

Award No. 2719
Docket No. MW-2731

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Ernest M. Tipton, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
MISSOURI PACIFIC RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that G. E. Kenzel, B. & B. Helper, Arkansas Division, be paid the difference between what he received and that which he should have been paid at B. & B. Helper's rate for 8 hours at pro rata rate and 4 hours at time and one-half rate for each of the regular working days, and 12 hours at time and one-half rate for each Sunday and holiday from December 31, 1941, to April 17, 1942, inclusive.

EMPLOYEES' STATEMENT OF FACTS: G. E. Kenzel was and is employed as a B. & B. helper in B. & B. Gang No. 1, North Little Rock, Arkansas, Arkansas Division. On December 30, 1941 Supervisor of Bridges and Buildings H. Wright instructed Kenzel to go to the Martin Street freight house, East Little Rock, to perform the work of watching material used in connection with repairs being made to the freight house. In the performance of that service Kenzel was assigned to work from 6:00 P. M. to 6:00 A. M. daily. Kenzel entered upon the duties of watching material at Martin Street freight house, East Little Rock, as per instructions of the B. & B. Supervisor on December 31, 1941, continuing on that assignment up to and including April 17, 1942.

For the month of January Kenzel received \$130.00 in compensation for services; in February he received \$167.90; in March, \$167.90; which was on the basis of 46¢ per hour. For the 17 days of service in April he received no compensation.

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 December 30, 1941 B. & B. helper G. E. Kenzel was summoned by the B. & B. Supervisor, Mr. Wright, who inquired of Kenzel if he be agreeable to work nights watching building material stored near the Martin Street freight house which was in course of reconstruction. Such an inquiry from the B. & B. Supervisor of the B. & B. helper was regarded by him as equivalent to instructions so Kenzel informed the B. & B. Supervisor that he be agreeable to accept that assignment.

Accordingly, and in compliance with instructions, B. & B. helper Kenzel assumed the duties of watching B. & B. material at the Martin Street freight house at 6:00 P. M., December 31st. He was instructed to report to B. & B. Foreman A. F. Killman in charge of the reconstruction work of the freight house when coming to work every evening at 6:00 P. M., and report to him any irregularities found during the night. A few days after Kenzel began

by the agreement. It does not specify watchmen or a class of labor for which Mr. Kenzel was employed at Little Rock to watch materials assembled for carrying out a certain project. Men employed by the Carrier to watch over materials for the purpose of avoiding theft, fire protection, etc., are not a class of employees generally recognized as performing work belonging to and coming under the jurisdiction of Maintenance of Way Department. Specific cases are herein cited to support the Carrier's contention, viz:

In November and December, 1943 the services of a watchman were required on Bridge 138, near Inola, Okla. A party was hired for a monthly rate—\$195.90 per mo. The job was not considered as being one subject to provisions of the working agreement with the Maintenance of Way Employees and no such contention was made by them.

In January, 1943 Bridges 12 and 12-A, near Mt. Hope, Kansas, were under construction. The services of a watchman were necessary. One was hired and paid for his labor at an hourly rate of pay without regard to rules and working conditions of the agreement with the Maintenance of Way Employees and no contention was made by the Employees that the job was subject to this agreement.

Similar situation again arose on the same division in February, 1943 in the reconstruction of Bridge 10-A, near Andale, Kansas.

In December, 1939 and January, 1940 a watchman was hired at a monthly rate of pay—\$90.00 per mo.—to watch the new ballast deck bridges under construction on our Central Kansas Division.

In July, 1939 a similar position was established where the services of a watchman were required to watch material assembled for reconstruction of Bridge 54-A, near Kenneth, Kansas.

The above cases are merely cited as illustrative of our practices. They are by no means conclusive of all instances where the services of watchmen are engaged on specific construction or reconstruction jobs.

In the Carrier's statement of facts reference is made to leave of absence rule No. 5 as being involved in this case. This reference is cited to support the Carrier's contention that the granting of a leave of absence to Mr. Kenzel was a permissible arrangement under rules of the agreement.

Reference is made to Rule No. 6 for the reason that when employees are transferred they are entitled to retain their rights on the district from which transferred.

Reference is made to Rule No. 11 (a) which requires new positions and vacancies to be bulletined, however this not being a job covered by the scope rule of the agreement, it was not bulletined.

Reference is made to Rule No. 16 for the reason that this rule provides for monthly rates of pay and compensation for all services performed to certain classes of employees named therein. The class of work upon which Mr. Kenzel was employed is not one of the classifications named in this rule, but if the Board should sustain the Employees' contentions, then it is felt that his compensation should be fixed in conformity with this rule and not at the punitive overtime rate for all time worked in excess of 8 hours under the Hours of Service, Overtime and Calls Rule No. 14 (f-1).

OPINION OF BOARD: From January through July, 1942, the Carrier was engaged in extensive enlargement and rehabilitation of its former Martin Street House at Little Rock, Arkansas.

It was necessary to protect the building materials stored on the site of the job, so the Carrier entered into a written contract with G. E. Kenzel, a B. & B. Helper, Arkansas Division, to act as a watchman. His salary was \$130.00 a month, with hours of service from 6:00 P. M. to 6:00 A. M., including Sundays and Holidays.

Petitioner claims that Kenzel's status was that of an employe and that he should be paid a B. & B. Helper's rate for eight hours a day and time and one-half for all overtime, and at the same rate for all services performed on Sundays and Holidays, while the Carrier contends that Kenzel's status was that of a contractor.

This contract was executed on December 31, 1941, evidently upon a printed form used by the Carrier in letting contracts for construction work, such as buildings. Under the terms of the contract, Kenzel was designated "as an independent contractor and not as agent or employe of the undersigned Carrier," yet, from the record, the plain inference is that Kenzel was under the control and subject to the orders of the Carrier as to methods used in performing the service as watchman. This is admitted by the Carrier in its answer to the oral argument of the Employees, wherein it said: "To the contrary, he (Kenzel) reported direct and was subject to the orders of the Bridge and Building Supervisor." It follows, therefore, that the relationship between Kenzel and this carrier is that of employe and employer, 39 C. J. 1316. This view is further strengthened by the fact that he was carried on the B. & B. pay roll.

Since he was an employe of the Carrier in the B. & B. Department while he was acting as watchman, the purported leave of absence was a nullity. An employe cannot be on a leave of absence and at the same time be in the employ of his master.

It is admitted that Kenzel was under the direction and subject to the orders of the B. & B. Supervisor, and it follows that this work was "recognized as belonging to and coming under the Maintenance of Way Department" by the Carrier; and, therefore, came within paragraph (c) of the Scope Rule.

Since this work is under the Scope Rule, the individual contract between Kenzel and the Carrier is void. See Award No. 2602.

As the work performed by Kenzel is under the Scope Rule, it follows that he should have been paid at Helper's rate of pay, and time and one-half for all work performed in excess of eight hours for week days, and time and one-half for work performed on Sundays and Holidays.

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 Employees 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 Agreement from December 31, 1941, to April 17, 1942.

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.