

Award No. 6726
Docket No. MW-6739

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
GULF, MOBILE AND OHIO RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it assigned the work of patrolling and watching tracks, right of way, and bridges during October and November, 1952 to individuals holding no seniority under the effective Agreement;

(2) The two senior section laborers on each of the section territories on which the violation referred to in part (1) of this claim occurred, be each allowed pay at their respective time and one half rates for an equal proportionate share of the total man hours consumed by other forces in performing the patrolling and watching work on their respective sections.

NOTE: Claimants and locations herein involved have been identified in an attachment to letter dated November 24, 1952 addressed to Mr. T. A. Steel, Contract Counselor by General Chairman M. C. Plunk.

EMPLOYEES' STATEMENT OF FACTS: The Track forces on this Carrier's property are generally required to patrol their assigned territories at least once during their assigned work week, for the purpose of observing the tracks, right of way, bridges, buildings, telephone and telegraph lines, right of way fences, etc., for any condition which may endanger or adversely affect the Carrier's property or its operations.

Additional patrol tours are required by track forces both within and outside of assigned work periods, in instances where there is an increased possibility of potential damage to the Carrier's property, such as storms, excessive rainfall, sleet, fire hazards, etc.

Account of a period of extreme drought during the summer of 1952, the Carrier became concerned with the increased fire hazards inherent thereto, and on October 29, 1952, instructions were issued to various section foremen to arrange for patrol and watching services to be performed twenty-four hours daily.

From one to three days later, some of the track forces were relieved of the work of patrolling and watching except during the hours of their respective regular assignments.

Following this is a list of the employees that the agreement covers. It will be noticed that all of the employees named are maintenance employees. They are not employees engaged in prevention or protection of the property against fires as are the employees in the Special Agents Department.

The Interstate Commerce Commission classification of the Maintenance of Way and Structures Worker Group provides that:

"This Group includes positions in which the preponderant duties of incumbents are to perform or supervise the performance of unskilled or semi-skilled manual labor in connection with the construction and maintenance of roadway, tracks, bridges, buildings, fences, signals, telegraph and telephone lines, water service facilities; and similar work."

The employees in the Special Agents Department did not perform, nor were they expected to perform, any of the duties of a Maintenance of Way and Structures Department worker. They did not perform or supervise any manual labor in connection with the construction or maintenance of the facilities. They only performed duties in connection with prevention of fires and protection of the property.

The Employees have offered no evidence that the employees in the Special Agents Department during the period of the claim performed, or were expected to perform, any duties in connection with maintenance or construction of roadway, tracks, bridges, buildings, etc. Neither have the Employees offered any proof that Maintenance of Way and Structures Department employees have the exclusive right to police the property to prevent fires.

For the reasons herein stated, Carrier respectfully requests that the claim be denied.

This claim has been handled in accordance with the provisions of the Railway Labor Act, as amended.

(Exhibits not reproduced.)

OPINION OF BOARD: Approximately fifty employees were added to the Special Agent Department (Police Department) by Carrier during a period of severe drought. The period of employment ran from October 30 to November 9, 1952, when a general rainfall alleviated the condition and the services complained of were terminated. These men were used to patrol not only the right of way but to caution trespassers, as well as hunters on adjacent lands. Their duty was primarily to report fires and not to fight them, giving particular protection to some 241 bridges, many of wooden construction. The claims concern the Southern Division. No agreement exists between employees of the Special Agent Department and this Carrier on this Division. The additional forces were hired at 75 cents per hour which is considerably below the laborers' rate under the Maintenance of Way Agreement.

The action complained of by the Employees was not general throughout Carrier's operations. In some districts, Maintenance of Way employees performed the work exclusively. October 29, 1952, instructions were issued to various section foremen to arrange for patrol and watching service to be performed around-the-clock but soon after, these forces were replaced on night and rest day periods by these new employees.

The Employees contend that the work of patrolling and watching tracks, right of way, bridges, etc., has been traditionally and customarily assigned to and performed by the Carrier's track forces and was so at the time of the negotiation and execution of the instant Agreement. Further, that track forces are generally required to burn right of way each fall, to cut fire guards and all other similar work in the field of fire protection on Carrier's right of way as a practice of long standing. These allegations are supported by letter

Exhibits. They contend that the disputed work assignments here involved are nothing more than individual contracts with a number of individuals for performance of work inherent to a section laborer's position. Further, that the work in question did not entail the exercise of police authority and the occupants of the positions were not deputized.

The Carrier asserts that it is the work of all classes of employees to be on the alert for fires or for any other conditions that might endanger the Company's property. It further alleges that the essential service of the Special Agents' Department is to protect Carrier's property. It points to the fact that it was employees of this Department who were used to protect bridges against saboteurs during World War II. Carrier contends that the Maintenance of Way employees do not have the exclusive right to perform subject duties and that Claimants were fully employed during the period.

While concerning ice and water and not fire, and tracks rather than bridges, Award 1366, decided by this Division without referee, is of some pertinency to the issue here presented. There the question presented was whether the services required constituted watchmen's services, as designated by the Carrier, or services as track laborers, as contended by the Employees. The Division found that the work was that of track laborers.

Practice, which survived rule revision upon the lines of this Carrier, would seem to have vested the work in question within the general scope of the Maintenance of Way Agreement rather than within the scope of the Special Agents' Department. That is the narrow question now before us. This is not to say that the work is exclusively that of the claiming Organization as the practice itself recognizes that signal, train, engine and other forces perform the work of safeguarding Company property, and particularly the right of way, as incidental to their regular assignments. But it must be so confined and not become their sole function for otherwise infringement upon the Scope Rule, as interpreted by a strong showing of practice, results. While the need and means adopted to solve it were novel, there is a close relationship between the work required and that usually performed by Maintenance of Way forces.

The situation before us is dissimilar to that of guarding bridges against sabotage during World War II. There the function performed by the Special Agents' Division was essentially that of policing rather than patrolling, with authority to arrest, work clearly beyond the ordinary duties of section forces either by custom or local practice.

While the docket reflects that the primary task required of the additional Special Agents' force was to patrol the right of way to discover and report fires, there is some evidence adduced by the Carrier to indicate that they also called upon adjoining property owners to solicit their interest and aid in guarding against fires. To that extent, and it appears minor in respect to the whole, the work could be properly that of a special agent rather than that of a section laborer. We mention this merely to avoid misunderstanding if the need should reoccur.

It avails the Carrier nothing, as we said in Award 5078, that Claimants were employed during the period in question. Rule 7 (k) of the effective Agreement provides:

"Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."

See also Award 6063. Because the work is outside an employee's regular hours of assignment does not grant the Carrier the right to assign the work to persons not covered by the Agreement. Award 4933.

We find that Maintenance of Way employes were improperly denied opportunity for work and overtime by the actions of this Carrier. The claims, while properly asserted by identifiable Claimants, however, are sustainable only at the pro rata rate.

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 violated in accordance with Opinion.

AWARD

Claims sustained, in accordance with Opinion and Findings, but at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 21st day of July, 1954.