

Award No. 2716
Docket No. MW-2728

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
MISSOURI PACIFIC LINES**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that J. C. Ponder, B. & B. mechanic, shall be paid six hours overtime rate on each date, July 6th and 7th, 1942, at his regular B. & B. mechanic's rate on account of that a junior employe was called for service on those days.

EMPLOYEES' STATEMENT OF FACTS: On July 6, 1942 B. & B. Foreman Gilday, Kingsville Division, was instructed by the B. & B. Supervisor to assign the Assistant Foreman and one carpenter from his crew to perform certain service at Bridge 162.8 near Sinton. The Assistant Foreman and the one carpenter thus assigned worked 6 hours overtime on July 6th and 6 hours overtime on July 7th. Instead, however, of assigning senior B. & B. carpenter J. C. Ponder in the performance of this overtime work, the Carrier assigned a junior carpenter.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: As stated in Employees' Statement of Facts, on July 6, 1942 a condition arose that would afford a carpenter employed in the B. & B. gang in charge of Foreman Gilday an opportunity to work some overtime and to earn some additional money.

Every man employed whether it be on the railroad or somewhere else is seeking to improve his economic status, to gain advancement, and to work in his own rank whenever an opportunity affords in order to make his earnings as large as possible. To assure the employes in the Maintenance of Way Department of that opportunity, rules have been negotiated and written into the Agreement between the Carrier and the Brotherhood which provide that the senior man shall be given preferred consideration in acquiring advancement, opportunity for service, etc.

We quote Schedule Rules 1, 1 (c), and 2:

"RULE 1. Seniority begins at the time the employe's pay starts on the position to which assigned following bulletining of the vacancy as provided in Rule 11, except:

RULE 1 (c). Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad.

RULE 2. Seniority rights of employes (other than section laborers) to new positions or vacancies, or in the exercise of their seniority, will be restricted to an operating division, except:"

It will be noted from the above letter that the claim of Mr. Ponder was declined for the reason that there was no provision in the agreement requiring the use of the senior employe under the circumstances existing in this case, but that it was agreed "that in future cases when the senior man is available and qualified, he will be used." The fact that such an agreement was reached between the representative of the Carrier and the representative of the Employees at the conference of March 29, 1943 is conclusive evidence that at the time of this claim (July 6 and 7, 1942) there was no contractual obligation on the part of the Carrier to use the senior man under the circumstances existing in this case as had such an obligation then existed, there would have been no occasion for that part of Mr. Lamb's letter reading: "It is agreed, however, that in future cases when the senior man is available and qualified, he will be used."

Furthermore, as shown in the Carrier's Statement of Facts, due to the nature of the emergency work to be performed at Bridge 162.8, the B. & B. Supervisor instructed that the Assistant Foreman and a "man who could swim" be sent to Bridge 162.8. Mr. Ponder could not swim and in that respect did not meet the qualifications for the assignment. Regardless of that fact, however, Mr. Ponder had no preferred right to the service in question for the reason that there were no schedule or other provisions requiring the use of the senior employe, and seniority has never been the determining factor in calling men for overtime, special or emergency work in the Maintenance of Way Department.

In the absence of any specific rule in the Agreement between the Carrier and its employes represented by the Brotherhood of Maintenance of Way, and, at the time of this claim no agreed to understanding with respect to the use of the senior employe under the circumstances involved in this claim, it is clearly evident that there was no irregularity in using a mechanic junior to Mr. Ponder for the special or emergency service at Bridge 162.8 on the dates in question. That being so, there is not, obviously, any basis for the claim.

When consideration is given to the above facts, it is clearly evident that the claim presented in favor of B. & B. Mechanic Ponder for six hours at the overtime rate of pay on each date, July 6 and 7, 1942 is entirely without basis, and, therefore, the contention of the Employees should be dismissed and the claim accordingly denied.

OPINION OF BOARD: Driftwood had accumulated at a bridge near Sinton, Texas. B. & B. Foreman with gang at Refugio was instructed to send his assistant Foreman and another man to remove the driftwood and to prevent further accumulations. The Assistant Foreman and B. & B. Mechanic, Core, performed this work on July 6 and 7, 1942, earning 12 hours overtime. J. C. Ponder, the Claimant, held seniority right over Core, and petitioner contends that he should have been used for this overtime work instead of Core.

To support their contention, petitioners rely on Rules 2 (a), 2 (d), and 2 (e). These rules define and deal with seniority rights. It is the Carrier's contention that these rules do not apply to overtime work, as shown in this record.

Rule 2 (d) says,

"Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad."

We are of the opinion that this rule applies to all positions, whether it be a regular bulletined position, a temporary position or one that is required to be performed only with overtime work. There is no exception noted in these rules. By analogy, this view is supported by Awards Nos. 2341, 2426, and 2490.

We are not impressed with the statement that J. C. Ponder was not qualified because he could not swim. There is no showing in the record that it was necessary for a man to swim in doing this work. It would only be necessary for him to swim in event he fell into the water, the same as if he was working on a bridge and fell into the water.

It follows that the claim should be sustained under Rules 2 (a), 2 (d), and 2 (e).

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 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 carrier violated the provisions of the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.