

Award No. 6931
Docket No. MW-6972

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

- (1) The Carrier violated the effective Agreement when it assigned the work of cutting brush in the vicinity of McClelland, Iowa to employes of Extra Gang No. 3 from January 25, 1952, to March 27, 1952, both dates inclusive;
- (2) Each of the employes holding seniority as a Section Foreman and/or Section Laborer on the M. C. & F. D. District during the period of the instant violation, be allowed pay at their respective straight time rates for an equal proportionate share of the total man-hours consumed by employes of Extra Gang No. 3 in performing the work referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Beginning on January 25, 1952, and continuing through March 27, 1952, Extra Gang No. 3 was directed to and did perform the work of cutting brush along the Carrier's right-of-way in the vicinity of McClelland, Iowa. Approximately 1685 total man-hours were consumed by extra gang forces in cutting brush.

The Carrier made no attempt, either prior to or during the period herein involved, to either increase its regular section forces or to double up adjoining section gangs for the purpose of cutting this brush. The Carrier made no attempt to establish floating section gangs to supplement existing section forces such as has been done in the past by agreement with representatives of the Employes.

Extra Gang Laborers are paid six cents an hour less than section laborers, and have not heretofore been recognized as having any right to work involved in cutting brush; the exclusive right to such work being vested in the section forces by a long established interpretation and application of Agreement rules.

The violation of the Agreement was protested and suitable claim filed with the Carrier; claim was declined throughout all stages of handling on the property.

Attention is called to the fact that the Employees have not made any claim in behalf of the members of Extra Gang No. 3 for a higher (section laborers') rate of pay, indicating they were not improperly used.

The Carrier has shown that the governing agreement does not impose the limitation on the duties of extra gang laborers which is contemplated by the action of the Employees in this case, and claim should, therefore, be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The historical background of this claim is, in brief, that by reason of a neglected condition in the removal of brush along Carrier's right-of-way near McClelland, Iowa, the Iowa State Commerce Commission directed that the same be removed. The Carrier had this work performed by use of Extra Gang No. 3 in a period from January 25, 1952, to March 27, 1952, both dates inclusive.

The record shows that prior thereto there had been a curtailment or reduction in forces and there were, at the time in question, men on furlough.

There is a conflict in the record relative to these furloughed men, Carrier asserting there were none available, the Organization denies this and gives four methods by which this work could have been done, namely:

1. Augmenting the force of Section Gang No. D-23 by the recall of furloughed men.
2. Recruiting new help and employing local talent.
3. Establishment of a "floating Section Gang" through negotiation with the Brotherhood.
4. As a last resort, have the work performed by overtime service of the regular force.

Also relied upon by the Organization is Rule 26(g):

"(g) Laborers in seasonal extra gangs, whose employment is temporary in character, when engaged in work not customarily done by section or maintenance gangs, such as reballasting and rail relaying, including tie renewals, ditching and riprapping in connection therewith, bank widening, grade and line changes, and emergency work occasioned by inclement weather, overtime, exclusive of meal period, will be paid on the minute basis as prescribed in paragraph (b) of this rule. Such seasonal extra gangs will not be worked in the place of regular section or maintenance gangs."

We are of the opinion that the work done comes within the Agreement and hence Carrier's failure to use the employees coming within the purview of the Agreement was a violation thereof. Claim (1) therefore should be sustained. On Claim (2) the matter of payment is more difficult to determine by reason of the fact there are no individuals named as claimants.

However, we view this record as showing that there were furloughed employees. In Award 6664 we said, in a similar situation, on a monetary claim:

"The claim will be sustained at the respective hourly rates on the pro rata basis on behalf of the Signal Department employees * * * who would have performed the claimed work for the number of hours equivalent to the time spent by the General Railroad Signal Company employees in the performance of the claimed work."

In the instant case we deem it shown that districts were extended and employees with seniority standing who were in a furlough status within the

district should have been used. Carrier states the urgency of the work necessitated immediate attention and it took the only course available to it in this situation. Petitioners allege that no effort was made to contact furloughed employees with seniority standing.

On the entire record, claims and counter-claims, we are of the opinion that Claim (2) should be sustained as to furloughed employees, in accordance with seniority status, who can show by positive proof that they were available, at the time in question in this claim, to perform this work and that such employes coming within such category be paid at pro rata rate.

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 herein; and

That Claim (1) is sustained. There was a violation of the Agreement.

That Claim (2) is sustained in accordance with Opinion by reason of the violation of rules of the Agreement.

AWARD

Claim (1) sustained.

Claim (2) sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of March, 1955.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 6931
Docket No. MW-6972

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes.

NAME OF CARRIER: Chicago Great Western Railway Company.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning, as provided for in Section 3, First (m) of the Railway Labor Act, the following interpretation is made:

The dispute arises as to what constitutes "positive proof" of availability within the intent and purpose of the last paragraph of Opinion of Board, reading

"On the entire record, claims and counter-claims, we are of the opinion that Claim (2) should be sustained as to furloughed employes, in accordance with seniority status, who can show by positive proof that they were available, at the time in question in this claim, to perform this work and that such employes coming within such category be paid at pro rata rate."

It would seem through the process of elimination the list has narrowed down to 13 employes who it is contended, comply with the provisions of the Opinion of Board set out above in Award 6931.

It appears to us that of those employes now being considered as eligible for payment that a showing should be made,

1. On seniority status in the M. C. and F. D. District and that he was on furloughed status during the time covered by this claim.
2. That he was available at the time in question and able, ready and willing to accept this employment.
3. That it not be necessary to show availability on each and every day covered by the duration of this claim, but if unavailable on any such day, to definitely set out those days when he was available.

In view of the above we think that an additional and more definite showing is necessary than that made to date and that the same be in keeping with the points set out.

Referee LeRoy A. Rader, who sat with the Division as a member when Award No. 6931 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of July, 1956.