and thereafter at the rate of time and one-half or double time as the case may be, until relieved.

"Time allowed for meals will not terminate the continuity of service.

"In the application of this rule to new employes temporarily brought into the service in emergencies, the starting time of such employes will be considered as of the time they commence work or are required to report.

* * * * *

"AUTHORITY FOR OVERTIME

"Rule 30. No overtime will be worked without authority of a superior officer, except in case of emergency.

"ABSORBING OVERTIME

"Rule 31. Employes will not be required to suspend work during any assigned work period for the purpose of absorbing overtime.

* * * * *

"REPRESENTATION

"Rule 59. . . .

(c) All questions pertaining to rates of pay, rules and working conditions, including seniority, arising under this agreement shall be matters of negotiation between the officials of the Elgin, Joliet and Eastern Railway and the duly authorized representatives of the Brotherhood of Maintenance of Way Employes or their duly accredited representatives.

"SCHEDULE

"Rule 63. (a) Should either party to this agreement desire to revise or modify the rules herein, thirty (30) calendar days' written advance notice containing the proposed change shall be given and the initial conference shall be held within said thirty (30) calendar days.

"(b) This agreement shall become effective December 1, 1945, and shall continue in effect until it is changed as provided herein or under the provisions of the Railroad Labor Act as amended."

(Exhibits not reproduced)

OPINION OF BOARD: On December 2, 1966, Carrier posted Bulletin No. 3852 which read: "Effective at the close of the work period on December 16, 1966, all positions in Paint Gang, Gary will be abolished." At this time there was only one so-called paint gang, and it was comprised of a foreman and six painters, who are not the Claimants before this Board. Their regular work hours were from 7:30 A.M. to 4:00 P.M.

On December 6, 1966, Carrier posted Bulletin No. 3854 advertising that applications would be accepted for the positions of foreman and six painters, to start on December 19, 1966, with regular working hours between 3:30 P.M. to 12:00 Midnight.

The record does not disclose whether any of the paint gang whose jobs were abolished applied or were hired for the new gang created by the second bulletin.

Employees allege that Carrier violated several provisions of the Agreement by its actions in abolishing one paint gang and creating another. All of the pertinent rules cited by Employees and Carrier, including Rule 33 which we find is properly before us, are set forth below:

"HOURS OF SERVICE

"Rule 25 (a) For regular day service, the starting time will not be earlier than 6:00 A.M., and not later than 8:00 A.M., and will not be changed without first giving employees affected thirty-six (36) hours' notice.

(b) When two or more shifts are employed, no shift will have a starting time between 12:00 o'clock midnight and 6:00 A.M.

(c) Employee's regular assigned hours will not be changed to avoid the application of overtime rules.

....."

"OVERTIME

Rule 28. (a) Time worked preceding or following and continuous with the regular eight (8) hour work period shall be computed on the actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen (16) continuous hours of work in any twenty-four (24) hour period, computed from starting time of the employee's regular shift. Employees required to work continuously from one regular work period into another shall be paid therefor at the rate of time and one-half for the first eight (8) overtime hours and thereafter at double time until the beginning of the next regular shift, and thereafter at the rate of time and one-half or double time as the case may be, until relieved.

Time allowed for meals will not terminate the continuity of service.

In the application of this rule to new employees temporarily brought into the service in emergencies, the starting time of such employees will be considered as of the time that they commence work or are required to report.

....."

"ABSORBING OVERTIME

"Rule 31. Employees will not be required to suspend work during any assigned work period for the purpose of absorbing overtime."

"ABOLISHING ESTABLISHED POSITIONS"

"Rule 33. Established positions shall not be discontinued and new ones created under the same or different title covering relatively the same class or kind of work for the purpose of reducing the rate of pay or evading the application of these rules."

The instant case turns on an interpretation of the above cited rules and their interrelation to each other. Employees contend that Carrier's action was one merely to avoid overtime. Carrier claims that it is management's prerogative to adjust work forces as necessary, and it denies a violation, in fact or in spirit, of the agreement.

Although this is not particularly a claim of first impression, there are indeed few awards to give us much guidance on the instant fact situation. However, this Board does subscribe to the basic tenet laid down in Award 7849, which reads in part that "no prerogative of management should be more self-evident than Carrier's sole right to decide what work is to be performed and Carrier's right to determine its time of performance, except where it has restricted itself by Agreement." And stated in another manner, it was said in Award 12419: "... there should be no question that Carrier management is free to determine the way in which the work and operations are to be performed and conducted in the interests of economy and efficiency except insofar as that freedom may be limited by law or agreements with the representatives of its employees."

We must then look to the existing Agreement and ascertain if Carrier abrogated its provisions in any manner. In the instant claim, we must particularly examine Rule 25(c) and Rule 33 together in deciding whether there was a violation of either or both by Carrier. We think not.

In Rule 25(c) Carrier is prohibited from changing employees' regular assigned hours to avoid paying overtime. Employees' hours were not changed here; one gang was abolished and applications for positions on a new gang were to be accepted. This Board has failed to uncover any proof by Employees that Carrier acted arbitrarily, in bad faith, or in a deceitful manner. As was said in Award 13139: "In studying the question of intent of Carrier, we find no reason to doubt Carrier's good faith." And further, in the same award—although dealing with the establishment of a second shift, we cite with approval the following language: "It may have lessened the employees' opportunity for overtime, but there is nothing in the Agreement which says that the day shift of Maintenance of Way forces have an absolute, unrestricted right to overtime work." (See also Award 15922).

As to Rule 33, prohibiting Carrier from discontinuing positions and creating new ones of a similar kind which cover the same work for the purpose of reducing the rate of pay or avoiding the application of overtime rates or other provisions of the Agreement—this Board again finds that Employees have failed in their burden of proof to show that the instant Claimants were denied an opportunity to bid for positions on the newly created paint gang nor in fact whether any of them were hired for it. Neither did Employees prove that by Carrier's actions overtime, if any, was in fact avoided.

For safety, convenience, weather considerations and general managerial discretion, this Board finds that Carrier could do what it did in the instant

claim, and in the absence of any proof by Employes that Carrier acted in bad faith, violated the Agreement, or actually avoided overtime payment, this Board must deny this claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1969.