Award No. 7062
Docket No. MW-6806

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, 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 Agreement when it failed to call and use Bridge and Building Mechanic W. J. Walls to perform ten (10) hours overtime service on Saturday, March 20, 1952, and in lieu thereof used a junior Bridge and Building Mechanic;

(2) Bridge and Building Mechanic W. J. Walls be allowed ten (10) hours' pay at the applicable time and one-half rate account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On March 29, 1952, Bridge and Building Mechanics W. J. Walls and E. A. Guinn were members of the Bridge and Building gang then located at Centerville, Iowa. The crew is regularly assigned to a work week of Monday through Friday, with Saturdays and Sundays designated as rest days.

This Bridge and Building gang is furnished a highway truck for use in connection with its customary Bridge and Building work.

On Saturday, March 29, 1952, at 4:00 A.M., Mr. Guinn was called and used to drive this truck in transporting Mechanical Department employes and equipment to a derailment at Glenwood Springs. He returned to Centerville at 2:00 P.M. For this service Mr. Guinn was paid for a total of ten hours at the Bridge and Building Mechanic's time and one-half rate of pay.

Mr. Walls is senior to Mr. Guinn as a Bridge and Building Mechanic, and was available and qualified to perform the work assigned to Mr. Guinn.

Claim was filed in behalf of Bridge and Building Mechanic W. J. Walls requesting that he be allowed ten hours' pay at punitive rate.

Claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated September 1, 1949 (rules) and December 1, 1952 (rates of pay), and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

OPINION OF BOARD: On Saturday, March 29, 1952, Carrier used B&B Mechanic E. A. Guinn to perform overtime work for a period of 10 hours. Claimant W. J. Walls, a B&B Mechanic who was senior to Guinn, claims that he should have been used and demands that he should be paid on account of the violation.

The record shows that Carrier maintains a highway truck in the northeast section of the Hannibal Division where it is used as needed in the Water Service, B&B, Mechanical, Track, and Store Departments. The record is clear that no classification of truck driver exists in these departments and that the practice has been to designate a truck driver from the class of employes making use of the truck. In the instant case, Carrier selected a B&B Mechanic to drive the truck to the scene of a derailment on an overtime basis. One Gaines was ordinarily used to drive the truck. When Gaines was not available, Guinn was ordinarily used. The day in question, Gaines was not available and the Carrier called Guinn for the overtime service. As we have stated, Walls claims the work on account of the fact that he was senior to Guinn.

We are in accord with the contention of the Carrier that the driving of a truck under the Agreement with which we are here dealing can properly be assigned to any member of the gang making use of it. The question to be resolved is: When Carrier elects to call an employe for overtime work from an established seniority group, is it required to call the senior qualified man?

It appears that Carrier contended on this property, among other things, that Claimant was not qualified to operate the truck. This condition appears to have been abandoned before this Board. In any event, the driving of a truck is not ordinarily a type of work that any employe could not perform. Claimant was a licensed automobile operator. The record shows he had driven the truck in a satisfactory manner. In addition thereto, Carrier had refused all efforts of the Organization to have truck drivers classed as such. Such refusal by the Carrier is a recognition on its part that the driving of trucks was a part of the duties incidental to a B&B Mechanic's position. It would appear, therefore, that the operation of the truck, under the facts disclosed by this record, was considered as incidental to the duties of a B&B Mechanic. It was work which could properly be required of any qualified B&B Mechanic in the gang from which Guinn was called. Under Rule 40 (a), current Agreement, the senior available qualified B&B Mechanic was entitled to perform the extra work here involved. See, also, Awards 2341, 4393, 5425, 5831, 5939.

Carrier insists that the work was not B&B work, but was in fact Mechanical Department work. We fail to see how this is important here. The Carrier elected to designate one holding seniority as a B&B Mechanic to operate the truck on an overtime basis. It was required to designate the senior qualified employe from the class or craft from which the employe was called.

The Carrier takes the position that Award 2341 is fallacious in its reasoning where it states:

> "We think that the Agreement properly interpreted in the spirit in which it was written requires the Carrier, when it is obliged to call extra men from an established class of employes, to take notice of their seniority rights. And this is true even if the Carrier was not required to call anyone of that class of employes at all."

The Carrier argues that the truck was used in Mechanical Department work and that Guinn, the employe called to perform the overtime work had no right to the work because he had seniority only as a B&B Mechanic. It contends, also, that Claimant had no right to the work for the same reason, and therefore the claim is without foundation because one may not claim work he has no right to perform. This leads us to the conclusion by Carrier's own admissions, that it used a junior employe to perform work which neither the senior or junior employe was entitled to perform. We submit that this is not a valid defense to the claim. Under the facts as asserted by the Car-

rier, the Organization could have filed a claim for the Mechanical Department employe deprived of the work or it could file a claim based on the violation of the seniority rights of this Claimant as it did. Certainly either claim is not defeated because the Carrier violated two rules instead of one. There can be but one recovery, but the Organization and not the Carrier may elect which violation to process. In the present case it elected to assert the violation of the seniority rights of this Claimant. This is had the right to do. We hold that Claimant's seniority rights were violated under Rule 40 (a) and the rule announced in Award 2341. We think that award is sound in principle and we adhere to it. A sustaining award is in order. See Awards 5029, 5604, 5945, 6158.

Claimant seeks the time and one-half rate for the time lost. Pay for time lost is the pro rata rate under many recent awards of this Division. The Organization relies upon a statement appearing in several awards of this Board to sustain the time and one-half rate to the effect that "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." See Awards 3193, 3271, 6306. These awards misconstrue the intent of the rule announced. The rule means: The penalty rate for work lost because it was given to one not entitled to it is the rate which the occupant of the regular position to whom it belonged would have received if he had performed it as a part of his regular assignment. Claimant is entitled to be compensated for the work he lost 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.

AWARD

Claim sustained 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 22nd day of July, 1955.