

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20754

Docket Number MW-20676

William M. Edgett, Referee

(Brotherhood of Maintenance of Way **Employees**

**PARTIES TO DISPUTE:** (

(Burlington Northern Inc.

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

(1) The Agreement was violated when shopcraft forces instead of Bridge & Building Painter forces were used to paint the inside and **out-**side walls of the Diesel Shop and of the lunch and locker room, toilets and floors of the boiler room at Lincoln, Nebraska on May 16, 17, 20, 22, 23, 24 and 25, 1972 (System File **33-P-3/MW-84 (p)-1 11-2-72 B**)

(2) The Agreement was further violated on June 21, 1972 when two shop laborers were used to paint the toilet rooms in the store house office as directed by Storekeeper Sam Tropino.

(3) Lines West Paint Gang Foreman Conrad Schwartz and Painters E. L. **McKinney** and S. K. Williams each be allowed pay at their respective rates\* of pay for an equal proportionate share of the total number of man hours expended by non-scope **employees** in the performance of the work described in Parts (1) and (2) above.

\*Straight-time rates to be applied for time worked during **straight-**time hours; time and one-half rates to be applied for time worked during overtime hours.

**OPINION OF BOAW:** Claimants allege that Carrier violated the Agreement when shopcraft forces **were** assigned to paint the inside and outside walls of the Diesel Shop, lunch and locker room, toilets and floors of the boiler room at Lincoln, Nebraska. The employees assert that using shopcraft forces to do this painting violated their scope rule and the practice which developed under it on the **former** Chicago, Burlington and **Quincy** Railroad. In Award No. 3130, on the former C B & **Q**, the Board found that the Agreement had been violated by the assignment of mechanical department employees, rather than maintenance of way employees, to **perform** certain painting in the round house and other buildings at Alliance, Nebraska. That award was rendered in 1946. The attention of the Board has not been directed to any contractual change which would alter the effect of that holding. Accordingly, we find that the Agreement was violated by the **assignment** here in question.

Carrier has **taken** exception to the citation of rules by the employees in their submission to the Board which were apparently not cited on the property. The Board has **many** times held that a material change in the claim will divest it of jurisdiction. In this case, however, the

citation of additional rules, which may or may not have been cited on the property, does not operate to work a material change in the claim. In the handling on the property all of the facts and circumstances of the claim were brought to Carrier's attention and the citation of additional rules, which have at all times been in evidence, has not resulted in handling on the property in other than the usual manner. In addition, Carrier has had full opportunity to reply to the arguments advanced by employees in their ex parte submission.

When the case was presented to Carrier on the property, the employees named seven shopcraft painters who allegedly performed the painting in question and, in addition, listed the dates, number of men, and basic **and** overtime hours worked on each date. The total claim amounted to 168 basic hours and 56 overtime hours. In a letter to the General Chairman Carrier took the position that "a total of 20 hours during regular working hours were expended by shopcraft forces in painting of the walls in the Diesel Shop area." In addition Carrier noted that on June 12, two laborers painted the toilet rooms in the storehouse office. This apparently confirmed, except for a change in the date, the claim of the employees that **9-1/2** hours had been used in painting the toilet rooms. During the conference on the property, Carrier furnished the employees' payroll records **of** the persons named. These records included a job charge for each day. That charge in the case of each named employee, shows painting locomotives. Carrier has taken the position that the employees have failed to meet their burden of proof and that, conversely, Carrier has established that no **more** than 20 hours were expended.

When the employees furnished Carrier with names, dates, and the number of hours involved in the **work, they** established a prima facie case. The burden of going forward with evidence to disprove the **employees'** claim then shifted to Carrier. Carrier's response was to furnish the employees the payroll records previously referred to. Those records conclusively establish the number of hours worked on each date. Neither party has dealt in specific terms with the matter of the job charge. **Carrier's** record, as furnished to the employees, does include the code used for job charges and, as might be expected, there is no provision in the system for charging time to painting buildings. One can speculate on this **matter**, but speculation is no substitute for evidence. However, after the employees had established a prima facie case, it fell to Carrier to establish, by evidence with probative value, what the employees were doing on the dates in question. It did not undertake to do so. The failure of proof, under the facts and circumstances present here, falls not on the employees, but on Carrier .

The claim will be sustained for the loss of work opportunity suffered by Claimants. The record shows **that** this **amounted** to 144 straight time **hours** and **54** overtime hours.

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 **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

That the Agreement was violated.

A W A R D

Claim sustained, to the extent stated in the Opinion.

NATIONAL **RAILROAD** ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A. W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this **18th** day of July 1975.