Award No. 5092
Docket No. MW-5036

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE & HUDSON RAILROAD CORPORATION

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

(1) That the Carrier violated the effective agreement, dated November 15, 1943, when it assigned Mason Helper Lawrence Lord, rather than the senior qualified mason helper to perform mason's work at Oneonta, New York, during overtime hours on July 22, 1948;

(2) That Mason Helper Lawrence Lord be allowed the difference in pay between what he did receive at the Mason Helper's overtime rate and what he should have received at the Mason's overtime rate for two (2) hours' work performed during overtime hours on July 22, 1948;

(3) That the senior qualified Mason Helper be allowed two (2) hours pay at the Mason's time and one-half rate by reason of not being permitted to perform mason's work during two (2) overtime hours on July 22, 1948.

EMPLOYES' STATEMENT OF FACTS: On July 22, 1948, Mason Helper Lawrence Lord was assigned to finish concrete at Shop No. 18, Oneonta, New York. He was so assigned for a period of two hours outside of his regular assignment.

Mason Helper Lord was compensated at the Mason Helper's rate of pay while so assigned.

Concrete finishing work is recognized as Mason's work.

The Senior Mason Helper in the crew was not given an opportunity to perform the finishing work.

Claim on behalf of the employes who were adversely affected was filed with the Carrier and claim was declined.

The agreement in effect between the two parties to this dispute, dated November 15, 1943, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 2 of the effective agreement reads as follows:

man Marks giving the facts in connection with his assigning Helper Lord to this overtime, photostatic copy attached marked Exhibit "A", is as follows:

"Mason Paul Lockwood asked me for a helper to help him finish concrete in Shop 18. Lord and Lockwood lived in Oneonta and the rest of the men lived out of town. So I told Lord to help Lockwood. It was on a Friday night, and I knew the out of town men would want to go home, because would miss their ride if they stayed and worked."

The work to be performed was that which required a journeyman mechanic who understood the finishing of concrete and Mason Lockwood remained on the ground performing this work, with the assistance of Mason Helper Lord. This Mason Helper was never at any time actually engaged in the work in any capacity other than as a helper. Attached statement, marked Exhibit "C", as submitted by Mason Lockwood, verifies the fact that Helper Lord did not perform other than helper's work during overtime hours on July 23, 1948, when he was assigned to help Mason Lockwood finish concrete in Shop No. 18.

When apprentice employes, such as mason helpers, are engaged, it is understood that they will work with the mechanics in order to learn the rudiments of the craft, and with the experience so gained, will eventually be graduated to the mechanic's status. As Lord was employed on April 16, 1948, he could not possibly be a qualified mechanic of the trade by July 23, 1948, scarcely more than three (3) months of training.

On this particular day and job, Mason Helper Lord, like the other helpers, had assisted in whatever way he was qualified, and his overtime service was likewise of the same nature. No claim has been made that Mason Helper Lord should be paid mason's rate for the hours of his regular tour of duty.

The Carrier has no particular interest in one helper being permitted to work overtime in preference to some other helper, as they all receive the same rate and in a training period, such as Lord was undergoing, each helper is given equal opportunity to learn the mason's work. In this case, Mason Helper Lord was assigned to the overtime service by the Foreman in charge of the gang. Copy of Foreman's statement is attached, marked Exhibit "A". The Foreman is subject to the rules and covered by the Scope of the same Agreement. The Carrier knows that senior employes are entitled to overtime if they desire it, under the rules, and believes the Acting Foreman, Roy Marks, who had been employed as helper and mechanic since 1925, also understood the rule; however, Acting Foreman Marks assigned Helper Lord to the overtime work for the reasons station in Exhibit "A" attached. It is not felt that under such circumstances the claim of any other employe for the work should be sustained.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim presents two contentions: viz., that the senior qualified Mason Helper should have been assigned to overtime work instead of the assigned employe, Lawrence Lord, and, that Lord should have been paid at the Cement Mason's rate, for the reason that the work he performed was a Mason's work, rather than a Helper's.

In view of the Carrier's admission in the record, that, under the rules of the agreement, "senior employes are entitled to overtime if they desire . . ." the first contention is confessed, although we are not unmindful of the Carrier's explanation that the assignment was made as it was to enable those entitled to the work to use the earliest possible transportation home. The Organization does not agree that this was the motivating reason, but we find the reasons are not pertinent.

