Award No. 7053
Docket No. MW-7070

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Hubert Wyckoff, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it required Section Laborers W. H. Meyer and John McDonald to discontinue performing overtime service on Section No. 10 and thereafter assigned such service to extra gang laborers from August 16, 1953, to October 9, 1953, both dates inclusive;

(2) Section Laborers W. H. Meyer and John McDonald each be reimbursed the exact amount each lost as a result of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Section Laborers W. H. Meyer and John McDonald were regularly assigned as such on Section No. 10 at New Haven, Missouri. This gang was regularly assigned to a forty-hour work week, Monday through Friday, with Saturdays and Sundays as designated rest days. Their regular assigned hours were from 7:00 A. M. to 4:00 P. M., with one hour out for lunch.

On or about May 17, 1953, various Maintenance of Way forces were engaged in repairing a slide that had occurred within the territorial limits of Section No. 10, between mile posts 67 and 68. Included in the above referred to force was Extra Gang No. 1, which was assigned a work week and assigned hours identical to that assigned to Section No. 10.

Because of the possibility of recurring slides and rocks falling from the adjacent bluff, the Carrier decided to have the track patrolled at the aforementioned location during hours outside of the regular assigned hours of Section No. 10, on a seven-day basis.

Beginning on June 24, 1953, the Claimant Section Laborers Meyer and McDonald were assigned to the performance of this overtime service; one claimant patrolling the track from 4:00 P. M. to Midnight; and the other from Midnight to 8:00 A. M. For this service the Claimants were compensated at time and one-half rate of pay.

Effective August 16, 1953, the Claimant employes were required to discontinue performing this overtime service and the work thereafter assigned to Extra Gang Laborers Willimann and Fennewald.

has been complied with and neither party may correctly assert that such compliance is a breach. In the instant case the Carrier had a burdensome overtime situation on its hands and merely put on additional jobs to do the work. The result was compliance with the purpose of the overtime rule; consequently there was no breach.

Awards 4526 and 5203 recognized Carrier right to change assigned hours to meet service requirements when the duration of such requirements is not known. It follows by logical reasoning that new jobs can be put on to accomplish the sme purpose. In fact there is no rule in this Agreement that would prohibit putting on additional jobs to meet temporary service requirements even if such requirements are known to be of short duration.

With reference to Rule 1 (c) relied upon by the Employes and quoted in Section 13 of our Statement of Facts we cannot understand how there could be a violation in the circumstances here involved. These claimants had regular section laborer positions secured under the provisions of this rule. How can it be said their seniority rights referred to in the rule also applied to other positions at the same time? It should be understood that during the period they worked the watchman jobs they retained their regular assignments as laborers and during the period of these claims they worked their regular assignments while others did the watching work for which they are making claims.

These additional watching jobs were not subject to bulletin—they were just additional section laborer jobs. They were not subject to the exercise of seniority by these claimants. Even if the jobs had been bulletined and the claimants had acquired them under Rule 1 (c) they would have been worked at the straight time rates because the claimants would have been severed from their 7:00 A. M. section laborer jobs.

The Employes' Statement of Claim calls for reimbursement to the claimants of the exact amount each lost as result of alleged violation of the Agreement. What loss? None has been identified; nor has any violation of the Agreement been proven. The claimants were utilized for a period of time at punitive rates for watching service and then returned to their regular assignments without the loss of an hour's work. All we can see for the claimants here is **gain.** We certainly cannot discern any evidence of loss.

Furthermore, even if these claimants had been entitled to the watching job, which we do not admit, they would not be entitled to time and one-half pay because they were not permitted to take them. They did not actually perform any overtime service during the period of their claims. Under principles established by numerous awards of your Board, including 2346, 2695, 2823, 3049, 3193, 3232, 3375, 3770, 4495, 4710, 4930, 5200, 5475, 5607 and 5887 an employe denied work which should have been given him is not entitled to recover at a penalty rate of pay even if he would have been paid at punitive rate if he had actually been used. Since these claimants have been paid the pro rata rate for the days involved, we fail to see how it can be said they have due any payments for time not worked. Certainly they could not be entitled to both their regular jobs and the watching jobs on the same dates.

