Award No. 5441
Docket No. MW-5474

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective agreement when it failed to call Section Foreman H. L. Clark and Laborer J. Gomez to perform work on their assigned section during overtime hours on Saturday, November 5, 1949;

(2) Section Foreman H. L. Clark and Laborer J. Gomez be compensated at their respective time and one-half rates for two (2) hours and forty (40) minutes because of the improper assignment referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On Saturday, November 5, 1949, a train movement damaged a switch on West End of tracks 4 and 5 in the Omaha Passenger Yard, Section RB-3.

It was necessary to make repairs on Saturday, November 5, 1949, and restore the switch to service.

Section RB-3, Omaha Passenger Yard, is assigned to Section Foreman H. L. Clark and his crew.

Section Foreman Clark and his crew have a regular five (5) day per week assignment, Monday through Friday.

Section Foreman C. E. Wilson, Section RB-4, and one member of his crew, having a regular five (5) day per week assignment, Tuesday through Saturday, were assigned to make repairs to the damaged switch on Section RB-3.

Section Foreman Wilson and his crew hold no seniority rights on Section RB-3.

The Carrier made no attempt to call Section Foreman Clark and Laborer J. Gomez to perform the necessary work on their assigned section.

Claim was filed in behalf of Foreman Clark and Laborer Gomez, and claim was declined.

The agreement in effect between the two parties to this dispute, dated December 1, 1946, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

There is a cardinal rule of interpretation of contracts to the effect that where an agreement is equally susceptible of two meanings, one of which would lead to a sensible result and the other to an absurd one, the former will be adopted. Assuming solely for the sake of argument, but not for one moment admitting, that the agreement of July 20, 1949 is susceptible of two meanings, the Carrier respectfully asserts that the contentions of the Petitioner in this dispute would lead to an absurd conclusion. Since the agreement of July 20, 1949 was negotiated for the purpose of providing six-day protection at the terminals listed therein, the only sensible conclusion that can be reached is that the gang on duty on Saturday can provide the protection of the terminal contemplated by the agreement only if it is permitted to take care of all emergency protection work in the terminal.

The absurdity of the Petitioner's contentions is obvious when consideration is given to the fact that the Employes agreed that the deviation from the Monday-Friday work week was necessary in order to provide six-day protection at the terminals listed in the agreement of July 20, 1949. While the Employes agree that it is proper and permissible to stagger the work week of the section gangs in terminals to provide six-day protection, at the same time they are contending that the gang assigned to protect the terminal on the sixth day is prohibited from providing that very protection which is contemplated by the agreement setting up the six-day assignments. The contentions of the Employes in this dispute would not only lead to an absurd conclusion, but would make a complete nullity of the agreement of July 20, 1949.

The Carrier respectfully submits that the agreement of July 20, 1949 provides for the assignment of some section forces at Omaha Terminal from Monday through Friday, and some section forces from Tuesday through Saturday, for the sole purpose of providing a working force six days each week to protect the terminal in the event emergency repairs are necessary on any section in the terminal. The claimants in this dispute are assigned Monday through Friday, and in conformity with the provisions of the agreement of July 20, 1949, any emergency work necessary on their section on Saturday is properly performed by the section gang that is assigned to protect such work on Saturday.

One of the universal principles of contractual construction is to the effect that as between general and special provisions of a contract the special controls the general. This principle, so well established that it needs no citation of authority to support it, has particular application in the dispute involved in this proceeding. The agreement of July 20, 1949, covering the staggering of section forces at the terminals listed therein, is a special agreement or rule applicable only to those particular terminals, and to a particular set of circumstances. As such, the special agreement which was negotiated for the sole purpose of providing six-day service at the several terminals, by its very nature, takes precedence over the general provisions of the contract. Obviously if it were not the intention of the parties that the special agreement would control the general rules, the special agreement would be a complete nullity. There would be no reason or purpose for such an agreement if it did not provide the six-day protection as contemplated by its terms.

The Carrier respectfully asserts that its right to use the members of the section gang providing the sixth day protection on any and all sections of the terminal while other section forces are off on their rest days is fully and unequivocally supported by the clear provisions and the intent of the special agreement of July 20, 1949, and the claim in the instant dispute is completely unsupported by any contractual requirement.

In the light of all of the facts and circumstances, there would seem to be no alternative other than to deny the claim in its entirety.

(Exhibit not reproduced.)

OPINION OF BOARD: The facts in this case are not in dispute and can be stated very briefly. Claimants are members of Section Gang RB-3,

assigned Monday through Friday with Saturday and Sunday as rest days, at the Carrier's Omaha, Nebraska Terminal, which is divided into four sections, designated as Sections RB-2, RB-3, RB-4 and RB-5. On Saturday, November 5, 1949, on one of Claimant's assigned rest days, the No. 5 Track Switch on Section RB-3 was damaged in an accident, and necessary repairs were made by employes of Section Gang RB-4, who are assigned to work Tuesday through Saturday.

