

Award No. 4877

Docket No. MW-4915

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Peter M. Kelliher, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
NORTHERN PACIFIC RAILWAY COMPANY**

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

(1) That Carrier erred when they denied Section Foreman Joseph Rosati, Auburn, Washington, the right to supervise Sectionmen assigned to his respective crew when they were called for overtime work in connection with icing cars during the period November 8, 1947 to March 31, 1948, both dates inclusive;

(2) That Section Foreman Joseph Rosati be paid at his time and one-half rate of pay for the same amount of time employees in his crew were assigned to the work referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Mr. Joseph Rosati is Section Foreman in charge of Section 203 at Auburn, Washington. On certain dates during the period November 28, 1947 to March 31, 1948, both dates inclusive, the Carrier called employees in Foreman Rosati's crew to perform work in connection with the icing of refrigerator cars. Mr. Rosati was available for duty on these above referred to dates, but the Carrier failed to call him.

We attach as Employees' Exhibit "A" a list of the dates and hours the employees of this Section Crew were called and employed by the Carrier when Foreman Rosati was available but was not called.

Foreman Rosati was responsible for reporting the time of the employee members of his crew when they performed this overtime work. He was also responsible for the reporting of any accidents or other such reports necessary to the performance of this work.

The Employees contend that Foreman Rosati should have been called to supervise the members of his crew while they were engaged in this overtime work. The Carrier has declined our claim.

The agreement in effect between the two parties to this dispute, dated August 1, 1943, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Auburn, Washington is located 21.5 miles east of Seattle, Washington the heart of the vegetable growing territory. There is maintained at Auburn facilities for icing refrigerator cars.

time of an employe who is called after release from duty will begin at the time called and will end at the time he returns to designated point at headquarters."

These rules deal with work performed; that is, these rules establish a penalty rate for work performed outside of assigned working hours. These rules are not designed to allow penalty rates for work not performed. The underlying theory involved in the adoption of the overtime and call rules is that as a condition precedent to the application of these rules work must actually be performed. This Division in Award No. 3504 epitomized this theory in the following language:

"In the absence of agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned."

The adoption of any other principle than that set forth above would vitiate the very essence of the call and overtime rules, namely, work performed.

The Employes have gone far afield in the presentation of the claim covered by this docket. They have not only contended that Mr. Rosati should have been called to supervise sectionmen that required no supervision, but contend that he should have been called to supervise such employe beyond his physical ability to do so. Coupled with this, the Employes now request that Mr. Rosati be paid at punitive rates for work that he neither could perform nor did perform.

The Carrier has shown:

1. That there is no rule of the agreement between the Carrier and the Employes requiring the use of the Section Foreman in all instances to supervise sectionmen used outside of regular working hours.
2. That Mr. Rosati was used outside of regular working hours when and if his services were required.
3. That Mr. Rosati could not have observed the hours for which additional compensation is claimed.
4. That in any view of this claim there is no rule that would sustain a claim for payment at punitive rates for work not performed.

The claim covered by this docket should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: The claim is that Section Foreman Joseph Rosati had a right to work overtime when members of his crew were called to do overtime work in icing cars during the period November 8, 1947 to March 31, 1948, and the Company, having denied him this right, should now be required to compensate him for such hours at the time and one-half rate.

The practice in effect before May 1, 1938 is in dispute. However, the carrier indicates that the practice was not uniform and inequalities existed in the distribution of overtime to the point where the foremen complained also "of not being called outside of regular working hours to work on the icing platform." The carrier stated that "in order to establish a method that was considered equitable and to eliminate complaints, the instructions dated May 1, 1938 were issued. The letter of instructions had for its purpose the division of overtime in icing cars to the fullest extent possible and where it was "necessary to use six or more men, the Foreman or Assistant Foreman," was to be called. These instructions were observed until 1942, when the carrier, due to the war manpower shortage, followed a practice of calling the foremen regardless of the number of members of his crew required. During this period,

continuing up to November 7, 1947, however, the carrier stated that the foremen performed manual work when called. After November 7, 1947, when it became necessary to ice cars outside the assigned hours of the section crew, the Refrigerator Inspector, not covered by the agreement of the Brotherhood of Maintenance of Way Employees and the carrier, called the number of sectionmen needed. He was responsible for the icing. The carrier states that while it was not obligated to call the Section Foreman when members of his crew were called outside of assigned hours to ice cars, it did call him when his presence was necessary and desirable in emergency work such as repairing tracks and switches during this period. This method was observed until April 1, 1948 when a Section Crew was established to handle the icing from 7:30 P.M. to 4:30 A.M. The instructions subsequently issued were that the day Section Foreman was to hold men when necessary for icing after 4 P.M. and that he was to be on duty until the men were released or until the night Section Foreman went on duty at 7:30 P.M. When "six or more men" are now called for Sunday or holiday icing a Foreman is called.

The claim relates only to the period from November 8, 1947 to March 31, 1948. It is evident from the record, however, considering the period May 1, 1938 and previous thereto up to the April 1, 1948 instructions that the matter of equitable distribution of overtime, including particularly the Foreman's claim to overtime, was a continuing problem that was handled under various instructions. The method of calling a Foreman when "six or more men" were called for overtime icing was observed from 1938 to 1942. This minimum equitable distribution of overtime to Foremen was not nullified by the carrier's disregarding, after 1942, the "six or more men" requirement up to November 7, 1947, in calling Foremen during the manpower shortage period.

The fact that the Foreman worked with his men would not change the practice in view of the manpower shortage and the Carrier's Rule 730 (m) which states that Section Foremen "must work with their men unless they have a large number of men in charge."

It must be found, therefore, that a practice existed for approximately nine years and that this established practice of the minimum equitable distribution of overtime to the Foreman on the basis of calling him if "six or more men" were required should have been observed in the period November 8, 1947, to March 31, 1948. It is understood that the Organization has withdrawn its claim for overtime compensation on November 16, 17, 19, and 20, 1947, when the claimant was unavailable for work should "six or more men" have worked on any of those days.

The Organization claims pay at the premium rate. After a review of many awards as to the correct penalty to be assessed for a contract violation, we have concluded that the correct rule is contained in Award Number 3277, wherein it is stated:

"The penalty rate for work lost because it was given to one not entitled to it under the Agreement is the rate which the occupant of the regular position to whom it belonged would have received if he had performed the work. Awards 3198 and 3271."

This rule is supported by legal authority in the case of *Steinberg v. Gebhardt*, 41 Mo. 519. The following additional awards support this rule:

Award Number 4571 (Whiting)
Award Number 3193 (Carter)
Award Number 3375 (Tipton)

Award Number 3193 states:

"It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this Agreement, is the rate which the employee to whom it was regularly assigned would receive if he had performed the work."

Foreman Rosati was regularly assigned as Foreman of the Section Gang and if he had performed the work he would have received the premium rate.

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 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

That the Agreement was violated.

AWARD

The claim covering the period November 8, 1947 to March 31, 1948 is sustained as to those dates that the claimant was available when "six or more men" were assigned to the operation of icing cars and the premium rate is payable.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of June, 1950.