

Award No. 11878
Docket No. MW-11460

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

William N. Christian, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, ROCK ISLAND AND PACIFIC
RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when, in lieu of calling and using Bridge and Building Mechanics W. R. Crawford, Donald Fisher and James Riley to perform overtime service from 8:00 A. M. to 5:00 P. M. on Sunday, December 15, 1957 at Bridge No. 4353, it called and used junior Bridge and Building employees.

(2) Bridge and Building Mechanics W. R. Crawford, Donald Fisher and James Riley each be allowed seven hours' pay at their respective time and one-half rates because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Claimants have established and hold seniority as Bridge and Building Mechanics and were regularly employed on a Bridge and Building Gang on the Des Moines Division under the supervision of Bridge and Building Foreman Glen Johnson.

They were regularly assigned to a 40-hour week, consisting of five days, eight hours each, Monday through Friday, with Saturdays and Sundays as designated rest days.

On Saturday, December 14, 1957, a derailment occurred on Bridge No. 4353 on the Des Moines Division. At 8:00 A. M. on Sunday, December 15, 1957, the Carrier called and used a number of Bridge and Building employees to repair the damage to Bridge No. 4353 occasioned by the aforementioned derailment. These employees worked from 8:00 A. M. to 5:00 P. M. and were paid for services rendered at their respective time and one-half rates.

The claimants, who were senior to the Bridge and Building Mechanics used, were not called or notified to perform overtime services at 8:00 A. M. on the rest day in question, although at that time they were equally available and willing to perform the work as were the junior employees who were used.

And Claimant Fisher claimed:

"Hours worked by junior men. Those hours being 8:30 A.M. 'till 2:30 P.M."

We contend also, that as Claimant Riley was not available when Carrier endeavored to contact him to accompany Claimants Crawford and Fisher, that there can be no merit to his claim.

It is our position that this was an emergency requiring immediate action and on basis of the facts there could be no violation of the Agreement on the part of the Carrier. In any event, the Case is closed under the provisions of Article V (b) of the August 21, 1954 Agreement.

In conclusion, and without prejudice to our above position, we submit that as the claimants performed no work 8:30 A.M. to 2:30 P.M., they are not entitled to penalty pay, even if claim had merit, which we deny, as your Board has ruled many, many times that penalty, if any, for work not performed is different from that actually performed.

For the above reasons, we respectfully request your Honorable Board to deny the claim of the employees.

It is hereby affirmed that all of the foregoing is, in substance, known to the Organization's representatives and by this reference is made a part hereof.

OPINION OF BOARD: Exhibits A and B attached to Employes' rebuttal submission are letters dated prior to the ex parte submissions. Their late offering was untimely and in violation of that part of Circular No. 1 of this Board which requires the petitioner to set forth in the original submission:

"... all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employes' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute."

Award 9552 (Bernstein).

The content and distribution of District Chairman Craw's letter of March 31, 1958, complies substantially with the notice requirement of Article V, 1(b) of the applicable August 21, 1954 National Agreement. Carrier's plea to the jurisdiction is without merit. Award 8564, where no notice was given is distinguished.

Carrier's asserted defense to the claim is justification based on an emergency. Such emergency as may have existed in this particular instance, so far as is shown by the record, did not necessitate or justify Carrier's failure to recognize the Claimants' seniority rights.

The claim as filed covers the period from 8:00 A.M. to 5:00 P.M. on Sunday, December 15, 1957; the facts support the claim only for the period from 8:30 A.M. to 2:30 P.M. on that day. The proper rates of compensation

are Claimants' respective time and one-half rates. Rule 25; Award 11333 (Coburn).

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 Employees involved in this dispute are respectively Carrier and Employees 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 is sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1963.

CARRIER MEMBERS' DISSENT TO AWARD 11878 DOCKET MW-11460

The award is correct insofar as it excludes letters attached to the rebuttal submission and allowed claim for period 8:30 A.M. to 2:30 P.M. instead of 8:00 A.M. to 5 P.M.

The existence of an emergency was undisputed; therefore, the sustaining of this claim is contrary to the vast weight of authority that carrier may, under emergency conditions, use such employees as good judgment dictates. Award 11241 (Moore).

The organization attempted to support its position with a citation of Awards 2341, 4200, 4393, 4531, 6831, 2716, 2717, 2994, 5939, 105, 6627, 6306, none of which were in point for the simple reason none dealt with an emergency nor did carrier rely on emergency conditions as a defense. Award 4531 supports carrier's position rather than the organization as reflected by this statement found in the opinion:

"We find that claimants had the senior right to this work, and, being available and the work not being of an emergency character, should have been called."

The allowance of time and one-half rate instead of straight time for work not performed is likewise contrary to the overwhelming weight of authority on this and other Divisions of this Board. For example, see Award 4244 (Carter):

Rule 25 provides: " * * * employees who are required to work * * * shall be paid at the rate of time and one-half for time worked."

Before coming under the purview of this rule, claimants must render some service which they failed to do in this case.

For these and other reasons, we dissent.

W. M. Roberts
G. L. Naylor
R. E. Black
W. F. Euker
R. A. DeRossett