There is no dispute between the parties regarding the fact that under seniority rules of the Agreement in existence prior to July 20, 1949, the incumbents of Section Gang RB-3 possessed seniority rights on its section and that except for an alleged agreement, which the Carrier asserts was consummated on that date in connection with negotiations preceding the revision of the then current Agreement for the purpose of incorporating therein the terms and provisions of the Forty Hour Week Agreement, the work in controversy would have belonged to them if available for service. Nor is it denied they would have been available if they had been called. In fact, when the record is carefully analyzed it appears the sum and substance of the Carrier's overall defense to the claim is that this so-called agreement gave it the right to assign such work to employes of Section Gang RB-4, irrespective and notwithstanding provisions of the subsequently executed revised rules Agreement, even though it was not incorporated within the latter contract.

Turning to the instrument on which the Carrier relies as contractual authority for its action we find that it is a letter, bearing date of July 20, 1949, directed to G. E. McNulty, Acting General Chairman of the Brotherhood of Maintenance of Way Employes, and signed by J. E. Wolfe, Assistant to the Carrier's Vice President, which reads:

> "Referring to discussion at conference on July 19, concerning Article II, Section 1, Paragraph (f), of the 40-hour week agreement dated March 19, 1949, with particular reference to Management's request that one section gang at Chicago, Galesburg, Kansas City, Omaha, Lincoln and Denver, be assigned to work Tuesday to Saturday, both days inclusive, the assigned rest days to be on Sunday and Monday.
>
> This letter will confirm the understanding reached at the aforesaid conference, that the senior foremen will be given opportunity to select the rest days they prefer and the junior foremen at the particular point will be required to take the assigned rest days that are not preferred by the senior foremen. After this has been taken care of, we will give you the numbers of the sections that are assigned Tuesday to Saturday, and this information will constitute an agreement between us that other sections will not be so assigned except by agreement or under that part of Article II, Section 1, Paragraph (f) which permits the Carrier to make such assignments subject to the filing of grievances or claims under the agreement in the event you do not concur in the necessity for such an assignment."

Turning to the Contract, which as we have indicated was executed subsequently to the date of the letter and became effective September 1, 1949, we find that Rule 40 (a) thereof, reads as follows:

> "Rule 40. (a) Subject to and qualified by any provisions of the '40-hour week agreement' of March 19, 1949 in conflict herewith, senior available qualified employes in the respective gangs will be given preference to work when overtime service is required."

We find, and Carrier points to, no provision of the Forty-Hour Week Agreement conflicting with the employes right to perform the work in question which, in view of the Rule just quoted, must be regarded as overtime work because, if they had been called and used, the work performed by them

would have been outside the hours of their regularly assigned positions. Of course, if the work had been performed by employes assigned to relief positions or by qualified available extra or furloughed employes, in conformity with the Forty-Hour Week Agreement the Claimants could have no cause for complaint but that is not what was done. It was performed by regularly assigned employes having seniority rights on another territory.

Thus, we come back to the question whether the letter warranted the Carrier's action.

We are not impressed with the Carrier's persistent arguments to the effect that the letter must be regarded as a part of the contract and hence, under cardinal rules of construction (1) that where an agreement is equally susceptible of two meanings, one of which would lead to a sensible result and the other to an absurd one, the former will be adopted, and (2) that as between general and special provisions of a contract the special controls the general, such Contract must be construed to mean that its action was warranted because there was some sort of an understanding between it and the employes that after September 1, 1949, three of its four section gangs at the Omaha Terminal would work Mondays through Fridays and one would work Tuesdays through Saturdays. There is another cardinal rule of construction, which is equally as important, if not more so, than the two referred to by the Carrier, to the effect that a contract executed pursuant to negotiations includes everything on which the parties had agreed. Its corollary is that unless they have done so, something which one party contends should have been included and the other denies, cannot be regarded as coming within the purview of its terms. Here, the letter on which the Carrier relies or a provision of similar import was not included in the Contract as subsequently executed. Therefore, we cannot reach out and say it became a part of that agreement. True, if it had been mentioned or a provision of like import had been incorporated therein, even though in ambiguous terms, we could then resort to intention of the parties in order to ascertain its meaning but that cannot be done where—as here—one of the parties is seeking to read something into a contract that is not there. If, as the Carrier now contends, whatever was referred to by the language used in the letter was one of the important matters under consideration during the preliminary negotiations leading up to the execution of the present Agreement, it was its duty to see such matter was included before giving its approval to that instrument by authorizing its representatives to affix their signatures thereto as written. Having failed to do so the responsibility for its neglect must be borne by the Carrier, not by someone else.

Heretofore, we have pointed out that the Contract as executed contains an express provision to the effect qualified employes in the respective gangs would be given preference on overtime work. Since we have held the letter cannot be regarded as a part of the current Agreement and since the Carrier failed to have the work in question performed by employes authorized to do so under provisions of the Forty-Hour Week Agreement it necessarily follows the Claimants were entitled to and should have been called to perform it. The result is the Carrier violated the Agreement and the claim must be sustained.

In conclusion it should perhaps be pointed out that this is not a case where it is claimed that subsequent to the execution of a current Agreement an understanding of the kind here relied on had been reached between the Carrier and the employes. If it had been we would then have been required to determine other questions raised by the parties, not now material, because it must be conceded that supplemental understandings and agreements, including the interpretation the Employes now agree they have placed on the letter itself, reach by the parties subsequent to the execution of their agreement would modify or change its terms and be binding upon them.

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

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.