Award No. 4841
Docket No. MW-4747

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, 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:

(1) That the Carrier violated the Agreement by not calling Section Laborer, Milford A. Austerman, Levasy, Missouri, for overtime work on Jan. 30th and March 7th, 1948;

(2) That Section Laborer Milford A. Austerman be compensated at the time and one-half rate for all time worked by the junior section laborer Earl McMullen on the dates specified in part 1 of this claim.

EMPLOYES' STATEMENT OF FACTS: Mr. Milford Austerman was, at the time this claim arose, a section laborer regularly assigned as a member of Section Crew 120, with headquarters at Buckner, Missouri.

On the night of January 30, 1948 there was a broken rail at Mile post 261-21 which is on Section 120.

Section Laborer Earl McMullen also a member of Section 120, but junior in service to Section Laborer Austerman, was called for this emergency. McMullen worked from 8:30 P.M. January until 1:00 A.M. January 31, 1948. A total of 4½ hours for which he was paid at the time and one-half rate. During this time Section Laborer Austerman was available for work but was not called.

On March 7, 1948 there was a derailment on Section 118 at Wellington. Again, Section Laborer McMullen was called for service at 10:00 A.M. and he worked until 9:00 P.M. on this overtime assignment.

Section Laborer Austerman, senior in service to Mr. McMullen was available but not called for this overtime work.

The Employes contend that Austerman should have been called for this overtime work on both of these occasions and have claimed an equal amount of compensation for him.

The Carrier has refused to pay the claim.

The Agreement between the parties to the dispute dated July 1, 1938 and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 1 (b) and (c) states as follows:

to the Buckner gang, and his gang was not called out for the reason that the gang was not available—this included the foreman and the claimant, Mr. Austerman.

The claim should be denied.

OPINION OF BOARD: Claimant was a section laborer assigned to Section Crew 120 with headquarters at Buckner, Missouri. On January 30, 1948, because of a broken rail, it was necessary to call an employe to work overtime. Carrier called Section Laborer McMullen, a member of Section Crew 120 who was junior to claimant. Claimant asserts that he should have been called and claims pay for the 4½ hours' work of which he was deprived. On March 7, 1948, because of a derailment overtime work was available. Carrier again called McMullen, an employe junior to claimant. Claimant asks that he be paid an amount equal to that paid McMullen.

The record shows that claimant lived at Levasy, a point 3.64 miles from Buckner. In both instances enumerated, the dispatcher was unable to contact the foreman at Buckner and the foreman at Lake City, 3.52 miles from Buckner, was called to do the work. In both instances he called McMullen without making any attempt to contact the claimant.

Claimant had a prior right to the work by virtue of his seniority. Carrier contends that he was not available. The record does not show any attempt by the Carrier to call the claimant for this work.

We think Carrier was obliged to call the claimant. If claimant could not be found after a reasonable attempt to contact him had been made, the Carrier would be justified in calling someone else. An employe is not unavailable merely because he lives 3.64 miles from his headquarters. This is not an unreasonable distance under modern methods of transportation. The case is very similar to and controlled by Award 4200.

Carrier contends that claimant had no right to the work on the basis of seniority by virtue of Rule 2 (c) which purports to restrict the seniority rights of section laborers to their respective gangs except in case of force reduction. We point out that claimant and McMullen, the employe used, were members of the same gang and claimant the senior of the two. Under such circumstances, if a member of Section Crew 120 is to be used, the senior employe has the prior right. The principle involved is set out in Award 2341 wherein we said:

> ". . . We think that the Agreement properly interpreted in the spirit in which it was written requires the Carrier, when it is obliged to call extra men from an established class of employes, to take notice of their seniority rights. And this is true even if the Carrier was not required to call any one of that class of employes at all. . . ."

We are of the opinion, therefore, that the Carrier, if it elects to use a member of Section Crew 120 to perform overtime work with Section Crew 118, it must use the senior employe if available.

The claim will be sustained as to the time worked on January 30, 1948, at the pro rata rate in accordance with the holding in Award 4244. As to the time worked on March 7, 1948, the claim will be sustained at the time and one-half rate, it being the contract rate for Sunday work.

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 Employe involved in this dispute are respectively carrier and employe 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.

AWARD

Claim sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of April, 1950.