It is the position of the Carrier in this casce that it would be completely inconsistent with the accepted principles of contract construction to say that full time jobs could not be established to protect special work in circumstances such as here involved at other than time and one-half rates. Certainly there is no rule in this Agreement requiring such payments. Rules 1 (c) and 18 are not in our opinion, by any stretch of reasoning, susceptible to an interpretation of that nature.

OPINION OF BOARD: This is a claim by Section Laborers to overtime work which was performed by Extra Gang Laborers.

Claimants were regularly assigned to a Section Gang on Section 10 with hours 7:00 A. M. to 4:00 P. M. Due to a slide it became necessary to use this Section Gang augmented by an Extra Gang which was assigned the same working conditions as the Section Gang.

The Carrier decided to have the territory patrolled from 4:00 P. M. to 8:00 A. M. and claimants were used for this purpose at the overtime rate of pay for almost two months, whereupon the Carrier discontinued the use of Claimants and gave the patrol work to two members of the Extra Gang who were thereafter carried on the payroll of Section 10 as Section Laborers and paid the straight time rate for almost another two months until the service was terminated whereupon these employes returned to their regular positions on the Extra Gang.

Section Gangs and Extra Gangs comprise separate and distinct classes of employes and are carried on separate seniority rosters. There were no available furloughed or extra men; and the two Extra Gang Laborers used held no seniority as Section Laborers.

First. It is settled on this property that rights accruing to employes under their seniority include the right to perform the overtime work of their positions (Awards 2716 and 2717); and so hold numerous other awards: 3955, 4490, 4700, 4987, 5172, 5200, 5261 and 6756. None of these awards, however, goes so far as to preclude a carrier from creating new positions in order to obviate the necessity for overtime work.

The dispute here is not between outsiders and Extra Gang employes which is to say that, if Claimants were entitled to this work, the claim is good regardless of who performed it. For our purposes, therfore, the dispute should be viewed as though the two Extra Gang employes who performed the work were new hirings.

Second. The work in dispute was Track Watchmen work and not performance of the regular duties of the Section Gang outside assigned hours. Track Watchmen positions are paid at a monthly rate (Rule 16) and must be bulletined (Rule 11 (a)) whereas Section Laborers' positions are paid at an hourly rate (Rule 14) and need not be bulletined (Rule 11 (a)).

The work in dispute was of four months' duration and it should properly have been, but was not, bulletined as Track Watchmen positions.

However, at no time has the Organization protested the Carrier's failure to bulletin the work as Track Watchmen positions and the claim is not made on this ground.

By the same token, the Carrier first treated the work in dispute as true overtime work of the Section Laborers' positions for two months and then asserted the right to create two additional Section Laborers' positions to perform the additional two full shifts of work at the straight time rate.

In other words, no dispute exists between the parties with respect to whether the work in question was Section Laborers' work. Both parties now maintain that it was; and we accordingly treat it as such.

Third. In this view, there was an increase in the work of the Section Gang. Ordinarily when an increase is work which can be performed during regular assigned hours, the Carrier is at liberty to meet the change in work load either with overtime or with augmentation of force. But the work in dispute here was an increase that, by its nature, could not be performed during the regular assigned hours of the Section Gang.

The essential question, therefore, is whether the Carrier violated any rule of the Agreement by assigning starting times for the two additional Section Laborers' positions different from the starting time of the Section Gang.

Fourth. Rule 18 requires regular assignments to have a fixed starting time and forbids regular starting time to be changed without 36 hours' notice to the employes affected. The Rule sets no limits within which starting time may be fixed or changed; nor does it require all members of a Section Gang to have the same starting time. The assignments made by the Carrier here had a fixed starting time and so met the requirements of Rule 18.

We are unable to view the work in dispute here as "emergency service" within the meaning of Rule 31 or as the type of situation which resulted in Award 4109.

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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 8th day of July, 1955.