

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
MISSOURI PACIFIC RAILROAD COMPANY**

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

(1) That the Carrier violated the Agreement by not calling Section Foreman J. S. Maher, East Little Rock, Arkansas Division, on the night of June 18, 1948, to inspect and determine the condition of a switch stand which had been damaged by Train No. 160 at about 8:30 P.M. and make all necessary repairs for its safe operations.

(2) That Section Foreman J. S. Maher be compensated 2 hours and 40 minutes pay at the time and one-half rate for a call because of the Carrier's violation of the Agreement.

EMPLOYEES' STATEMENT OF FACTS: John S. Maher is Section Foreman at East Little Rock, Arkansas. On the night of June 18, 1948, a switch stand at East Little Rock was damaged, when Train No. 160 had a timber hanging over the side of one of its cars and the timber struck the switch stand, bending the staff and damaging the mechanical parts of the switch. The Yardmaster at East Little Rock, inspected the damaged switch stand, making repairs, and did not call Section Foreman Maher whose duty it is to inspect apparatus of this kind.

Agreement effective July 1, 1938 between the Carrier and the Brotherhood, and subsequent amendments and interpretations, are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As recited by the Employees in their Statement of Facts, a switch stand was damaged at East Little Rock on the night of June 18, 1948. In order for the Carrier to continue its movements over this point where the damage occurred it was necessary that the damaged switch stand be inspected to ascertain whether or not movements could be continued at this specific location.

The scope of the Effective Agreement provides as follows:

"SCOPE: These rules govern the hours of service and working conditions of all employes herein named in the Maintenance of Way Department and sub-departments thereof (not including supervisory forces above the rank of foremen) as follows:

"(a) Bridge and Building Department:
Foremen
Assistant Foremen

he made the necessary repairs the following day. To take the position that only certain employes covered by certain working agreements can be utilized to remove hazards such as was the case in this claim is approaching the point where reason disappears and the working agreement becomes a mockery.

The Employes may point to Third Division Awards Nos. 3690 and 3767 in an attempt to gain support for this claim. A careful review of these awards will reveal that in both cases the switches had been damaged and in order to operate over them certain temporary repairs were made. Although we do not necessarily agree with the holding in those awards, we recognize the facts *there are not the same as the facts here, and, therefore, they are not in point* and cannot support the instant claim.

No tools of any kind were used by Yardmaster Eldridge and no repairs were made. In fact, what he did do had the reverse effect of making repairs, in that the banner staff was completely broken off making repairs necessary, which provided work for Section Foreman Maher and his crew.

This claim is nothing more than an effort to force the Carrier to call Foreman Maher out to perform work at overtime rates which could very properly be performed during the regular hours of his assignment. The Carrier has the right to have work performed at any time he desires, so long as those employes to whom the work has been contracted are used to perform such work. If the Carrier decided the replacement of the banner staff could be postponed until the regular hours of Section Foreman Maher's assignment then it was only exercising its prerogative. The Employes have no right, under the agreement, to demand overtime work, and to do so is inconsistent with the prior demands of the organization for shorter hours of work which has finally culminated in the shorter work day and the shorter work week. Payment of the time and one-half overtime rate is in the nature of a penalty against the Carrier for working employes long hours, and there is no rule in the applicable agreement to force the Carrier to penalize itself. To do so would defeat the alleged purpose of the shorter working day and the shorter work week.

The Carrier respectfully calls the attention of your Board to part (2) of the Employes' Statement of Claim, and desires to offer its objection to the claim for compensation at the punitive overtime rate of time and one-half *for work not performed*.

Your Board has repeatedly held that the penalty for a violation of an involved working agreement is the pro rata rate of the position, and that question is now so well settled in this division as to scarcely require further comment.

In Award No. 4196, your Board held that:

"It is only where work is actually performed in excess of eight hours on any day that the overtime penalty rate of time and one-half applies."

For other Third Division Awards supporting No. 4196, see No. 4037 and awards there cited; No. 2695, No. 3232, No. 3049 and cases there cited; also No. 3193, No. 3251, No. 4244 and numerous cases there cited.

Yardmaster Eldridge made no repairs to banner staff and performed no work which could be considered a violation of the Maintenance of Way Agreement.

This claim is wholly without merit, without support under the working agreement and without basis in fact. It should, therefore, be denied.

(Exhibit not reproduced).

OPINION OF BOARD: On the night of June 18, 1948, a switch stand at East Little Rock was damaged by a timber protruding from a car in a moving

train. Yardmaster Eldridge discovered that the banner staff was bent over and in attempting to straighten it up, broke it off about 2½ inches above the top shaft collar and the staff. The switch itself was not damaged. The Yardmaster left a note for Section Foreman Maher directing him to make necessary repairs which he did on the following day. The claim is for a call for Section Foreman Maher because of the failure of the Carrier to use him on the night of June 18, 1948.

The record shows that at the time Yardmaster Eldridge discovered the bent banner staff, he attempted to straighten it up and broke it off in so doing. His purpose was to eliminate the hazard to employees working in the Yard. He made no effort to repair the damage. In fact, he damaged it more than it was when he found it. He inspected the switch itself and observed that it was in no way damaged. He concluded that there was no need to repair the banner staff until the next day. The Organization does not contend that the decision of the Yardmaster was faulty, they insist only that it should have been made by the section foreman.

The position of the Carrier is the correct one in this case. The Yardmaster had the right to remove the immediate hazard if he could and to examine for the purpose of determining if claimant should be called to make repairs. That claimant was entitled to make the repairs is not disputed. But when the Yardmaster determined that the switch was operating, it was within the province of Carrier's supervisory officers to determine when the repairs should be made. The inspection to determine the extent of the repairs to be made and the manner of their making is a section foreman's work, but an inspection to determine if the damage requires immediate correction or otherwise is not the exclusive work of a section foreman. Under the theory advanced by the Organization, the claim would have been valid even if the Yardmaster had called the section foreman. The inspection in the one instance would have been no different in the one case than the other. No such result is intended or required by the rules.

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 herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of July, 1950.