

Award No. 13946
Docket No. MW-14108

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE DELAWARE AND HUDSON RAILROAD CORP.

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

(1) The Carrier violated the Agreement when it failed to call Crane Operator Edward T. Kwazneski to perform overtime work on Saturday, September 9, 1961.

(2) The Carrier now allow Mr. Kwazneski nine and one-half (9½) hours' pay at the Crane Operator's time and one-half rate of pay because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On Saturday, September 9, 1961, the Carrier called Crane Operator David Cortese to perform the work of unloading cinders at Saratoga Springs.

Mr. Cortese worked from 6:00 A. M. to 3:30 P. M. on the above mentioned date and was compensated for this work in the amount of nine and one-half (9½) hours at the crane operator's time and one-half rate of pay.

The claimant has established and holds seniority as a crane operator as of April 14, 1958. Mr. Cortese holds seniority as a crane operator as of October 26, 1960. Both the claimant and Mr. Cortese were headquartered at Colonie. The claimant was available to perform the subject work and would have done so had he been called by the Carrier.

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 November 15, 1943, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1(a) reads:

"Seniority begins on the date the employe last entered the service in the Maintenance of Way Department.

OPINION OF BOARD: In September 1961 Crane Operators E. Kwazneski and D. Cortese were assigned to Gang No. 1, headquartered at Colonie, New York. Kwazneski was the senior man. During the period September 6 to 15 Kwazneski operated a crane at Gansevoort, New York which was used in laying welded rail. During this same period Cortese operated a crane at Saratoga, New York which was used in unloading cinders. Both men worked Monday to Friday, with Saturday and Sunday rest days.

On Saturday, September 9, Carrier utilized Cortese, on an overtime basis, to operate the crane at Saratoga to unload cinders. Petitioner claims that Kwazneski, the senior man, should have been offered this work.

Rule 15½ (j) of the applicable Agreement provides:

“Work on Unassigned Days: 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.”

The key question here is which Crane Operator, Kwazneski or Cortese, was “the regular employee” entitled to the September 9 work.

The evidence shows that crane operators on this property are not customarily attached to any specific work group nor are they permanently attached to any particular crane. Rather, they are assigned to a designated headquarters in order that their skills may be utilized as needed in the general area of such headquarters. (Management asserts, additionally, that despite this assignment to a given headquarters, there is no limit to the area in which an employee may be given work.) It so happens that on September 6 Crane Operators Kwazneski and Cortese each received specific assignments, to work at different locations. There is nothing in the record to indicate, however, that such work assignments were in any way based on their relative seniority standing. Presumably, Carrier could have used either man on either job, and even switched them around later(unless such action was otherwise barred).

In light of these facts it is fair to conclude that Kwazneski was “the regular employee” entitled to have received the September 9 assignment since he was the senior Crane Operator available to perform crane operator’s duties in the area on that unassigned day.

In some prior cases we have reached a contrary conclusion where the facts were different. Thus, in Award 5346 we stated:

“Inasmuch as the work of the position which Mr. Eldridge occupied was the operation of Crane No. W-3346 and that was the crane used on the Sunday in question, the overtime would be properly assignable to him unless the Carrier arbitrarily assigned that particular piece of equipment with its Operator to perform the work in question for the purpose of defeating the senior employee’s right to preference for overtime work.”

Significantly, in that case the Crane Operators bid in and were assigned to operate specific cranes. In Award 9946 we held that the “regular employee” under the unassigned day rule is “the employee who normally performs the work as part of his regular assignment.” But the key point in that case was that the Claimants were men not even assigned to the same class of work as the employees who received the disputed assignment. In Award 5972 a similar conclusion was reached when we sustained a claim by a Clerk-Typist for

work on an unassigned day when the Carrier gave the "regular work of the Clerk-Typists' position" to a Chief Clerk. The Board held that "the regular employe," under the unassigned work rule, could not be merely "a regular employe."

In a case containing facts similar to those in the present dispute, Award 9391, the successful Plumber claimant was a regular member of a Gang; it was presumed that all members of the group were qualified to do any work assigned them; they had no fixed point at which to regularly and continuously work; their jobs took them to various places. The Board held, in language which is applicable here.

"It is our judgment that, under the operative facts developed here determination of the 'regular employe' within the meaning of the Rule invoked must be made upon consideration of the general duties of the members of the Gang from day to day and not upon the basis of any one particular job, as found at Weehawken. Any other construction would permit the denial of seniority right to a plumber employe by assignment to a job requiring work on rest days to junior employes. The job to be done at Weehawken was probably of short duration and the work on rest days light. However, if 'the regular employe,' under the Rule involved, is restricted to those assigned to a particular job such interpretation must follow as to any job no matter how long it may require to complete it. This construction, in our judgment, is not reasonable and does not accord to employes with seniority rating that protection which such status requires."

Certain evidence submitted to this Board in the present controversy but which was not discussed on the property (including argument concerning a November 15, 1960 Agreement, claims settled on the property and other matters) cannot now be considered.

The claim for 9½ hours' pay at overtime rates will be sustained. The overtime rate is appropriate because that is the rate which would have been paid had not the Carrier incorrectly denied Claimant the opportunity to work on September 9.

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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of November 1965.