

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24332
Docket Number MW-24499

William G. Caples, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employes
{ Illinois Terminal Railroad Company

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

(1) The Carrier violated the Agreement when it assigned a junior track laborer to perform overtime service on December 21, 1980 instead of calling and using Track Laborer D. J. Goree who was senior, available and willing to perform that service (System File ITRR 1981-4).

(2) Track Laborer D. J. Goree shall be allowed ten and one-half (10-1/2) hours of pay at his time and one-half rate."

OPINION OF BOARD: Claimant D. J. Goree is employed as a track laborer and is assigned as such to Gang No. 10. He was regularly assigned to work Mondays through Fridays with Saturdays and Sundays designated as rest days.

On Friday, December 19, 1980 it was necessary for the Claimant to be absent from work because of personal illness. He telephoned the Carrier's St. Thomas Office on December 19 and informed the Carrier he was ill and would therefore be unable to work on said date. On the same date, December 19, 1980, all of the members of the Gang 10 except for the Claimant but including those track laborers with less seniority than the Claimant, were notified they would be needed to work on the ballast work-train on Sunday, December 21, 1980. The Carrier failed at that time and at any time subsequent thereto, to notify or call Claimant to come to work scheduled for Gang 10 on December 21, 1980. The other members of Gang 10 worked ten and one-half hours of overtime service that day.

The Carrier made no effort whatsoever to call or use the Claimant on December 21, 1980 even though he was a senior, willing and able to perform the work in question. The Carrier did not question his ability or his contractual right to perform said work.

Paragraphs (f) and (g) of Rule 4 read:

"Rule 4-Seniority. (f) Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad is hereinafter provided.

(g) Senior available employees will be given preference in the performance of overtime work."

The above quoted paragraph (g) of Rule 4 provides in language so abundantly clear and unambiguous that it requires no interpretation, the senior available employe to give him preference in the performance of overtime work. Rules precisely identical to the above-quoted paragraph of Rule 4 have been interpreted many times by this Division and have uniformly held that it applies to regular work, overtime and extra work.

It is Carrier's position that there has been no violation of any rule of the current agreement or otherwise in this instance. There is nothing contained in the cited rule which would entitle Claimant to the unearned compensation claim under the circumstances presented in the instant case.

The facts indicate that on Friday, December 19, 1980 Claimant called the St. Thomas Office and reported he was sick and unable to work; therefore, he was given permission to be absent from work because of illness. During the day of December 19, 1980 it was determined by Carrier's officials it would be necessary to utilize the forces of Gang 10 to work on the ballast work train on Sunday, December 21, 1980. Carrier's officials advised all available members of Gang 10 of the need to work on December 21, 1980 during their work day of December 19, 1980. No attempt was made to notify Claimant. Thus it is assumed by the Carrier that instructing the members of Gang 10 at the worksite to report on December 21, 1980 for the performance of necessary work for the work train constituted compliance with Rule 4. It is the opinion of the Board that paragraph (g) of Rule 4 quoted by the Organization is clear and unambiguous and that the Claimant should be given preference in the performance of overtime work.

There are a number of awards of the Third Division of this view in which we are in accord, see Third Division Awards 2716, 2994, 4531, 6136 and 15640 all of which of the same interpretation. No notice was given to the Claimant and work available was performed by the junior track laborers, junior in service to him.

There is no basis to assume that the Claimant when reporting off sick on the 19th would be unavailable for work on the 21st which was scheduled for a rest day for the Claimant.

The second part of the claim is for penalty time and asked that the Claimant be allowed ten and a half hours of pay at his time and one-half rate. It is the position of the Carrier that if the claim is allowed that it be allowed on a pro rata rate and not at a punitive rate because they contend the punitive rate is only for work performed.

The decisions of this Division where an employe is allowed pay where there has been an error in assignment or the hours involved are at variance as to pro rata or punitive rate where the time claimed had been of hours other than regular schedule. Some referees have held that the overtime rule applies only to "time worked" and others have held that since the regular occupant of the position was denied the overtime work because the Carrier violated the effective Agreement and if the Carrier had not violated the effective Agreement he would have been compensated at the time and one-half rate if he had performed work and, that, therefore the penalty rate for work lost, because it was given to one not entitled to it under the Agreement, is the rate which the regular occupant in

position would have received if he performed the work. Therefore the claim should be sustained at the penalty rate, in this case, one and a half time. This referee is in accord that the opinion which has been held in Awards No. 9436, 9309, 5579 and 4571.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By  _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of April 1983.