Award No. 6627
Docket No. MW-6637

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

(1) That the Carrier violated the agreement when it assigned forces of Extra Gang 4 and/or Extra Gang 10 to perform certain work on Section No. 17 on Monday, May 14, 1951 and on subsequent Mondays thereto in lieu of the forces regularly assigned to and holding seniority on Section No. 17;

(2) That Section Foreman Steve Carone and the following section laborers, namely, Modesto Martinez, Juan V. Ramirez, Jose Alaniz, Joe Lopez, Ysidro Nieto, Nicholas Juarez, Paul Juarez, Jose Guevara, Jessie Vasquez, Victor J. Esquivel, Ed Hamilton, Agustin G. Gonzales, Antonio Vingochea, Jose Mejia, Jose Aguilera, Antonio Benuelos, Santiago Elizarrarez, and Porfirio Venturo be allowed eight (8) hours pay each at their respective time and one-half rates for each day in which the agreement was violated as referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimants specified in Part (2) of the Statement of Claim are regularly assigned to work in the Carrier's Taylor Yard at Los Angeles, California, on the section territory identified as Section No. 17. They were regularly assigned to work Tuesdays through Saturdays and their regularly assigned rest days were Sundays and Mondays.

On Mondays, May 14, 21, and 28, 1951, and on Mondays subsequent thereto, the Carrier assigned Extra Gang No. 4 and/or Extra Gang No. 10, to perform work on Section No. 17, consisting primarily of relaying rail.

Although each of the Claimants were willing and available to perform the necessary work on their regular assigned territory on the dates herein involved, the Carrier made no attempt to call or notify them to perform the work in dispute.

Claim was accordingly filed requesting that each of the Claimants be allowed eight hours' pay at their respective time and one-half rates for each Monday on which an extra gang was permitted and/or required to perform work on Section No. 17, in lieu of assigning the work to the employes regularly assigned to and holding seniority on Section No. 17.

of their regularly assigned work week (Monday through Friday) and the question of overtime is not involved. This is strictly a case in which the carrier used extra gang employes at straight time rate on assigned work days for work properly performed by extra gang employes.

The petitioner is simply attempting to secure through an award of this Division an agreement provision over and above that which was agreed to by the parties. Inasmuch as the petitioner's position cannot be sustaind by any rule of the agreement, but on the contrary the carrier's action was clearly contemplated by the agreement and is in conformity with long-standing practice thereunder, the carrier respectfully submits that, within the meaning of the Railway Labor Act, the instant claim involves request for change in agreement which is beyond the purview of this Board. To accept petitioner's position in this docket would definitely be tantamount to writing into the agreement a provision which does not appear therein and was never intended by the parties.

Even if there were any merit to the claim submitted, which the carrier categorically denies, there would still be no basis for claim for time and one-half. Rule 26 provides for time and one-half in the case of "* * * **work** in excess of 40 straight time hours in any work week * * *", or in the case of "* * * employes **worked** more than five days in a work week * * *". Rule 27 provides for payment of time and one-half to "employes who are required to **work** on their assigned rest days * *". It will be noted that time and one-half compensation is accorded only in the case of an employe working more than five days or more than 40 hours in a work week or in the case of an employe working on his assigned rest day. The claimants did not work more than five days or more than 40 hours in any work week, nor did they work on their assigned rest day; and accordingly, even if there were any merit to the claim presented (which the carrier denies) claim for time and one-half is not supported by the agreement and should be denied.

CONCLUSION

The carrier asserts that it has conclusively established that the claim in this docket is without basis or merit and, therefore, respectfully submits that it is incumbent upon this Division to deny the claim.

All data herein submitted have been presented to the duly authorized representative of the employes and are made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants were members of Section Gang 17, regularly assigned to work in Taylor Yard, Los Angeles, Tuesday through Saturday, with Sunday and Monday as rest days. Carrier also had two Extra Gangs, 4 and 10, regularly assigned to the Los Angeles Division (which included Taylor Yard), Monday through Friday, with Saturday and Sunday as rest days.

On the days in question, which were Mondays, Carrier assigned either Extra Gang 4 or 10 to perform service in Taylor Yard, as a part of the regular week-day assignment of the Extra Gang so utilized. The members of Section Gang 17 were available on said days but were not called. Claimants demand that they be compensated at their time and one-half rates for eight hours for each of said Mondays that either of said Extra Gangs performed work on said Section 17.

The facts are meager as to the functions performed by the Extra Gangs in Taylor Yard. The Carrier merely says that said Extra Gangs are generally required to work on large relay jobs; that they were used on Section 17 for the purposes of performing **the major portion** of a large scale program of rail renewal **over and above maintenance ordinarily performed** by the

Claimants, commencing in the month of March, 1951, and extending on through the remainder of that year, and that this was in accordance with well recognized and long established practice on the property.

