

Award No. 16943
Docket No. MW-16736

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

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 required Section Laborer Ernest Gomez to suspend work during his regularly assigned work period (7:30 A.M. to 4:00 P.M.) on July 2, 1965 for the purpose of absorbing overtime worked from 10:30 P.M. to 6:30 A.M. on that date. (System Case No. W-56/F-3-71)

(2) Section Laborer Ernest Gomez now be allowed eight (8) hours' pay at his straight-time rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Section Laborer Ernest Gomez is regularly employed as a section laborer on the Fort Worth section with an assigned work period from 7:30 A.M. to 4:00 P.M. (excluding a half-hour meal period) and a work week consisting of Mondays through Fridays.

On July 2, 1965, the Carrier required Claimant Gomez to suspend work during his regular assigned hours (7:30 A.M. to 4:00 P.M.) and required him to perform the duties of a crossing flagman from 10:30 P.M. to 6:30 A.M. on that date.

Claim was timely and properly presented and handled by the Employees 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 January 1, 1955, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On July 2, 1965, due to an employee who was regularly assigned to a five-day crossing flagman position being absent, Mr. W. R. Pierce, who is assigned the duties of section laborer four days and crossing flagman one day per week, was used to fill the above vacancy for one day.

This created a vacancy on Mr. Pierce's position as section laborer-flagman and the claimant, Ernest Gomez, was used to fill that vacancy. Mr. Gomez was used in that capacity for the one day, resulting in the Organization filing claim as set forth in the Statement of Claim. This claim was based on the contention that claimant was required to suspend work on his assignment for the purpose of absorbing overtime.

A copy of the currently effective collective agreement between the parties to this dispute, revised effective January 1, 1955, is on file with the Board and by reference is made a part of this submission.

OPINION OF BOARD: Claimant, a section laborer, was used on July 2, 1965 to perform crossing flagman's work on the third trick (10:30 P. M. to 6:30 A. M.). His regular assignment that day, as a section laborer, was not worked.

Petitioner alleges that Claimant was required to suspend work on his regular assignment for the purpose of absorbing overtime, this being in violation of Rule 10 of the Agreement. It reads:

"Employees will not be required to suspend work during any assigned work period for the purpose of absorbing overtime."

Carrier denies the alleged Rule 10 violation and asserts the handling given Claimant in this case conformed with the provisions of the letter of agreement and understanding of April 1, 1960. In essence, the fourth paragraph of said letter of understanding provides that where a relief crossing watchman is needed for two days or less work per week such work will be offered in seniority order to the qualified section laborers on the section where the crossing watchman's work is required.

In reviewing the record, evidence and awards cited by the parties herein, and considering the meaning and intent of the parties as to the ancillary agreement of April 1, 1960 and the applicable rules of the Agreement, we find the assignment of Claimant by the Carrier, did not violate the Agreement nor was said assignment made to absorb overtime.

Petitioner had the burden of establishing that the work period of the Claimant was suspended for the purpose of absorbing overtime and, in addition, to show that to perform the work of another position which, otherwise, would have to have been performed on an overtime basis by the incumbent of the latter position. This burden of proof was not met by the Petitioner. Award 13192.

Evidence shows that Claimant was used on fifty-six (56) previous occasions as a crossing flagman subsequent to the 1960 letter of agreement and understanding. The Organization asserts that on these fifty-six (56) previous occasions when Claimant was assigned and performed said crossing flagman duties "he was not required to suspend work during his regular assigned hours for the purpose of absorbing overtime worked as a crossing flagman." We take no issue with the Organization's statement per se, but we do not find from the facts and circumstances in the instant dispute that Claimant was required to suspend work to absorb overtime. Here Carrier followed the exact previous procedure in assigning and using Claimant as had been the practice.

Rule 10, therefore, was not violated when Claimant was assigned to another assignment in accordance with all the rules of the Agreement and the valid ancillary agreement of April 1, 1960. We will deny the Claim.

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 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 not violated.

AWARD

Claim denied.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of February 1969.