Award No. 4948
Docket No. MW-4907

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, 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:

(1) That the Carrier violated the Agreement by failing to assign Section Foreman Worden and his crew to overtime duty on his own section between the hours of 12:00 midnight, January 2, 1948 and 6:30 A.M. January 3, 1948, at Woodsville, N. H.

(2) That Section Foreman Worden and the seven members of his crew be each paid 6 hours at double time rate because of the violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: Mr. Shirley B. Worden was on January 2, 1948 the foreman in charge of Section Crew No. 252 with headquarters at Woodsville, N. H.

Foreman Worden and the following employes, members of Crew No. 252 are the claimants involved in this dispute:

Newton Lang	Raymond Miller (Asst. Foreman)
R. Boldgett	R. Millette
J. Stebbins	Earl Towne
	Melvin Salmon

The regularly assigned hours of Section Crew No. 252 on the dates in question, were from 7:00 A.M. to 4:00 P.M.—with a one hour lunch period.

On January 2, 1948, the claimants were engaged in removing snow from the Carrier's tracks and switches on Section No. 252. They worked continuously from 7:00 A.M. to 12 Midnight, excepting for meal periods.

At 12 Midnight they were sent home by direction of the Carrier. The foreman and crew of Section 253, with headquarters at Lisbon, N. H., were instructed to continue with this snow removal work on Section No. 252 and Crew No. 253 worked from 12 Midnight, January 2, 1948 to 6:30 A.M., January 3, 1948.

Crew No. 253 had been previously released and instructed to report back for duty at 12 Midnight. They, therefore, were only paid at the time and one-half rates.

work to provide a release period for rest of six hours, what would the penalty be? Again we diligently search the controlling agreement for such a penalty provision. Only one rule between the covers of the agreement stipulates the payment of double time—Rule 30(A)—Overtime. But this rule reads:

> "Time worked preceding or following and continuous with a regularly assigned eight-hour work period shall be computed on actual minute basis and paid for at time and one-half rate, with double time computed on actual minute basis after sixteen continuous hours of work, in any twenty-four hour period computed from starting time of the employe's regular shift." (Carrier's underscoring)

Little, if any, amplification should be necessary in connection with the application of this rule. Double time is only provided for in case of time **worked**, not for time **not worked**. That Foreman Worden and his Crew did not work after sixteen continuous hours of work on January 2, 1948 is not disputable, in fact the allegation of agreement violation is based squarely upon the so-called failure of Carrier to work them during the period 12:00 Midnight to 6:00 A.M., January 3, 1948. Obviously, therefore, even were it conceded that Carrier "violated the agreement", which it is not, the double time claimed could not be sustained. The claim under such conditions would come within the scope of a long line of decisions by the Third Division, epitomized best perhaps by one line in the Opinion of Award No. 3955 which reads:

> "The Overtime Rule has no application where only the right to perform work is involved."

Carrier has already paid other track forces for services performed, during the six hours involved in the demand at the time and one-half rate. Failure to sustain Part 3 of Carrier's claim would amount to the imposition of an excessive penalty, a penalty imposed "by implication", and a penalty not contained in the controlling agreement.

SUMMARY

Carrier has shown conclusively:

That the work of snow removal and/or "snow duty" is not an exclusive property right of Maintenance of Way Employes, for it is not recognized as such either by the terms of the controlling agreement or by the practice in assigning employes to perform such work; that there was no violation of any rule of the agreement when other than the regular forces of Section No. 252 were used for "snow duty" on Section 252 from 12:00 Midnight, January 2 to 6:00 A.M., January 3; and that there is no reason in rule or equity to pay the six (6) hours at double time to Foreman Worden and seven (7) members of his crew as demanded in this dispute by the Employes.

The claim of Carrier should be sustained.

OPINION OF BOARD: Claimants are members of Section Crew 252, assigned 7:00 A.M. to 4:00 P.M. On January 2, 1948, they were engaged in removing snow from tracks and switches. They worked continuously from 7:00 A.M. to midnight, excepting meal periods. They were released at midnight to obtain rest in order that they might work their regular assignment commencing at 7:00 A.M. the next morning. In order to expedite the removal of snow in Section 252, the Carrier directed Section Crew 253 to assist in the work. They were worked until 6:00 P.M. of said day, at the overtime rate after 4:00 P.M., and then released to obtain rest in order that they could relieve Section Crew 252 at midnight. This arrangement was carried out. It is the contention of the Organization that Section Crew 252 should have been continued at work after midnight at double time rate instead of assigning Section Crew 253 to perform it at the time and one-half overtime rate.

