Award No. 6306
Docket No. MW-6186

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC LINES

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

(1) That the Carrier violated the Agreement when they required or permitted the section employes from Angleton section to perform overtime work on Section No. 43 at Dansberry, Texas on February 22, 24, and 25, 1951, and failed to utilize the services of the regular section gang at Dansberry who were available;

(2) That Foreman O. J. Tippit and Laborers Alberto Caldron, Jack Brown and Jerry Hall be allowed thirty-one (31) hours pay each at their respective overtime rates, because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the early part of February, 1951, signal, telegraph and telephone service lines on the Carrier's property became inoperative because of storms in the vicinity of Dansberry, Texas.

On or about February 8, 1951, emergency repairs had restored the signal, telegraph and telephone service lines to full operating efficiency, and efforts were thereafter directed to restore the lines to their former physical standards in accordance with the Carrier's specifications.

The Carrier's signal and telephone and telegraph forces were assigned to this rehabilitation work and track forces were assigned to assist each of the signal and telegraph and telephone gangs.

Section Foreman O. J. Tippit is regularly assigned to Section No. 43, with headquarters at Dansberry, Texas, his crew members being Track Laborer Alberto Caldron, Jack Brown and Jerry Hall and A. Marshall.

During the period in which signal and communication lines were being rehabilitated on the territory assigned to Section 43, the crew from the adjoining section were assigned to assist in such work, and Track Laborer A. Marshall was also assigned thereto, his time being carried and reported on Section Foreman O. J. Tippit's time roll.

The adjoining section gang performed eleven hours service on February 22, 1951, ten hours on February 24, and ten hours on February 25,

In the first place, it is the Carrier's position, as evidenced by the foregoing record, that claimants were not deprived of any overtime work to which they were entitled under their agreement, therefore, the claim should be denied.

In the second place, and without any thought or intention of detracting from the position of Carrier and the merits supporting said position as argued in the foregoing submission, the Carrier, however, realizing, but not anticipating in this case, the possibility of an adverse decision and, further, appreciating that conflicting decisions have been rendered where claims for payment have been made, as here, when no service was performed by claimants, desires to call attention to the fact that by far the majority of such decisions recognize the pro rata rate only as applicable where the merits of the case have in the opinion of the Board justified any payment at all. Awards 3467, 3587, 3955, 4244, 4245, 4963, 5419, 5620, 5638. In this particular case, however, the Carrier feels that the contention of the Employes is entirely void of merit, or support under agreement rules, and, therefore, the accompanying claim should be denied.

The substance of matters contained in this submission have been the subject of discussion in conference and/or correspondence between the parties.

OPINION OF BOARD: The System Committee makes this claim in behalf of the members of the regular section gang of Carrier's Section No. 43 with headquarters at Dansberry, Texas. They are Foreman O. J. Tippit and Laborers Alberto Caldron, Jack Brown and Jerry Hall. It asks that Carrier be ordered to pay each of these men for thirty-one hours at their respective overtime rates. The Committee bases this claim on Carrier's use of the regular section gang of its Section No. 14, headquarters Angleton, Texas, to perform work on Section No. 43 on February 22, 24 and 25, 1951. This, the Committee claims, is in violation of Carrier's Agreement with the Brotherhood of Maintenance of Way Employes.

Carrier first denied the claim on the grounds that it was emergency work done in connection with restoring telegraph, telephone and signal service which had been disrupted by a severe sleet storm. Later the claim was denied on the theory that these employes performed this work for the Western Union and that it was not, in fact, work of the Carrier and that these men were merely made available, or loaned, to the Western Union for that purpose.

While there is some difference in the parties' presentation of the factual situation we find the following reflects what happened. Due to an ice and sleet storm in the general area around Dansberry, Texas, in the early part of February, 1951, the signal, telegraph and telephone service lines on Carrier's property were put out of commission. This service, by emergency repairs, was restored to full operating efficiency sometime between February 8 and 10th. Then the emergency situation created by the storm ceased to exist. Thereafter the work Carrier had performed thereon was directed toward a restoration of these communication lines to the physical standards at which they are normally maintained.

The Western Union's service lines had also been affected by the storm. They are along the Carrier's right-of-way. During the week of February 19 to 25, 1951, Carrier assisted the Western Union in restoring its service lines to their usual standards. It did so by assigning the regular section gang of Section 41 to help the Western Union gangs. Carrier paid these men and then billed Western Union for the work. On February 22, 1951, Washington's Birthday, and on February 24 and 25, 1951, Saturday and Sunday, these men worked 31 hours on the territory of Section 43. For this service they were paid in accordance with Rule 28 and at overtime in accordance with Rule 15 (a) of the parties' Agreement. On these three days the members of the crew of Section 43 were available for work and willing to do so on their territory.

