

Award No. 13836
Docket No. MW-14788

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

FORT WORTH AND DENVER RAILWAY COMPANY

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

(1) The Carrier violated the agreement when it called two section laborers to perform overtime work on December 14, 15, 17, 18, 19, 20, 21, 22 and 23, 1962 and failed to call Section Foreman H. P. Lockeby.

(2) Section Foreman H. P. Lockeby now be paid for nine (9) calls at the section foreman's rate of pay account of the violation referred to in Part (1) of this claim."

EMPLOYEES' STATEMENT OF FACTS: On December 14, 15, 17, 18, 19, 20, 21, 22 and 23, 1962, Telegraph Operator L. C. Beverly called Section Laborers J. H. Welling and Melvin to perform overtime work unloading mail and baggage from night passenger trains at Delhart, Texas. For this work, each section laborer was paid a call at the section laborer's time and one-half rate for each of the aforementioned dates. The section laborers were supervised and directed by Telegraph Operator Beverly while performing this work.

The claimant is the regularly assigned foreman of the section gang headquartered at Delhart, Texas. Section Laborers Welling and Roach are regularly assigned to work under the claimant's supervision and direction. The claimant was available, willing and able to call, supervise, direct and assist the section laborers in the performance of this work and would have done so had the Carrier called him. Instead, the Carrier specifically advised Operator Beverly not to call the claimant and the claimant was informed of this fact when Operator Beverly reported the section laborer's time in a communication reading:

when the laborers were used to handle mail and baggage outside their regularly assigned hours.

Because the Union has still not informed Carrier what provision of the agreement has been allegedly violated, it is patent that Carrier is in a quandary as to how to defend against this ridiculous claim. Certainly, if a violation of some portion of the collective agreement allegedly was committed, it would seem that the Union would have the courtesy to at least tell the Carrier what it was supposed to have violated while the claim is being handled on the property. This is particularly true since the Carrier in this case pleaded with the Union to advise what rule Carrier was accused of violating (see Carrier's Exhibit No. 1). It is axiomatic, however, that the burden is not on the Carrier to show that its action is authorized by some provision of the agreement; rather the burden is on the complaining employee to show that the action violates some part of the agreement. See Third Division Award 10950. Since Petitioner has not seen fit to tell Carrier what rule was allegedly violated during the six-month period the claim was being handled on the property, it is obvious the Union has no basis in the agreement to support the claim, and cannot therefore meet the burden required of the Union to prove that any violation exists in this case. See Third Division Award 10067.

In summary, it must be remembered that:

1. Two section laborers were used outside their regular assigned hours to assist station forces in loading and unloading mail and baggage at the Dalhart station during the Christmas season.
2. No supervision was required.
3. No rule has ever been cited by Petitioner to support this unwarranted claim.
4. The Third Division has consistently denied identical claims where employees were worked on an overtime basis without supervision, as noted in the Awards cited herein, and it must also deny this claim.

With these facts before it the Board has no alternative but to deny the claim in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: On December 14, 15, 17, 18, 19, 20, 21, 22 and 23, 1962, Carrier called and used two regularly assigned section laborers at Delhart, Texas, to assist in the loading and unloading of mail and baggage from a night passenger train. They were compensated at their respective overtime rate of pay since this work was performed outside of their regular, assigned hours. Claimant, the Section Foreman who is regularly assigned as their superior, asserts that he had the right to supervise the work performed when section laborers under his jurisdiction were utilized to perform overtime work.

Carrier denies any liability on the theory that the work performed was not within the scope of work normally performed by Maintenance of Way Employees and that no supervision was involved or provided by any other employee.

The record is barren of any evidence by the Organization that supervision was required or given.

Since we find no evidence within the record to support the right of the Foreman to be called to supervise his laborers when doing work other than that normally under his jurisdiction, we are in agreement with the ruling of this Board in Award 11441, as follows:

"We have consistently held that unless otherwise specifically provided in the Agreement, Carrier has the sole and exclusive right to determine when and under what circumstances a foreman is assigned to supervise a group of employees."

This claim is, therefore, denied.

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September 1965.