The Organization contends that the removal of snow is work which belongs exclusively to maintenance of way employes. With certain qualifications and exceptions, we think this is true. We have held, correctly we think, that employes of other crafts may engage in snow removal when it is incidental to the work of their crafts. Award 4593. But as a general proposition the work belongs to maintenance of way employes. As long as snow handling is a normal operation within the capacity of maintenance of way employes to perform, it is their work. It must be borne in mind, however, that snow storms in certain parts of the country become emergent when considered in connection with the movement of railway traffic. Under emergency conditions, snow removal cannot be delayed in order that it may be wholly performed by maintenance of way employes. The duration of such emergencies are unpredictable and available forces must be used with contingencies in mind which may never occur. Management is not required to guess correctly on such matters at its peril.

Where snow removal has become emergent, we have no hesitancy in saying that a carrier may properly augment its maintenance of way forces with employes of other crafts and, if necessary, with persons not previously within the employ of the Carrier. It necessarily follows that under such circumstances, track forces from other sections may be utilized in overcoming the emergency in order to keep trains moving. It was entirely proper, therefore, for the Carrier to utilize Section Crew 253 to augment Section Crew 252 in snow removal during the period of the emergency at Woodville, New Hampshire.

The record in this case shows that Carrier relieved Section Crew 252 when several of the gang had completed 16 hours' work. The Carrier says it was done to afford a six-hour rest period before Section Crew 252 was required to report for its regular assignment the following day. In order to do this, Carrier released Section Crew 253 at 6:00 P.M. to afford rest before it relieved Section Crew 252 at midnight. The Organization contends that augmentation of maintenance of way forces cannot be had in an emergency unless all of those to whom the particular class of work is generally assigned are themselves working. The theory of the Organization seems to be that augmentation means physically aiding the regularly assigned employes during the time they are working. This is a misconception. Augmentation of maintenance of way forces during an emergency applies as well to relieving exhausted employes as it does to giving direct assistance. To say that an emergency whose duration is wholly unpredictable, must be met in every case by such an absolute rule of thumb, would not recognize practicable problems connected with keeping traffic continuously moving under the conditions herein described.

The claim here is for the double time claimed to have been lost to Section Crew 252 when Section Crew 253 relieved them. We must again reiterate that the purpose of the overtime rule is not to create work for which punitive compensation can be demanded. Its purpose is to penalize the Carrier for working an employe for more than eight hours in any day and thereby coerce it into avoiding so doing. Award 4194. Consequently a Carrier should use an extra or furloughed man rather than to work another employe more than eight hours. It is only when the latter cannot be avoided that the Carrier can properly work an employe more than eight hours by paying the punitive rate for the hours worked in excess of eight. Likewise, in the present case, the Carrier is required to work employes who have worked eight hours or more and less than 16 hours before it may properly direct employes to work more than 16 consecutive hours. This is so because the Carrier is required to pay double time for time worked in excess of 16 consecutive hours' work. The additional penalty is added to further restrain the Carrier from working its employes in excess of 16 hours. But where the exigencies of the situation require that it be done, the double time penalty rate is assessed. But overtime as such is not a matter of right. Where the necessities of a situation require that overtime be worked, then, and not until then, does the senior

employe available acquire a right to perform it, assuming of course that there is no specific contract provision to the contrary.

Both the Carrier and the Organization have recognized that an employe's efficiency wanes after eight hours of continuous work. They have recognized also that after 16 hours' continuous work a further loss of efficiency may reasonably be expected. The punitive rates imposed by the Agreement for working employes in excess of eight and 16 hour periods were entered into as a means of coercing the Carrier into maintaining the efficiency of its employes by not working them for unreasonable periods of time. The reasons advanced in support of the hours of service rules invariably point out that the efficiency of the employes demands the assignment of shorter work periods. There is no consistency between such expressed reasons and a claim that employes are entitled to work long periods of time as a matter of right in order to earn time and one-half or double time as the case may be. It is the duty of the Carrier to avoid the use of employes in excess of eight hours per day whenever it can without violating the collective agreement. To give some assurance that it will be done, penalty rates were imposed to coerce the Carrier into giving effect to the intent of the rule. Its purpose is not to create work for which high penalty rates can be demanded. Its purpose is the imposition of restraints, not to create high rated positions. Where the restraint is effective in accomplishing the purpose of the Agreement, the Agreement has been complied with and neither party may correctly assert such compliance to be a breach.

For the reasons herein stated, no basis for an affirmative award exists.

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 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 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.