

Award No. 3067

Docket No. MW-3087

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that foreman carpenter Joseph A. Crowley, Terminal Division, shall be paid at time and one-half rate for the same number of hours that members of his crew worked on Sunday, October 31, 1943.

JOINT STATEMENT OF FACTS: Joseph A. Crowley is the regularly assigned Foreman Carpenter of the B&B Gang No. C-14, Terminal Division. On Sunday, October 31, 1943, a portion of Crowley's Gang No. C-14 were sent from Boston to Saugus River Drawbridge under the supervision of Crowley's Assistant Foreman and instructed to work at Saugus River Drawbridge and report to Foreman Mulhern. The headquarters of Crew C-14 is Boston.

Foreman Carpenter Crowley was not called nor paid for that day, yet he was required to report the time for members of his crew working on that day, report on the services performed, etc.

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rules 16 (b) and 16 (c) of Agreement in effect between the Boston and Maine Railroad and the Brotherhood of Maintenance of Way Employees read:

"Rule 16-B. New Positions or Vacancies. When new positions are created, or when vacancies occur, a bulletin will be posted promptly and in no event later than ten (10) days thereafter. Such bulletin shall show the location, descriptive title, hours of service and rate of pay. This bulletin to be posted for a period of ten (10) days at the headquarters of the gangs in the sub-department entitled to consideration in securing the positions. During this time, the employees may file their applications with the official whose name appears on the bulletin.

Temporary vacancies of thirty (30) days or less need not be bulletined.

Vacancies or new positions of trackmen and B&B laborers need not be bulletined."

"Rule 16-C. Assignment to Position. The senior qualified applicant will be assigned to the position promptly and not later than thirty (30) days from the date the position was bulletined. When a new position or vacancy occurs in a rank where employees of such rank, by reason of force reduction or abolishment of position, are then working in a lower rank, the senior employee of such rank in that seniority district making

"Temporary vacancies of thirty (30) days or less need not be bulletined."

16 (c) refers to assignment of positions to the senior qualified successful bidder. In this case now before the Board there was no vacancy—there was merely a need for extra men to work at the Saugus River Drawbridge under Foreman Mulhern, and certain men from Gang C-14 were sent down to supply the shortage of manpower. They worked there one day—Sunday, October 31st. There was no such vacancy for a foreman's job as needed to be advertised, nor was there any other vacancy that needed to be advertised.

The situation merely is that the men were asked to work overtime and did work overtime, and reported to a foreman in charge of a specific job on that specific day.

It is a well known rule of the common law applicable to relationship between an employer and his employees and their Union that an employer may operate his establishment as he deems advisable except for such limitations as are imposed by statute or are agreed upon as a part of a collective bargaining agreement. The rights, privileges and prerogatives of an employer under the common law are reserved to him except as limited by law or surrendered in the collective bargaining agreement. If the Board is going to recognize this rule of law, then it must recognize that there is nothing in the Agreement which provides that a foreman shall be called every time any of his gang are called or which provides that a foreman shall be paid if he is not called when his men are required to work.

There was a competent foreman on duty at the Saugus River Drawbridge in charge of the work. There was no need for another foreman to go there, yet the Committee is claiming that whether it was necessary or not Foreman Crowley should have been sent to the Saugus River Drawbridge because a part of his crew was sent there.

As pointed out above, neither Rule 16 (b) nor 16 (c) is applicable. No other rule in the book covers the case, and the Committee is asking the Board to write a new rule in the Agreement. It is submitted that the Board is without authority to write any such rule. In many cases it has been decided that the Board cannot write a new rule by interpretation, and if that is so, certainly the Board is without authority to write a new rule where there is nothing to be interpreted. The Committee might just as well ask the Board to prescribe a rule stating that no part of a crew will be sent anywhere without the foreman. It is hard to believe that the Board would assume to write such a rule.

OPINION OF BOARD: On Sunday, October 31, 1943, an undisclosed number of the members of B&B crew C-14, of which the Claimant was Foreman, were sent from Boston to the Saugus River Drawbridge, where they worked with the members of another crew and under the supervision of the Foreman thereof. The Claimant was not called, but subsequently reported the time and services performed by the members of his crew who did work on that day. The demand is that the Claimant be compensated at time and one-half for the number of hours worked on the day named by the individual members of his crew.

It is impossible to determine the merits of this controversy from the meager facts disclosed by the record. We do not know how many men were in the Claimant's crew or the number that worked or did not work on the day in question. Neither do we know whether the Claimant made out the time report on that day or some subsequent day for which he was paid. There is nothing in the facts revealed by the record to indicate that there was any violation of the Rules called to our attention.

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 parties waived oral hearing thereon;

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 no violation of the Agreement has been established.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 21st day of December, 1945.