The Carrier has the right to assign the work, but with this right goes the corollary duty to tender the work in accordance with the seniority rules of this agreement. Had the work been offered to employes, with seniority rights paramount to Lord's claim, and rejected, there would have been no

violation of Rule 2 of the agreement. However, when either party makes unilateral decisions amounting to a deviation from the agreement, no matter how commendable the reasons, it would amount to an undue burden on this Board to ask that it settle equities between the parties. We are powerless to grant relief on such basis. Compare Award 5091.

The crux of the second contention is, did Lord perform Cement Mason's work? The parties would have greatly assisted the Board if the record had shown what exact duties were assigned and required of Lord. The case file is short on evidentiary facts and long on conclusions, but is believed sufficient on which to base a true and correct decision.

We do not necessarily agree with the Organization's inference that Lord was chosen over other Helpers with greater seniority in order to get a qualified mechanic classified as a Helper to perform the work at the Helper's rate. We are inclined to accept the explanation that the Foreman believed he was doing right by keeping the two men on the job who lived near the site of the work. One who has been so considerate of his fellow workers does not merit criticism.

As to the evidence and the reasonable deductions therefrom which influences a decision in this case, the Board has considered that at the close of the day's work there was freshly poured concrete which required finishing before it hardened. Ordinarily finishing concrete is a Mason's work, and in the absence of more convincing explanation of the work requiring the presence of a Helper, there is no basis for holding that Lord was held over to do other than finish concrete. There is also the sworn statement of the Mason that he asked for one man to help him finish freshly poured concrete and Lord did exactly the same work as the Mason.

The foregoing statement conflicts with an earlier one given the Carrier by the same employe and must be weighed carefully. Except for the fact that cases are brought to the Board ex parte and oral testimony is not presented, such conflict would be the basis for ruling out both statements. But to discredit such statements in their entirety, under such circumstances, without carefully reviewing the same, would be to take undue liberty with the creditability of persons who honestly may be trying to assist the Board. Accordingly, we feel under compulsion to entertain the statements to whatever extent they hold up under critical examination.

We find greater value in the Mason's statement which supports the claim than in the one offered by the Carrier. The earlier statement appears to be more the statement of the Carrier than the statement of the employe. Admittedly it was prepared by the Carrier but the employe's signature authenticates it. As to its value, however, we have noted that it employes the key words, "helper", "Mason's work", and "Mason Helper's work", all reasonably calculated to put the affiant on record without opportunity for explanation, and at the same time making the employe responsible for classifying work for the employer. The Carrier's evidence shows that Affiant signed the statement of his own free will and accord, but under some possible misapprehension. There was a discussion of the actual work at the time the statement was signed and we see in this that there was a need for reassuring Affiant that the Carrier's choice of words was appropriate and properly classified the work. On the other hand the very thing which the Carrier offers as criticism of the later statement is the thing which we believe speaks most eloquently for its genuineness. It is not a skillfully prepared paper. It is in free and easy language, more typical of the one making the statement, and entirely lacking in guile. We discredit the first statement and credit the last. This evidence, together with the other facts and circumstances of the case, impels us to find that the work performed was Mason's work.

Whether or not Lord was qualified as a Mechanic (the Organization contends he was; the Carrier denies or disclaims any knowledge of his qualifications) is not controlling. The Board has held many times that it is the work assigned in controversies of this kind which governs, and not the qualifications

of the employe chosen by the Carrier to do the work. Neither is the dispute over the correct date as to when the work was performed important. The Board cannot concern itself with such details, but presumably the Carrier's records are correct.

We see no justification for allowing both monetary claims at punitive or premium rates of pay. Lord having performed the work, he is entitled to receive the difference in pay between what he did receive at the Mason Helper's overtime rate and what he should have received at the Mason's overtime rate. The senior qualified Mason Helper should receive only pro rata pay. The principle that employes who do not work should not receive overtime rates of pay seems applicable here. See Awards 4196, 4244.

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 agreement.

AWARD

Claims (1 and 2) sustained. Claim (3) sustained to the extent shown in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

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