

Award No. 4700
Docket No. MW-4678

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
BOSTON & MAINE RAILROAD

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

(1) That the Carrier violated the agreement by not assigning Extra Crew Foreman Paul Walsh to laying rail in the vicinity of Ayer, Massachusetts, on Sundays, October 6, 20 and 27, 1946.

(2) That Foreman Walsh be compensated for the monetary loss suffered by him on account of the Carrier's violation of the Agreement.

JOINT STATEMENT OF FACTS: As of October 6, 1946, Paul F. Walsh was the Extra Crew Foreman of the Rail Crew.

Under date of September 27, 1946, Notice No. 33, Paul F. Walsh was awarded the position of Extra Crew Foreman, Rail Crew, Fitchburg. We quote below copy of Notice No. 33:

"BOSTON AND MAIN RAILROAD
Engineering Department

Fitchburg Division

Track Department

NOTICE NO. 33

The positions advertised for bid in Notice No. 30 dated September 9, 1946 are awarded to the following:

Location	Title	Crew	Awarded to
Fitchburg	Ex. Crew Fore.	Rail Crew	A. J. Courtemanche
"	" "	" "	T. Posco
Fitchburg	Ex. Crew Fore.	Rail Crew	P. F. Walsh
Fitchburg	Asst. Foreman	Rail Crew	A. Stebbins
"	" "	" "	L. Chabot
"	Rdwy. Mach. Opr.	" "	H. Tourigny
"	" "	" "	W. E. Rivard
"	" "	" "	F. R. Wornham
"	" "	" "	A. J. Santini
"	" "	" "	B. R. McGrath
"	" "	" "	I. W. Brown
"	" "	" "	H. J. Fisher
"	" "	" "	T. Hansen
"	" "	" "	O. Perrault
"	" "	" "	G. H. Sawyer
"	Welder	" "	H. F. Myers
"	"	" "	G. McPhee
"	"	" "	A. J. Ippolito

sent to work and do work with another foreman, he is entitled to be paid even though there is no work for him to do and he does no work.

This is not the claim of a foreman for time lost because a junior foreman was called to work. The situation is merely that some men were asked to work on various Sundays and did work on those Sundays, reporting to the foreman who was properly in charge of the work on those days. There was no occasion to call another foreman, such as the Claimant, and no rule requiring it.

"The purpose of the punitive rate as it applies to overtime is to penalize the Carrier for working an employe in excess of eight hours in any one day. Its purpose is not, as some seem to suppose, to create work for which time and one-half may be demanded."

See Third Division Award No. 4194, Docket No. MW-4187.

The same is true as to the punitive rate for Sunday work. Its purpose is to insure that employes will have their Sundays free to be at home, go to church and enjoy the company of their families—it is not to create work for which penalty time may be demanded.

It is a well-known rule of the common law applicable to the relationship between an employer and his employes and their Union, that an employer may operate his business as he deems advisable, except for such limitations as are imposed by statute or by contract as part of a collective bargaining agreement. The rights, privileges and prerogatives of an employer are reserved to him, except as limited by law or surrendered by him in the Union Agreement. If the Board is going to recognize this rule of law, it must recognize that there is nothing in the Agreement which requires the Carrier to call a Foreman to work on a penalty day, when there is no work for him to do, simply because other individuals, who on assigned work days are under his supervision, are working on a penalty day.

The Committee is frankly asking the Board to write a new rule into the Agreement where no rule exists. They are not even asking the Board to interpret an existing rule for there is no rule to interpret.

It should be noted in the Joint Statement of Facts that—

"Foreman Walsh and his Trackmen were not employed by the Carrier on any of these above dates."

In Award No. 3067, regular members of B. & B. Crew C-14, of which the Claimant was Foreman, were required to work with other Foremen. In the instant case, no Trackmen of Walsh's crew worked on the Sundays involved, but three specialized workmen, Welders, worked on those days. There is no crew unit rule in the Agreement with the Maintenance of Way Employees. Therefore, the claim is without merit.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant bid in a position as extra crew foreman of a Rail Crew at Fitchburg. On the Sundays mentioned in the claim, Carrier used regularly assigned section foremen and their crews (from the section on which the Sunday work was actually performed and adjoining sections) to perform certain rail laying work which it was not feasible to perform on week-days. Claimant asserts that, as an extra crew foreman, he was entitled to the overtime work involved.

The Employees apparently base their claim on the premise that the extra men were entitled to perform the overtime rail laying work because they were assigned to perform this work on week-days. It should be noted at this point that the crew of which Claimant was foreman was not used on the Sundays involved in the claim. However, three of the men who were assigned to Claimant's extra crew as welders worked with their regular crews as trackmen on said days. This latter factor we do not regard as sufficient to justify a holding that Foreman Walsh should have been employed as their supervisor.

It is true, as a general rule, that the incumbent of a position is entitled to the overtime work arising from that position. That rule would clearly support a claim if the extra crew of which Claimant was foreman was assigned to work on the days in question. It is also true, as admitted and contended by the Organization, in the absence of Agreements, understandings or established practices to the contrary, that work on a section belongs to the regularly assigned foreman and his crew. On the days covered by this claim, the regularly assigned foremen and crew were employed on the overtime work on their sections. But we find no Agreement provision nor has one been called to our attention covering the rights of extra crew foremen or members of their crews to overtime work. If they had been engaged exclusively in the performance of the type of work involved, perhaps a claim could be supported under the general rule above referred to. Here, however, it is clear that the regular section crews were also engaged in the rail laying work involved herein. We have been cited no Agreement rule which has been violated in this instance and we find none.

It is not within the power of this Division to write Agreement rules but merely to interpret them as they exist. Accordingly, we are constrained to hold that a denial Award is in order.

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 Employee involved in this dispute are respectively carrier and employee 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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. J. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 27th day of January, 1950.