

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21421
Docket Number MW-21341

Walter C. Wallace, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Denver and Rio Grande Western Railroad Company

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

(1) The Agreement was violated when, on August 4, 1974

(a) two section laborers from the Malta section gang who are junior to Section Laborers R. F. Mascarenas and William Martinez of the Malta section gang were called and used to perform overtime service from 2:00 a.m. to 11:00 p.m.

and

(b) Assistant Roadmaster J. J. Gonzales instead of Section Foreman Jack Priest was permitted to call and to supervise the section laborers in the performance of the overtime work (System File D-10-27/MW-12-74).

(2) Section Laborer R. F. Mascarenas be allowed 16 hours' pay at his time and one-half rate and five hours' pay at his double time rate

and

Section Foreman Priest and Section Laborer William Martinez each be allowed 11 hours' pay at their respective time and one-half rates and 5 hours at their respective double time rates account of the violation described above.

OPINION OF BOARD: Claimants Mascarenas and Martinez are employed as section laborers and are assigned to the crew under the jurisdiction of Section Foreman Priest in the Malta Section. Laborers Porco and Guccione are part of the same crew and are junior in seniority to Mascarenas and Martinez. On August 4, 1974 a derailment occurred at Mile Post 125.70 and track forces from several sections, including the Malta Section, were called out to alleviate the problem. Laborers Porco and Guccione, the junior crew members were called. Section Foreman Priest was not contacted to make the call or to supervise those called. The work was performed at the aforesaid location outside the Malta Section from 2:00 A.M. to 11:00 P.M. It was alleged on the property that Claimants Priest, Mascarenas and Martinez subscribe to telephone service and were available for service. Carrier did not try to contact them. These claims arose and were progressed on the property until submission to this Board on the grounds we will discuss in this opinion.

Claimants do not claim seniority rights in the district where the work was completed. Their seniority rights are related to the Malta Section. The Claimants for their part rely upon Rule 4 of the Agreement which provides in pertinent part:

"Each of the classes of work coming within the scope of this schedule shall be supervised and performed by the foremen, mechanics, helpers and laborers holding seniority rights for such class of work."

The Carrier points out that it relies on Rule 14 (b) relating to emergencies which provides:

"Emergencies - (b). In emergencies brought about by conditions such as floods, fire, snow storms, hurricanes, earthquakes, accidents or derailments resulting in the Company's operations being suspended in whole or in part, the Company may augment existing forces by transferring employes from another seniority district to assist with the alleviation of such emergencies. Such transfer should not exceed ten (10) calendar days unless otherwise agreed to by the General Chairman."

The Awards of this Division are persuasive to the effect overtime of a given class must be assigned on the basis of seniority even where there are no specific rules in the Agreement covering the situation. See Third Division Awards 5346, 14161, 4531 and 5029. In Award 14161 it was pointed out:

"It is our view that unless there is a rule in the agreement or a negotiated local practice providing for the assignment of overtime on some basis other than seniority, that seniority should be the determining factor. This Board has so held on a number of occasions."

As we view this, Rules 4 and 14 (b) combine to provide authority in the event of an emergency of short duration for the transfer of employes to another seniority district to alleviate such emergency. When these rules are examined there is no provision here which provides for the suspension of normal seniority rules. The Carrier was free to decide not to use the Malta Section laborers, but once it decided to do so it must act in accordance with their seniority rights and, in accordance with the above awards, it cannot select junior employes under their seniority roster to do this work. See Awards 6306, 7062, 5831 and 5425.

While on the property the Organization had indicated the Claimants were available to perform the work insofar as it indicated they could have been telephoned. This matter did not become an issue until it

reached this level. We conclude that it was then too late to consider it.

With respect to the claim of Section Foreman Priest, foreman of the Malta Section, we find authority in Rule 4 indicating that work within the scope of this schedule "will be supervised . . . by the foremen" Accordingly, we are of the view that calling out the proper employes in their home seniority district is the work of the foreman properly assigned, here Claimant Priest. Whatever method was employed to call out the Malta Section employes in this instance, it was not accomplished through Section Foreman Priest and to that extent the Agreement was violated. We are mindful the work was to be performed in a different seniority district. It is our view nevertheless that they were to be selected in accordance with their own seniority rules and by their regular foreman.

The awards cited by Carrier to the point that Carrier has the sole and exclusive right to determine when and under what circumstances a foreman is assigned to supervise a group of employes, serve to confirm this conclusion. All these awards make it clear that the parties could alter this by their agreement. See Awards 18601, 14041, 4992. We are of the view that Rule 4 of the Agreement did just that.

We have set the stage for a more difficult question. If the Section Foreman is entitled to supervise the laborers in the Malta Section under Rule 4 and the senior laborers should have been selected for the assignment under Rules 4 and 14 (b), can we go one further step? Can we require that Section Foreman Priest should accompany these senior laborers when they were transferred to a different seniority district to alleviate an emergency? We think not. Whatever logic there may be in favor of such a conclusion, we are of the view that the underlying premise of Rule 14 (b) is an emergency situation. If it is interpreted to require that employes may be transferred to a different district only if accompanied by their regular foreman, it would go a long way toward undermining the effectiveness of the rule. The awards cited by Carrier to the effect that carrier has the right to determine the supervision in the district where the work is to be performed, have application here, particularly under emergency conditions.

In its submission before this Board the Organization made the point that Section 14 (b) was improperly invoked insofar as the emergency did not involve a suspension of service required under the rule. We find this matter was not discussed on the property and we cannot consider it here. Instead, we must assume Rule 14 (b) was properly invoked for our purposes.

We conclude, therefore, that the Carrier violated the agreement in that it did not call the senior employes to perform the work and the claims of Claimants Mascarenas and Martinez are sustained. They must be compensated for the hours worked by others. With respect to the claim of

Section Foreman Priest we sustain his claim with respect to the time required to call out the senior section employes. We conclude that Section Foreman Priest was not entitled to supervise the Malta Section employes when they worked in a different seniority district under the terms of Rule 14 (b) and to that extent his claim is 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

The Agreement was violated.

A W A R D

- (1) The claims of Laborers Mascarenas and Martinez are sustained.
- (2) The claim of Section Foreman Priest is sustained in part and denied in part in accordance with this Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1977.

CARRIER MEMBERS' DISSENT TO AWARD 21421, DOCKET MW-21341

(Referee Wallace)

We dissent. For the reasons stated in the memorandum submitted to the Referee by the Carrier Members, the entire claim should have been denied.

A. F. Taylor

P. C. Carter

W. F. Eicher

J. E. Johnson

G. M. Youder