Award No. 1269
Docket No. 1201
2-CRI&P-CM-'48

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement the carrier improperly assigned two bridge and building employes to perform carmen's work on R. I. bunk car 99604, R. I. & G. kitchen car 196065 and R. I. box car diner 95778, on August 22, 1947, and that accordingly the carrier be ordered to additionally compensate Carmen Wallace C. Arthur and George R. McGhee therefore in the amount of five hours each, at the time and one-half rate on said date.

EMPLOYES' STATEMENT OF FACTS: The carrier maintains a car shop at Silvis, Illinois, and at this seniority point some of the force of about 90 carmen are employed on each of three shifts.

On Friday, August 22, 1947, the carrier assigned W. T. Brooks and Emil Plavak, from the bridge and building force, to work on R. I. bunk car 96604, R. I. & G. kitchen car 196065, and R. I. box diner car 95778, in connection with applying screens to windows in vestibule, etc. The maintenance work on these cars was started at 9 A. M. and completed at 2:30 P. M. on that day by these two aforesaid men, which is affirmed by the submitted copy of statement identified as Exhibit A, signed by Messrs. Brooks and Plavak.

This work was performed adjacent to the repair track, whereat about 30 carmen were employed, from 7:15 A. M. to 3:45 P. M., within such period of time the work in question was performed. However, the carmen named in the statement of claim, hereinafter referred to as the claimants, were regularly employed on the 4 P. M. to 12 midnight shift, and they were not called to do the work on the aforesaid cars.

The carrier has declined to adjust this dispute on any acceptable basis, and the agreement effective September 15, 1941, is controlling.

POSITION OF EMPLOYES: It is not in dispute that these claimants established and maintain seniority rights within the sub-division "Other Carmen," under the terms of Rule 26, captioned "Seniority," and that they were regularly employed as such, as provided in the first paragraph of Rule 27, in applicable part reading:

to 12:15 P. M., and 12:45 P. M. to 3:45 P. M. If any claim is in order, we do not regard the claimants as having a valid claim before this Board, but if the Board is not in agreement with our contention in that respect, then assuredly the claimants cannot have a proper claim for time and one-half rate.

There is no rule in the agreement here controlling which specifies any penalty for work not performed. If payment is due, it should be on the basis of the pay rate which would have been allowed to the carmen who would have performed this work. The work in question assuredly would not have been done on overtime. It would have been done on the repair track located at Silvis, Illinois, during the regularly assigned hours of the repair track.

Rule 5 of the controlling agreement reads in part:

> "For continuous service after regular working hours, employes will be paid time and one-half on the actual minute basis for any such service performed. . . .
>
> Employes called or required to report for service, reporting and used will be paid on basis of time and one-half for all time on duty with a minimum of two (2) hours and forty (40) minutes at time and one-half, and will be required to render only such service as called for or other emergency service which may have developed after they were called and which cannot be performed by the regular force in time to avoid delays to train movement."

We are unable to locate any awards of this Board in which this matter has been adjudicated. However, we do find awards of the Third Division, National Railroad Adjustment Board, in which the question of whether or not the time and one-half rate should be paid under similar circumstances has been decided. When a similar issue was before the Third Division, that Board said in Award 3193:

> "The Organization claims the time and one-half rate of the position. The Carrier claims, in case a violation is found, that the pro rata rate controls. The Organization bases its claim on the fact that if Claimants had performed the work, it would have been paid for at the overtime rate of time and one-half . . . It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this Agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. We fail to find any contract provision, or any reason in addition thereto, that would give any other employe a greater penalty rate than the employe to whom the work was assigned in the event he was deprived of it. In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned. . . . The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently, time not actually worked cannot be treated at the overtime rate unless the Agreement specifically so provides. This conclusion is supported by this Division Awards 2346, 2695, 2823 and 3049."

We, therefore, contend that the payment in this case should be at the pro rata rate of the carmen on the repair track who would have performed this work had it not been performed by the B&B employes.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The record shows that on August 22, 1947, the carrier used two of its bridge and building employes, employes who are in the maintenance of way department and covered by their agreement, to do work which is within the scope of the parties' agreement herein involved.

Since the work here involved belonged to the employes covered by the agreement it could not properly be assigned to and performed by other employes of the carrier not covered thereby. Work embraced within the scope of an agreement cannot be removed therefrom and assigned to employes not subject to its terms. This is true even if in having the work performed it becomes necessary for the carrier to call employes subject to the terms of the agreement and working them on an overtime basis.

The carrier contends that the claimants are not entitled to be compensated because they were not assigned to nor did they work on the repair track. The record shows that they were carmen who were eligible and also available. It does not appear that a claim has ever been filed on behalf of anyone else and, since the allowance of this claim will preclude another for the same work, we find it is proper and should be allowed.

We are, however, of the opinion that this claim should be sustained at the pro rata rate only. While it is true that if claimants had been called to perform the work, their rate would have been time and one-half, however, the penalty rate for depriving an employe of work is pro rata rate of the position.

AWARD

Claim sustained on a pro rata basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling,
Secretary.

Dated at Chicago, Illinois, this 19th day of July, 1948.