Award No. 6473
Docket No. MW-6236

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BANGOR AND AROOSTOCK RAILROAD COMPANY

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

(1) That the Carrier violated the agreement when it assigned an extra gang to perform overtime work on Section No. 354, at Houlton, Maine on November 22, and 24, 1951, in lieu of the employes regularly assigned to Section No. 354;

(2) That Section Foreman G. L. Pettengill and Trackmen C. Carroll, G. D. Faulkner and G. W. Green be allowed 16 hours each at their respective time and one-half rates of pay account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: During the month of November 1951, the Carrier arranged to retire certain tracks in its yards at Houlton, Maine, which is within the territory assigned to Section Foreman G. L. Pettengill and his crew, consisting of Trackmen C. Carroll, G. D. Faulkner and G. W. Green. This territory is designated as Section No. 354.

On Thanksgiving day, November 22, 1951, a designated holiday under the effective agreement, and on Saturday, November 24, 1951, a regularly designated rest day for the track forces on this property, the Carrier assigned a Fence-Track crew to perform overtime service in connection with the removal of the track sidings in Houlton Yard and compensated them at the overtime rate of pay. The Carrier did not call the regular members of Section No. 354 to perform the overtime service above mentioned, although they were all willing and available to perform such overtime service. The Fence-Track crew worked eight hours on each of the days herein involved.

Claim was filed in behalf of the regular employes of Section No. 354 for sixteen (16) hours pay each, at their respective overtime rates of pay. The Carrier declined the claim.

The agreement in effect between the two parties to this dispute, dated December 8, 1950, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Section Foremen and Trackmen on this property are assigned to work on certain specific territories, and are respon-

picked up and in such condition that it would make the road safe for operation, and on account of early snow which we received in 1951 we found it necessary to work this crew on Saturdays and a holiday.

Therefore, the work that Section Foreman G. L. Pettengill, Trackmen C. Carroll, G. D. Faulkner and G. W. Green are claiming was not overtime work that belonged to them or would have been performed by them.

If conditions had allowed, the work would have been done within a regular 40-hour week by our extra crew, which is the practice when we have a volume of work to do of this kind.

All matter contained in this submission has previously been discussed with representative of the employes.

OPINION OF BOARD: During the month of November, 1951, the Carrier arranged to retire certain tracks in its yards at Houlton, Maine. This territory is designated as Section No. 354 and is territory assigned to Foreman Pettengill and his crew. On November 22 and 24, 1951, the Carrier assigned a track fence crew to perform overtime service in connection with the removal of certain track facilities within the limits of Section 354.

Article II, Sec. 2 provides:

> "Rights accruing to employes under their seniority, entitle them to consideration for positions in accordance with their relative length of service with the railroad, as hereinafter provided."

It is the position of the Employes that under the Agreement they have a right to perform all work, both regular and overtime on their respective territories.

It is the position of the Carrier —

> "Early in November it became evident to management that this crew was not going to be able to do the amount of work assigned to it and continue to work a 40-hour week. Therefore, on the week commencing November 14, 1951 this crew was put on a 48-hour week, with time and one half for all hours over 40.
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> "Therefore, when this crew worked November 22, which was Thanksgiving Day, and November 24, which was Saturday, under the Working Agreement with the Brotherhood of Maintenance of Way Employes we were compelled to pay them time and one-half for working on those days. The work performed on those dates belonged to this crew and not to the crew of Section No. 354.
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> "As previously stated, the amount of sidings to be retired made it impossible to have our section forces remove these sidings and get the scrap picked up and in such condition that it would make the road safe for operation, and on account of early snow which we received in 1951 we found it necessary to work this crew on Saturdays and a holiday.
>
> "Therefore, the work that Section Foreman G. L. Pettengill, Trackmen C. Carroll, G. D. Faulkner and G. W. Green are claiming was not overtime work that belonged to them or would have been performed by them.
>
> "If conditions had allowed, the work would have been done within a regular 40-hour week by our extra crew, which is the practice when we have a volume of work to do of this kind."

The Carrier also urges that the Extra Gang which is a traveling track fence crew are regular employes during the life of their assigned program and the work they did is permitted under the provisions of Article 5 (g) (7) of the Agreement. The record shows that section men regularly perform work in connection with the removal of track facilities on this particular railroad. It is an acknowledged principle that all work on an assigned section belongs to the regularly assigned section crew—see Award 3822. Moreover, the Carrier has recognized the prior right of regular employes to perform overtime work in preference to temporary employes. The facts in this case are controlled by Award 5261.

The Carrier urges that in the event Claimants are entitled to an Award that compensation should be limited to the pro rata rate, and cites many cases to that effect. The Employes likewise cite cases to the effect that time and one-half is the proper rate of pay except where a day other than Sunday or a Holiday is assigned as the rest day. It is our opinion that an employe denied work is entitled to the rate of pay he would have received had he performed the service denied him.

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 terms of the Agreement in permitting the track crew to work on Section No. 354.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 9th day of February, 1954.

DISSENTING OPINION TO AWARD 6473, DOCKET MW-6236

This Award deprives employes of the Track Fence crew of its seniority rights to the system program of side track removal to which it was assigned in October, 1951, and sustains the claims of a section crew that was not assigned or equipped to perform the disputed work.

Award 5261, which was strongly relied upon to sustain this claim, actually justifies a denial Award because here the program was not a maintenance one but was one of abandonment calling for the use of equipment which ordinary section gangs do not have.

This Award also ignores recent Award 6339 between these same parties involving a similar situation, and departs from a long line of awards holding

that "the overtime rule has no application where only the right to perform work is involved" by sustaining the claim at penalty rates of pay.

For these reasons this Award errs and we dissent.

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ E. T. Horsley