

Award No. 6331

Docket No. MW-6358

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

- (1) That the Carrier violated the agreement when they assigned extra gang laborers to perform overtime service on the Somerset track section on June 5, 1951, in lieu of the section laborers regularly assigned to the Somerset section;
- (2) That Section Laborers V. S. Newell, J. W. Trimble, W. E. Cook, J. W. Stegal, C. Mills, C. Haynes, T. L. Jasper and B. Jasper be allowed two hours and forty minutes pay each, at their respective time and one-half rates of pay account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On June 5, 1951, Section Foreman C. B. Gooch, who was the regularly assigned foreman on the Carrier's Somerset track section, was on vacation and assistant extra gang foreman L. A. Helton was assigned as acting foreman during foreman Gooch's vacation period.

Acting foreman L. A. Helton resided just a few miles from Somerset and was given permission to go home each evening, with the understanding that extra gang foreman N. D. Helton, whose gang was then camped at Somerset, would protect acting foreman Helton's assignment for the hours outside of the regular assigned work period.

The Carrier's train No. First 52, which passed Somerset at 8:45 P.M. on June 5, 1951, reported Block Signal No. 1612 as displaying a "Stop" indication. Carrier's train No. Second 52 passed Somerset at 9:07 P.M. on June 5, 1951.

Signal Maintainer J. R. Hines was called at 9:05 P.M. on June 5, 1951, advised of the signal failure and instructed to investigate and correct. At approximately 9:25 P.M. he discovered a broken rail which was the cause of the signal failure.

Signal Maintainer Hines was aware that regular section foreman Gooch was on vacation, but he had not been advised as to the identity of the acting

rection, if correction be needed, of this practice. That is persuasive that, for eleven years or more, the employees themselves have not regarded it as a violation of their contract."

In Award 1435, Referee Stone, it was held—

"Conduct may be, frequently is, just as expressive of intention and settled conviction as are words, either spoken or written. Here there is so much uncontradicted evidence of unambiguous conduct by both parties to the issue, evidencing the conclusion which is considered determinative, that no course is open for a judicial pronouncement other than that the claim be denied."

In Award 4349, Referee Robertson, it was held—

"Previous awards of this board have held that where a contract is negotiated and existing practices are not abrogated or changed by its terms, such practices are enforceable to the same extent as provisions of the contract itself. (See Award 2436 and Awards cited therein.)"

Also see Third Division Awards 1811, 3727, 4366, 4593, 4638 and others.

Thus, under Rule 53 of the effective agreement and principles enunciated in the above referred to awards, when considered in the light of past practices, the claim must be denied.

CONCLUSION: In conclusion, Carrier respectively submits that:

(a) The effective Maintenance of Way Agreement was **not** violated on the date here involved when extra gang rather than section laborers, the claimants, were utilized in emergency in removing a broken rail from the northbound main track near Mile Post 161 and replacing it with a rail in serviceable condition.

(b) The claim is **not** valid under the effective Maintenance of Way Agreement here in evidence as it is unsupported by any provision thereof.

(c) Claim is **not** supported by past practices under the agreement in evidence, or by prior awards of the Board.

For the reasons given, the claim should, in all things, be denied and Carrier respectfully requests that the Board so hold.

All relevant facts and arguments involved in this dispute have heretofore been made known to the employees' representatives.

Carrier, in replying to the notice of the Third Division without having seen the petitioner's submission and undertaking to meet the issues raised in handling of the claim on the property, reserves the right, after being apprised of petitioner's allegations of fact, statement of position and argument, to present such additional evidence and written or oral argument as to it may seem appropriate and necessary for a complete presentation of the case.

(Exhibits not reproduced)

OPINION OF BOARD: This claim concerns the request of eight named individuals that the Respondent be found to have violated the effective Agreement when it permitted Extra Gang Laborers to perform overtime services; and that each of them be allowed pay for two hours and forty minutes at the rate of time and one-half. Each of the claimants was regularly assigned to the Section on which the complained of work was performed.

On June 5, 1951, at about 8:54 P.M., it was determined that a block signal had failed. A Signal Maintainer was called and, after investigation by him, it was found that a broken rail was causing the failure, of which fact he so advised the Extra Gang Foreman. At the time in question the regularly assigned Gang Foreman was on vacation and was being relieved by Assistant Gang Foreman L. A. Helton, who, having been granted permission to return home at night, was being protected by his brother, N. D. Helton, between the end of the service on one day and the commencement thereof on the day following. It was N. D. Helton whom the Signal Maintainer contacted concerning the broken rail.

The record indicates that Mr. Helton rather than calling out the regularly assigned section crew, who lived in section houses close by, proceeded a considerable distance away and called out members of his extra gang.

Respondent defends the action of the acting Gang Foreman in calling extra gang laborers rather than the regularly assigned crew, of which claimants here were members, on the grounds that (1) an emergency existed and (2) past and existing custom and practice in this regard.

While the broken rail here was on a main line, we cannot agree that the facts of record justify the Respondent's contention that an emergency condition existed which was grave enough as to preclude the calling out of the regular crew. They were living near by and it would have been possible to get them to the scene of the work in a shorter time than was required to so transport the extra crew that was called to do the work. They were also well acquainted with the location of required tools and material. In addition, there were no trains operated over the rails in question between 9:07 P.M. and 1:44 A.M.

An examination of the Exhibits submitted in the main reveal different circumstances than are here present. No contention is made that the work there done was during the assigned hours of the regular crew or that the regular crew was not available when the performance of the work was required.

Here the regular crew was available, rested, and readily accessible to the location of the broken rail and their number was sufficiently large to meet the needs of the occasion.

Rule 4 (a) of the effective Agreement restricts seniority of Laborers on Section Gangs to their respective gangs. Inasmuch as it is clear that seniority once bestowed upon an employe gives to such employe the right (emergencies and availability excepted) to perform certain work, we here find that the claimants, being members of the regularly assigned gang, had the prior right to the work in question; and, being available, should have been called rather than the Extra Gang; and the Respondent, in failing to so call them, violated the effective Agreement.

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 18th day of September, 1953.