However, the matter in controversy is narrowed somewhat by a letter written by the Carrier's Division Superintendent to the Organization's Division Chairman declining the claim while it was under consideration on the property. In that letter the Division Superintendent said that, "extra gangs may engage in any form of track maintenance, including tie installation, rail changes, or relay jobs." He added that he was declining the claim because Claimants "lost no time, worked their regular assigned hours and there is nothing in the agreement that requires us to call them on overtime or single time basis because the extra gangs were working on their unassigned days."

From the quoted language of the Division Superintendent's letter of declination we deduce that it is the Carrier's contention that an Extra Gang may be employed on any kind of track maintenance work in territory regularly assigned to a Section Gang, on the rest days of the members of such Section Gang, without incurring any liability to them. This contention is predicated on the assumption of a long continued practice on this railroad and the absence of any provision of the Agreement to the contrary.

The Organization denies the existence of any such long continued practice and on the basis of the preponderance of the evidence we are of the opinion that the Carrier has failed to discharge the burden resting on it to establish such. The practice of using Extra Gangs on sections for relay work appears to be well established, but we find no evidence justifying the conclusion that there has been a practice of using Extra Gangs for maintenance work on the rest days of the regularly assigned Section Crews.

There is in the effective Agreement a provision (Rule 2) that provides that, "Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad." Rules of this character have been construed to be applicable to overtime work. Awards 2717, 2341, 2426, and 2490. Even in the absence of such a rule, it has been held that employes are entitled to perform the overtime work that may accrue on their assigned positions. Awards 4531, 2716, 2994, and 4393.

We find no basis for a conflict of functions or rights by reason of the fact that members of Extra Gangs enjoy seniority in their respective districts. Such rights place no limitations or restrictions on the seniority rights of the members of Section Gangs with respect to maintenance work in their sections. As was observed in Award 5261, "it is recognized that . . . when a large scale project is undertaken, the regularly assigned section crew **may be augmented** by extra crews," and it may be observed that such a merger of functions and duties does no violence to the seniority rights of the members of either group.

Inasmuch as the duties of the members of Section Gangs and Extra Gangs are not spelled out with particularity in the Agreement, and that both groups enjoy seniority rights which they deem valuable, we think it highly important that nothing be said that would afford a basis for either group to encroach into the field of the other. Proper lines of demarcation can be preserved if it is held, as we do, that all maintenance work, proper, in the section ordinarily belongs to the regularly assigned Section Gang; that Extra Gangs may, however, be used to augment the forces of the Section Gang when such things as the volume of the work, an emergency, or heavy construction requires; but that Extra Gangs may not be used in the absence of the regularly assigned Section Gangs on their rest days if they are available and willing to work.

Carrier further contends that the part of the claim which is for violations of the Agreement on Mondays subsequent to Monday, May 14, 1951,

is too vague and indefinite for enforcement. No authority is cited in support of this contention and, in our opinion, it has no merit.

Finally, the Employes ask to be allowed pay at time and one-half for each of the specified days when they were not called for work and on which an Extra Gang performed service on Section 17. While there are conflicts among the awards dealing with this subject, those most favorable to the Employes go no further than to hold that the penalty for work lost because it was given to one not entitled to it under the Agreement is the rate that the occupant of the regular position to whom it belonged would have received if he had performed the work. The confronting situation does not meet the requirements of this formula. We have not held that the Extra Gang performed work that the regular Section Crew was entitled to perform, but rather that the Extra Gang was not entitled to work on Section 17 without the Section Crew also working or having an opportunity to work. The Section Crew had no absolute right, under all circumstances, to work on its rest days, and we cannot say from the record that the Extra Gang performed work that the Section Crew would have performed had both crews worked. In any event, the imposition of a punitive penalty in situations where the recipient does not work is in the nature of a coercive exaction, designed to discourage violations of the Agreement. In imposing such penalties this Board is entitled to exercise some discretion and in the instant case we are inclined to the view that sustaining the claim with a direction that the Claimants be compensated at their pro rata rates of pay for the days when an Extra Gang worked on Section 17 is sufficient to accomplish the desired end.

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 disptue involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained at the applicable pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1954.

DISSENT TO AWARD 6627, DOCKET MW-6637

For the reason that the majority have here failed to follow universal principles of contractual construction, this Award falls into harmful error.

First, the facts are not meager as to the functions performed by the two extra gangs in Taylor Yard. It is stated as a fact by the Employes that the

work "consisted primarily of relaying rail." It is stated as a fact by the Carrier that the work "consisted of rail renewal work."

Having found that both groups of employes (section gang and extra gang) hold seniority rights on the territory where this work was performed and the Agreement being silent as to the demarcation line between the two groups, determination of the seniority rights of each group to this work should have been made on the basis of the established practice on the property (see Awards 4700 and 4803).

While conceding that the practice of using Extra Gangs on rail relay work "appears to be well established," the majority then fall into error in attempting to distinguish between the practice covering that work and the practice covering maintenance work on rest days of the regularly assigned section crews, notwithstanding there is agreement between the parties that the work involved was rail relay or renewal work and not maintenance work.

The Award is clearly in error. We dissent.

/s/ J. E. Kemp

/s/ C. P. Dugan

/s/ E. T. Horsley

/s/ R. M. Butler

/s/ W. H. Castle