

Award No. 13720

Docket No. MW-14913

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ILLINOIS TERMINAL RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when, instead of calling and using a truck driver to perform overtime truck driving service on January 6 and February 5, 1963, it called and used section laborers to perform such overtime truck driving service.

(2) Truck Driver Tunnie Hitchcock be allowed twelve (12) hours' pay at his time and one-half rate because of the violations referred to in Part (1) of this claim."

EMPLOYEES' STATEMENT OF FACTS: Mr. Walter Collins is the regularly assigned foreman of Gang No. 17. Truck Driver William Pratt is assigned to work under the supervision of Foreman Collins.

For an eight hour period on Sunday, January 6, 1963 and from 6 P. M. to 10 P. M. on Tuesday, February 5, 1963, the Carrier required the services of a foreman and of a truck driver on the territory assigned to Foreman Collins. The Carrier allegedly could not locate Foreman Collins. It called and used Truck Driver Pratt to perform the work of the foreman's position. Mr. Pratt called Section Laborer H. Johnson to perform the work of a truck driver on January 6, 1963 and Section Laborer C. B. White to perform the work of a truck driver on February 5, 1963. Neither of these section laborers held seniority rights as a truck driver. Mr. Johnson received eight hours' pay and Mr. White received four hours' pay at the truck driver's time and one-half rate for the work they performed.

The claimant has established and holds seniority rights as a truck driver on the seniority district where the subject work was performed. He was available, willing and able to perform the work of his rank and would have done so had the Carrier assigned him to it.

Claim was timely and properly presented and handled at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated

The organization has not, in handling the matter on the property, advanced any rule violation but have just made a general allegation that seniority rights of claimant has been violated. We submit that since the work in question was not on the section to which claimant was assigned as truck driver, there has been no violation of his seniority rights in view of the established practice on this Carrier of using employes on their assigned section for overtime work, and your Board should so find. Should this claim be sustained, your Board should limit the findings to straight time rate as no work was performed by claimant, and, therefore, he is not entitled to premium pay. See Third Division Award No. 8568.

OPINION OF BOARD: On two occasions Carrier required the services of a foreman and of a truck driver on territory assigned to Gang No. 17. The regularly assigned foreman could not be located and the Carrier called and utilized as foreman Mr. Pratt, the regularly assigned truck driver of Gang No. 17, who then called and utilized section laborers to perform the work of truck driver. The section laborers were paid time and a half at the truck driver's rate for the services performed.

Claimant held seniority rights as a truck driver on the seniority district where the work was performed.

Rule 4 (g) reads as follows:

"Senior available employes will be given preference in the performance of overtime work."

Rule 13 (d) reads as follows:

"(d) Seniority rights of section laborers as such, will be restricted to their respective gangs, except, when force is reduced or sections abolished, laborers affected may displace laborers junior in service on their seniority district, and such laborers may return to gangs from which displaced, when openings occur or sections are re-instated, in order of their seniority, provided such rights are exercised within ten (10) days from date forces are restored, of which they will be promptly advised."

By virtue of these Rules, all job classifications enjoy district-wide seniority rights to overtime except section laborers who have only gang-wide seniority. While the Agreement does not list truck driver as a distinct job classification, it is clear that it is not deemed a section laborer position. It is paid at a higher rate and is, therefore, a higher and distinct classification.

Carrier defends by alleging past practice and by asserting that emergency situations existed. It offered no evidence, however, as to either. We have held on many occasions that mere assertion is not proof. Award 12942. Carrier had the burden of proving its affirmative defenses.

Carrier relies on a number of awards which hold that a Carrier's freedom of choice in filling a temporary vacancy should not be restricted by requiring it to follow strict seniority. It cited Award No. 11030 and others. Whatever their merit, it does not appear that the Carriers in those cases were faced with the unambiguous requirements of rules similar to Rules 4 (g) and 13 (d) or the absence of any evidence that an emergency existed.

Contract obligations which the Carrier may find to be burdensome may

not be disregarded. To permit it would be tantamount to writing a new rule, a caution which Carriers have frequently urged upon this Board when an Organization sought to change a clear rule. The Agreement in force on this property required that district seniority be followed.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 Carrier violated the Agreement.

AWARD

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 9th day of July 1965.