Award No. 5261
Docket No. MW-5229

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: (1) That the Carrier violated the effective agreement when it assigned an extra crew, rather than Track Foreman J. J. Courtney and his crew to perform work on their assigned section on Saturday, March 26, 1949;

(2) That Track Foreman J. J. Courtney, Assistant Foreman Niilo J. Koski, Trackmen George McPhee, G. Lomaglio, D. Courtney, B. Kennedy, K. Haapakoski, and A. P. Lawrence be compensated for 8 hours each at their time and one-half rate of pay because of this improper assignment.

EMPLOYES' STATEMENT OF FACTS: Track Foreman J. J. Courtney, Assistant Track Foreman N. J. Koski, and the following Trackmen: G. McPhee, G. Lomaglio, D. Courtney, B. Kennedy, K. Haapakoski, and A. P. Lawrence are assigned to and hold seniority on Section 23, East Fitchburg, Massachusetts.

Foreman J. J. Courtney and his crew have a regular assigned work week—Monday through Friday.

On Saturday, March 26, 1949, the Carrier assigned Foreman W. Rivard and his extra crew to perform the work of aligning and trimming stone ballast shoulder along East Bound Main Line on Section 23, East Fitchburg, Massachusetts.

Track Foreman J. J. Courtney and his crew were not called.

Foreman Courtney and his crew were available and qualified to perform the above referred to work.

Claim was filed in behalf of the employes with the Carrier and claim was declined.

The agreement in effect between the two parties to this dispute, dated May 15, 1942, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rules 1 and 3(a) of the effective agreement reads as follows:

"Seniority—Effective Date

Seniority begins at the time the employe's pay starts in the class in the sub-department on their seniority districts. An em-

an extra crew has precisely as much contract and past practice rights to perform the work involved as has the Section Crew of Section No. 23. Precisely where the line of demarcation exists is not disclosed by any rule or rules of the controlling agreement. The respective seniority rights to work as distinguished from seniority rights to bid and displace, are very poorly defined, if at all, by the rules of the controlling agreement. Therefore, it becomes necessary to examine the practices which have prevailed, without serious complaint, during the tenure of the present and past agreements.

These practices have generally been conceded as proper. The right to work within the confines of a track section is not an exclusive possession of the section crew thereof. Ordinary track maintenance work is generally performed on a section by that section crew personnel. But it must be conceded that patrol crews, welding crews, regular extra crews and temporary extra crews also have rights to work within the confines of all sections, since such crews have always been assigned to perform such work.

Petitioner's position in this claim, simply stated, is that no work on the right of way within the confines of a section may be performed by any one **unless** the section crew of said section is actually **working at the same time.** Such a position is not sustained by any rule and cannot be supported by the practices of the Railroad.

In the instant case there was an extra crew which had been delegated to perform certain work on Sections 21 and 23. This crew was just as much entitled to perform the work as was the section crew of Section No. 23, perhaps more so, for the work was lining stone for a considerable distance through two sections. This is work usually assigned to extra crews since it is not generally considered as ordinary maintenance but as special work to be performed by special crews. The extra crew performed the work during their regularly assigned hours and no overtime was involved.

Petitioner asserts that the Carrier should have taken the extra crew away from work to which they had been assigned, and had been performing, prior to Saturday, March 26, 1949, and called in the section crew of Section No. 23 to do the work, merely because it happened to be within the confines of Section No. 23, or possibly to call in the personnel of Section Crew No. 23 to work with the extra crew on Saturday, March 26, 1949 even though the section crew had not been engaged in this work on Friday, March 25, 1949 and Carrier had no need for additional employes.

Past practice does not support the claim in this docket.

3. **THE CLAIM IS EXCESSIVE.**

Although Carrier feels it has shown clearly above that there is no merit to this claim, it should be pointed out that there is no provision in the controlling agreement which could possibly be construed as warranting a penalty payment at time and one-half rate. The only rule providing for the payment of time and one-half is the overtime rule. No overtime was worked by claimants.

SUMMARY: Carrier has shown that there is no merit in the claim because no rule supports it while past practice supports the Carrier. The claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants are regularly assigned as members of Section Crew No. 23, working Monday through Friday. On Saturday, March 26, 1949, Carrier assigned an extra crew to the work of aligning and trimming stone ballast shoulder along the eastbound main line on Section 23. During the week which included the date of this claim the extra crew had

been engaged in the work of lining stone on both Sections 23 and 21. The extra crew was assigned a work week Tuesday through Saturday, so no punitive rate was paid for any of the work performed. Employes file claim as indicated.

The parties in their respective submissions both cite Award 4700 of this Board as lending support to their positions herein. However, that docket involved entirely different facts than those herein. The question there involved was the right to overtime work on a section as between the regularly assigned section foreman and an extra crew foreman where both had crews working on a rail laying job and the extra crew as such was not used. Here we are confronted with the determination of the rights of a regularly assigned section crew to work on its section where an extra crew is required to work on a day not included in the section crew's regular assignment. The question is essentially one of seniority rights to work and turns upon the effect to be given to Rule 5-A of the effective Agreement, which reads as follows:

> "5-A. Seniority Districts—Trackmen and B&B Laborers.
>
> Seniority rights of trackmen and B&B laborers, as such, will be restricted to their respective gangs; except, on force reduction, trackmen and B&B laborers affected may, if they so desire, displace trackmen and B&B laborers junior in the service on the Supervisor's district where employed, provided such displacement rights are asserted within ten (10) days. When force is increased or vacancies occur, these trackmen and B&B laborers may return to their original positions according to their seniority. Employes out of service because of force reduction will be given an opportunity to return to service in accordance with seniority when forces are increased or vacancies occur."

It is clear that this rule restricts seniority of section men to the gang to which they are assigned except in force reduction. Obviously, that seniority must attach to certain work, otherwise that provision of the Agreement would be meaningless. It follows that a class of work even though not specifically described in this rule nor elsewhere in the Agreement was contemplated by the parties as being subject to the operation of that seniority. Inasmuch as the seniority is confined to the section, it is the Maintenance of Way work in the section to which it applies. It is from this line of reasoning that we evolve the general principle that work on a section belongs to the regularly assigned section foreman and his crew. (See Awards 3627, 4803, 5142.) By the very nature of Maintenance of Way work, however, it is clear that the rule is not absolute. Generally it is recognized that in emergencies and when a large scale project is undertaken, the regularly assigned section crew may be augmented by extra crews and that adjoining section crews may be mixed with the regularly assigned crews to accomplish the work which must be done. That is exemplified by the situation involved in Award 4700. No complaint was raised by the Employes in that docket about the mingling of crews or performance of work on a given section by extra crews, so long as the regularly assigned section crews were working. Considering the over-all nature of the work of the Maintenance of Way Department, the seniority rule above quoted and the requirements of the Carrier's operating rules which hold the foreman responsible for proper inspection and safe condition of tracks, roadbed and right of way in his section, it seems clear the Agreement contemplates that when it is necessary to perform maintenance of way work on a particular day involving the services of one crew or a part thereof, which work does not require the employment of specialized skills not to be found in the normal complement of a section gang, such work belongs to the necessary complement of the regularly assigned section crew. It follows that the assignment of the extra crew to this work on the date involved was a violation of the Agreement and a sustaining award is indicated. Under the facts and agreement appearing in this docket there is no doubt that the applicable rate is pro rata and not punitive.

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 Carrier violated the Agreement.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of March, 1951.