Award No. 5826
Docket No. MW-5830

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

David R. Douglass, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective agreement when they assigned L. Mosser to perform services at Nodaway during the period February 19 to 23, 1949, in lieu of assigning this work to Section Laborer F. A. George;

(2) Section Laborer F. A. George be paid at his respective overtime rate of pay for the same number of hours that Section Laborer L. Mosser was assigned to the above referred to overtime work.

EMPLOYES' STATEMENT OF FACTS: Because of high waters in the vicinity of the Carrier's Nodaway Bridge, at Nodaway, Missouri, from February 19 to 23, 1949, Mr. L. Mosser, a furloughed Section Laborer was assigned to patrol the track in the vicinity of the high water and to watch the track and bridge for signs of water damage.

The service performed was not within the hours of the regular work period, and Mr. Mosser was paid at the Section Laborer's overtime rate of pay.

Carrier failed to call Mr. F. A. George, a currently employed section laborer, senior to Mr. Mosser, for this overtime work. During the period that Mr. Mosser was performing the overtime service, F. A. George continued to report to his designated assembly point and performed eight hours service during each of his regular assigned work periods, for which he was compensated at the section laborer's straight time rate of pay.

The Employes contend that George's seniority entitled him to be called and used for overtime service in preference to calling and using a junior employe.

Claim was filed in behalf of Mr. George for pay at his respective overtime rate of pay for the same number of hours that Section Laborer L. Mosser was assigned to the above referred to overtime work.

Claim was declined.

P. 2d 707, in the case of **Jacobs vs. Office of Unemployment Compensation and Placement**, wherein claim for unemployment compensation was denied because the claimant was not available for work. In that case the Court said:

> "The evidence shows that the appellant claimant definitely restricted her work to daytime employment, regardless of whether or not available work required that she report for a night shift; furthermore, she failed to meet the burden of showing to the satisfaction of the commission that she had proper transportation if work were offered to her. In short, she failed to prove that she was 'available for work' within the meaning of the act in question."

It is significant to note that in Third Division Award 3875, in First Division Award 12765, and in the Court decision cited above, the claims were denied on the basis that the claimant was not available for the work in question. The issue here is the same, and the Board cannot consistently render a decision other than complete denial.

In conclusion, the Carrier asserts that:

(1) The employes have heretofore relied entirely upon Rule 40(a), and having so handled their case on the property, it must, under Section 2, Sixth and Section 3, First (i) of the Railway Labor Act as amended, and the rules and procedure of the Third Division, be presented on the same basis to that tribunal and anything not presented to the Carrier cannot, under the law, be presented to the Board.

(2) The claimant, holding seniority rights exclusively in the section laborer classification and who was assigned and working as such during the period specified in the claim, had no right from a seniority standpoint, or otherwise, to the service performed by the Bridge Watchman at Nodaway.

(3) Rule 40(a) clearly provides that an employe must be available to perform the overtime service required in his seniority classification if he is to be given preference. The claimant in this dispute was not available and the overtime service required was in a different seniority group.

(4) The Awards of the National Railroad Adjustment Board, and the Court Decision cited by the Carrier clearly and decisively support Carrier's position that an employe who is not available or in a position to perform service is not entitled to claim for time lost because of his non-availability.

(5) With these irrefutable facts and circumstances present, Petitioner's claim is totally lacking in contractual substance and must, therefore, in all things be denied.

The Carrier affirmatively states that all of the data herein and herewith submitted has previously been submitted to the employes.

(Exhibits not reproduced.)

OPINION OF BOARD: In the present case one F. A. George, a Section Laborer, makes claim for payment at overtime rates because of one L. Mosser, a Section Laborer, junior in seniority to Mr. George, having been called to perform certain work at Nodaway. It develops that the work performed had to do with watching the tracks and bridge at Nodaway.

The Carrier maintains that the work performed was that of a Bridge Watchman; that Mosser was employed to watch the bridge and the tracks thereon and that such work is that of Bridge Watchmen, a group of a subdepartment of the Maintenance of Way and Structures Department in which seniority was held by neither the claimant nor Mosser.

The facts as appear in this docket seem to bear out the contentions of the Carrier that Mosser did, in fact, merely watch the bridge. In so doing he also observed the tracks on the bridge. There is not positive proof that Mosser was called upon to watch anything other than the bridge and its several parts and to observe the condition of the bridge in relation to the flooded conditions.

The Employes state that Mosser was carried on the Section Payroll and compensated at Section Laborer's rate of pay. This is not affirmatively denied by the Carrier. However, we of this Board, are of the opinion that the work, as performed by Mosser, was not changed in its nature by the way he was carried on the payroll. If he was paid at the rate other than the rate to which he was entitled for the service he performed then he had a proper remedy to take care of that situation, but that, of course, is not the case before us.

The availability of the claimant to perform the work, even if it had been work to which he had been entitled, is doubtful.

For the reasons as here above set out, we are unable to sustain the claim.

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: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of June, 1952.