

Award No. 2302
Docket No. MW-2234

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Herbert B. Rudolph, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DELAWARE & HUDSON RAILROAD**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Pietro Maddalone, furloughed Foreman on the Susquehanna Division, be paid the difference between the Assistant Foreman's rate of 60 cents per hour and \$200.40 per month, Extra Gang Foreman's rate, from April 22, 1940, to March 1, 1941.

EMPLOYEES' STATEMENT OF FACTS: On April 22, 1940, Extra Gang D-56 was established on the Susquehanna Division at Oneonta, New York. Bulletins were posted advertising for eight (8) trackmen for this gang, in accordance with Rule 28 (a) of the current agreement. No bulletin was posted for the position of Foreman of Extra Gang D-56. The gang was supervised by a Ditcher Engineer, who also took care of the necessary reports *customarily made out by a foreman, from April 22, 1940 to May 23, 1940.*

From May 23, 1940 to February 22, 1941, Assistant Track Foreman Joseph Mesiti, whose regular assignment was assistant track foreman on Section D-10, was in charge of this gang. Gang D-56 was organized May 20 and worked as a separate unit for the period involved in this claim, without the assignment of a foreman.

An agreement is in effect between the parties bearing effective date of July 1, 1939, which, by reference, is made a part of this Statement of Facts.

POSITION OF EMPLOYEES: Rule 28 (a) of the agreement in effect between the Carrier and Employes contains the following provisions:

"ADVERTISING AND ASSIGNING POSITIONS

Rule 28 (a). New positions, permanent and temporary vacancies will be bulletined any time within ten (10) days after they are created or occur for a period of ten (10) days. Bulletin will be posted at headquarters of employes entitled to consideration. Appointments will be made within ten (10) days after close of advertising period. Temporary vacancies of thirty (30) days or less duration need not be bulletined."

The Employes contend that the Carrier failed to comply with the provisions of the above rule by not advertising the vacancy of foreman. No bulletin was posted by the Carrier at the headquarters of the employes entitled to consideration to fill the position of foreman in Gang D-56, thus depriving the employes entitled to the position through seniority, of the privilege of placing themselves in accordance with Rule 28 (a).

foreman who was in charge of Gang D-56 worked six days during the week of June 24. Mesiti served in the capacity of foreman of Gang D-56 for five days during the week of June 24 and as assistant foreman of Gang D-10 on the sixth day.

CARRIER'S STATEMENT OF FACTS: While awaiting completion of treating plant, which was being built by the Federal Creosoting Company at Sidney, N. Y., untreated ties were stored at Oneonta for seasoning prior to treatment. Extra track gang D-34 was taken from track work and assigned to handle the storing of ties at Oneonta from January 4th to April 17, 1940. During this period, extra gang D-34 was augmented by employees from nearby sections. On April 17, 1940, extra gang D-34 was moved out of the yard and on April 22, 1940, several new men were employed to continue the work. P&H crane operated by R. Mazzeralla was used to assist in this work from January 4th to May 23, 1940. From April 22nd to May 23rd, the laborers which were hired on April 22nd to continue this work were carried on the time book of Mr. Mazzeralla. On May 24, 1940, these men were assigned to Section D-10, Oneonta Yard, Foreman P. Delello, and worked with the section gang on the track when not storing ties. The ties were arriving intermittently and there were not, at all times, cars to be unloaded. When storing ties after May 24, 1940, their time was kept by the assistant foreman, J. Mesiti, assigned to Section D-10.

POSITION OF CARRIER: The Carrier contends that no extra track gang was created on April 22, 1940. From April 22nd to May 23, 1940, the work of storing ties at Oneonta was under the direction of the crane operator, an employee under the scope of the Maintenance of Way Agreement, who was receiving \$245.40 per month, and who had been working on the job since January 4, 1940.

When handling case on the property, the organization claimed that an extra gang was created and referred to bulletin dated May 1, 1940, which indicated, under "assigned territory," "Oneonta Gang D-56." Each gang on this railroad, whether it is composed of one or more employees, is assigned a number for identification purposes. On the sections, these numbers correspond with the section number. D-56 was the number assigned R. Mazzeralla, Crane Operator, who might be working anywhere on the railroad. There was no Section D-56. These men were to work with Mr. Mazzeralla, therefore, Gang D-56 was indicated on the advertisement.

Effective May 24, 1940, the new men hired April 22nd to store ties were transferred to the regular yard section gang, D-10, and worked on the section as trackmen when not storing ties. When storing ties, they were under the direction of the Assistant Section Foreman of the section to which they were assigned.

In handling the case locally, the only rule cited by the organization in support of claim was Rule 28, advertising and assigning positions, it being their contention that position of extra gang foreman was not advertised and assigned. The Carrier contends there could be no violation of this rule because there was no new position of extra gang foreman created.

It is the position of the Carrier that no rule of the agreement was violated and that claim should be denied.

OPINION OF BOARD: From the facts of record it appears that the Carrier had Ditcher Engineer Mazzeralla act as foreman of Gang D-56 from April 22, 1940, to May 23, 1940. Mazzeralla had no seniority as a foreman of track forces. Effective May 24, 1940, the members of Gang D-56 were transferred to Section D-10, under Foreman Delello. The record and joint statement with exhibits attached disclose that following May 24th the time of these men was reported by Foreman Delello and that they were carried on

the company books as members of Section D-10. The facts fail to support employees' contention that subsequent to May 24 the men formerly of Gang D-56 worked as a separate unit under Assistant Foreman Joseph Mesiti.

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 Employe involved in this dispute are respectively carrier and employe 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 Carrier violated the agreement from April 22, 1940, to May 23, 1940, when requiring Mazzeralla to act as foreman.

AWARD

Claim sustained for the period from April 22, 1940, to May 23, 1940; denied for period following May 23.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of September, 1943.