Award No. 5950
Docket No. MW-5687

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

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

(1) The Carrier violated the agreement when it failed to call Track Foreman T Hoey and his crew of four men to perform work on their assigned section during overtime hours on Saturday, April 23, 1949;

(2) Track Foreman T. Hoey, Trackmen P. Carroll, A. Ferraro, T. Powers and M. Doyle be compensated for three (3) hours each at their time and one-half rate account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Track Foreman T. Hoey and Trackmen P. Carroll, A. Ferraro, T. Powers and M. Doyle were assigned to and held seniority on Section #7 of the Boston and Maine Railroad.

Track Foreman T. Hoey and his crew have a regular five day a week assignment, Monday through Friday.

On Saturday, April 23, 1949, the Carrier assigned an Extra Crew to pick up coal on Section #7.

Track Foreman Hoey and his crew were available but were not called to perform this service.

A claim was filed in behalf of Track Foreman Hoey and his crew for compensation at their respective time and one-half rate of pay for three (3) hours on April 23, 1949 because of the Carrier's improper assignment.

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. Reprinted January 2, 1951).

POSITION OF EMPLOYES: Rules 1, 2 and 3 (a) of the effective agreement read as follows:

Rule 1. "Seniority begins at the time the employes' pay starts in the class in the sub-department on their seniority districts. An

to remove this coal with a crane at the earliest possible moment as its presence prevented use of the lead track.

There is before the Third Division, at this time, a dispute, submitted ex parte by the Employes, party to this dispute, identified by Acting Secretary, Mr. A. I. Tummon, as follows:

> "Failure to call Section Foreman J. F. Delorey and his crew to perform necessary work on their assigned section on August 13, 1949."

The Position of Carrier, as set forth in Carrier's answer to the aforesaid ex parte submission of the Employes in the quoted dispute, is equally applicable to this dispute. Rather than burden this docket with a repetition of Carrier's entire argument, Carrier's Position in the above quoted dispute is hereby made a part of Carrier's Position in this docket.

In addition to the foregoing there is the added feature here that the work performed by the **regular extra crew,** in this docket, was definitely in the category of emergency work. Carrier's lead track into Mystic Wharf Yard was blocked and could not be used until a crane and crew removed the accumulated coal therefrom.

There is no merit to the claim in this docket and it should be denied.

All data and arguments herein contained have been presented to the Committee in conference and/or correspondence.

OPINION OF BOARD: This case is concerned with a claim of the System Committee of the Brotherhood on behalf of Track Foreman T. Hoey and his crew for three hours' pay at penalty rates for Saturday, April 23, 1949. It is asserted by petitioner that respondent Carrier violated the effective Agreement when it failed to call claimants for work on the date in question.

There is no controversy between the parties with respect to the essential facts involved in the instant situation. Both parties state that the principle involved in this case is the same as the one involved in Dockets MW-5688 and MW-5689, on which Awards are made this day.

The issue is primarily one of interprting the relevant rules of the Schedule with respect to the rights of Claimant Crew to the work involved on April 23, 1949. Petitioner contends that Claimant Crew, by reason of seniority, owned the right to perform the work here at issue. The Carrier denies that Claimant Crew had any such exclusive right to the work. It is contended that the Carrier acted properly and within the provisions of the Agreement when it had the work in question performed by a regular extra crew rather than the section crew. The Carrier states that over a period of many years, the regular extra crews have had rights to certain work, and that the section crews cannot, therefore, be said to have the exclusive right to work upon their respective sections.

Petitioner cites Rule 5-A as the governing rule on this matter:

> "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. . . ."

The Third Division has had before it in earlier dockets involving these same parties and the same contract, the identical issue posed in this docket,

and in dockets MW-5688 and MW-5689. These earlier dockets were disposed of with Award 4700 and 5261.

In Award 4700, the Division stated:

> "It is true as a general rule, that the incumbent of a position is entitled to the overtime work arising from that position. . . . It is also true as admitted and contended by the Organization, in the absence of agreements, understandings or established practices to the contrary, that work on a section belongs to the regularly assigned foreman and his crew. . . ."

In this case on which Award 4700 was made these same parties took positions to some extent opposite from their respective positions in the instant case. In Award 4700 the Carrier's position was upheld and it was determined that the regular section crew which Carrier had used was entitled to the work.

In Docket MW-5229, resulting in Award 5261, the issue in dispute was virtually identical with the issue in the instant case. In that case, as in the instant case, Petitioner contended that the regular section crew had the primary right on the bases of Rule 5-A to the work on the section. The Division sustained the claim, and stated as follows:

> "It is clear that the rule restricts seniority of section men to the gang on 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 on 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. . . . Considering the over-all nature of the work of the Maintenance of Way Department, the seniority rule above quoted (Rule 5-A) and the requirements of the Carrier's operating rules which held the foreman responsible for proper inspection and safe condition of tracks, roadbed and right of way on 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. . . ."

The respondent Carrier in the instant case requests that the Division reverse its holding in Award 5261. Therefore, we must ask whether the decision in Award 5261 was so manifestly wrong that it should not be reversed. Further, are there sufficient variations in the facts in the instant case to justify a different conclusion than that given in Award 5261?

With respect to the second question, we find that the facts are not suffciently different to justify a different conclusion. The Carrier's contention that an emergency existed is not convincing. With respect to the first question, no evidence or argument has been submitted in the instant case to justify a conclusion that Award 5261 was manifestly wrong. It appears that the Division had before it in Award 5261 virtually all of the considerations which have been submitted in the instant case.

In view of these considerations an affirmative Award is justified. Under the circumstances obtaining, and in keeping with previous Awards of the Division, payment should be at pro rata rates.

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 at pro rata rates.

NATIONAL RAILROAD ADJUSTMEENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of October, 1952.