

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20223
Docket Number MW-20102

Dana E. Eischen, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Port Terminal Railroad Association

STATEMENT OF CLAW: Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement when it called and used other than Section Foreman F. Ross and his crew for overtime **service** on December 12, 1971 (System File Time Claim **MW-72-2**).

(2) Section Foreman F. Ross, **Trackmen Kary** Thomas, G. **Mejia**, John Hickman and Jesse Adams each be allowed four and **one-half (4-1/2)** hours' pay at their respective time and **one-half** rate because of the **violation** referred to within Part (1) of this claim.

OPINION OF BOARD: Claimants herein, a foreman and four **trackmen**, constitute a **regularly** assigned section gang in the employ of Carrier. These **employees** are assigned to work Mondays through Fridays with Saturdays and Sundays designated as rest days.

On Sunday, December 12, 1971 an engine derailed on the claimants' section territory near the Crown Petroleum Company. The claimants were at home, available and qualified to perform the work incident to **rerailling**.

Carrier did not call claimants but rather called and used another foreman and four **trackmen** to **reraill** the engine and to replace a broken rail. This gang, under Foreman D. Walker, worked from 7:00 **A.M.** to 11:30 **A.M.**

In **the** foregoing circumstances, Petitioner **asserts** that Carrier violated the Agreement, Rules 14(L), **15(I)** and 16(A), reproduced in pertinent part as follows:

"RULE 14:

(L). WORK ON UNASSIGNED DAYS. **Where** work is required by the Association 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 forty (40) hours of work that week; in all other cases by the regular employee.

RULE 15:

(I). Employees notified or called to perform work before or after but not continuous with the regular work period will be allowed a minimum of two hours and forty minutes at time and one-half rate for two hours and forty minutes work or less. If held on duty in excess of two hours and forty minutes (2'40"), time and one half will be allowed on the minute basis.

RULE 16:

(A). Except as otherwise provided in this rule, employees who are required to work on their assigned rest days and the following **holidays--namely, New Year's Day** Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, **the** day observed by the State, Nation or by Proclamation shall be considered the holiday) shall be compensated **therefor** at the rate of time and one-half with a minimum of two hours and forty minutes (2'40"), as per paragraph I of Rule 15."

Carrier premises its failure to call the regularly assigned employees essentially on the bare assertion that an emergency situation existed which **necessitated** disregarding its contractual obligation under Rule 14(L). In this connection, Foreman Walker allegedly was in **the immediate** area of the derailment at the time it occurred and readily available.

Having asserted the affirmative defense of emergency, Carrier assumes the burden of establishing on the record that one did in fact exist. The record made on the property contains no probative evidence to support Carrier's assertion that there was **an** emergency involved herein. In the absence of such probative factual information we find that Carrier's defense of "emergency" fails for lack of proof; ipso facto, Walker's proximity to the derailment is of no evidentiary consequence.

Carrier has proven no recognizable defense for its failure to call the regularly assigned employees. The claim for four and one-half hours pay at the **respective** overtime rate for each of the claimants is sustained.

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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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauler
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1974.