Rule 2 (i) of the parties' Agreement provides:

"Seniority rights of section laborers, as such, will be restricted to their respective gangs, except when force is reduced laborers affected may displace laborers junior in service on their seniority district (roadmaster territory), and such laborers may return to gangs from which displaced in order of their seniority, provided such rights are exercised within thirty (30) days from date forces are restored, of which they shall be promptly advised."

We have said of like or comparable rules as follows:

"Rule 17 (e) would seem to recognize that the members of each crew constitute an integral unit of their district and that they are entitled to enjoy the protection of seniority with respect to the distribution of such work, including overtime, as may become available on their particular section." (Award 2619 of this Division).

"When, therefore, a gang is, by Carrier direction, assigned work on a section other than that bulletined to its foreman, it is invading the seniority district of the gang of the foreman to whom was assigned the section so invaded. And the foreman not only goes outside his working district, fixed by his assignment, and by seniority rights of his gang, but he also violates the terms of the assignment of the foreman upon whose section he encroaches." (Award 3627 of this Division.)

"Awards of this Board are clear on the principle that, in the absence of Agreements, understandings or established practices to the contrary, work on a section belongs to the regularly assigned foreman and his crew." (Award 4803 of this Division.)

See also this Division Award 4531.

Consequently, if this work belonged to the employes of Section No. 43 it did, under the facts disclosed by the record, belong, by reason of Rule 14, Section 1, (j), to the regular members of the section gang thereof.

Carrier suggests that the Order of Railroad Telegraphers and the Brotherhood of Railroad Signalmen of America are necessary parties to this dispute for the reason that if this work comes within the scope of any agreement it comes within the scope of either one or the other of the above Agreements and does not come within the scope of the Maintenance of Way Agreement. But that question is not material here for it is not contended that the work in dispute is covered by the scope of the Maintenance of Way Agreement nor that Carrier was obligated to have track forces perform it. What is contended is, that when Carrier elected to have track forces perform it that then Carrier was obligated to recognize the seniority rights of these claimants in having it performed.

As stated in Award 4139 of this Division:

"The Maintenance of Way Agreement furnishes the only rules, terms and conditions under which a Maintenance of Way employe is working for the Carrier. The Composite Rule of the Maintenance of Way Agreement should apply to the service which a Maintenance of Way employe is required to give even on work covered by another agreement. On such service the other rules of the Maintenance of Way Agreement should likewise apply."

The principle question is, was it work subject to the Agreement? In Award 1556 of this Division it was said: "* * * the Carrier is obligated to apply the rules of the Agreement to any work where it elects to use its own

employes, * * *, as they are still employes in the service of the Carrier and the Agreement covering their employment is with the Carrier and not with any particular part of it * * *."

As stated in Award 5425:

> "Being an emergency, Carrier could have relied with immunity upon men other than Maintenance of Way employes to correct the condition present on the dates in question. Electing, however, to use Maintenance of Way employes, Carrier was obligated to respect the seniority within the ranks of such Organization."

And as said in Award 5939:

> "Under a long line of well-reasoned decisions, to which we adhere, we have held, with rules such as are involved in the confronting record, that when a Carrier elects to call employes from an established seniority group to perform work of another group, there being no employes holding seniority in the other group available, it is required to take notice of the seniority rights of the men in the group called upon to perform the service."

We think, in the first instance, the work involved was not Carrier's normal work but having agreed to help perform it the work then became subect to its collective bargaining agreements. Then, in having it performed, it should normally be performed by those employes whose agreement covered it. However, if Carrier does not elect to do so, but elects to use other of its forces, it must respect their seniority rights in having it performed. Under this construction of the parties' rights we find the claimants were properly entitled to do this work, when performed by track forces on the territory of Section No. 43.

We come then to the question as to the rate at which it should be allowed. The claim is made for overtime. The work was performed on Washington's Birthday and Saturday and Sunday. The latter are rest days for track forces on regular section gangs. Rule 15 (a) requires overtime pay for work performed on these days. We have often announced the following rule:

> "The penalty rate for work lost because it was given to one not entitled to it under the Agreement, is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3193 and 3271." (Award 3277 of this Division.)

See Award 3375.

Considering when Carrier had this work performed, and provisions of Rule 15 (a) of the parties' Agreement, the occupant of the regular position to whom it belonged would have received overtime had he performed the work. Consequently the claim is properly made for time and one-half.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1953.