Award No. 7584
Docket No. MW-7918

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

RAILROAD DIVISION, TRANSPORT WORKERS UNION OF AMERICA, CIO

ALIQUIPPA AND SOUTHERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Employe — That it is improper for the Carrier to now assign the work of hauling employes, equipment and material by Signalmen and Foremen when this work has always been done by the Track Equipment Operators.

1. Mr. Sam Marenkovich is a Track Equipment Operator. On November 6, 1954 a Foreman was assigned to haul employes. This was Mr. Marenkovich's rest day. Since this work was done by a Foreman instead of an Operator we are asking that Mr. Marenkovich be compensated eight (8) hours at the punitive rate of Operator's pay.

2. Mr. Sam Marenkovich is a Track Equipment Operator. On November 7, 1954 a Signalman was assigned to haul track material. This was Mr. Marenkovich's rest day. Since this work was done by a Signalman instead of an Operator we are asking that Mr. Marenkovich be compensated eight (8) hours pay at the punitive rate of the Operator.

3. Mr. Sam Marenkovich is a Track Equipment Operator. On December 4 and 5, 1954 a Foreman was used to haul employes, equipment and material to and from 342 Track. These were Mr. Marenkovich's rest days. Since this work was done by a Foreman and it does belong to Track Equipment Operators we are asking that Mr. Marenkovich be compensated eight (8) hours pay at the punitive rate of the Operator for each day worked by the Foreman.

Past practice of the Carrier has been that when men were needed as Track Equipment Operators the men regularly assigned to this work did it regardless of their rest days.

As the work of Track Equipment Operators belongs to that class of employes so assigned, we are asking that Mr. Sam Marenkovich be compensated as stated in the above submission.

The Organization feels that since the Carrier used improper employes to perform the work of the Track Equipment Operators that Mr. Marenkovich

should be compensated eight (8) hours punitive rate of pay of the Operator for November 6 and 7, 1954 and again on December 4 and 5, 1954.

EMPLOYES' STATEMENT OF FACTS: That Mr. Sam Marenkovich is a regular assigned Track Equipment Operator.

That the Railroad Division, Transport Workers Union of America, CIO, formerly "The United Railroad Workers of America, CIO" does have a collective bargaining agreement, effective December 31, 1946 with the Aliquippa and Southern Railroad Company covering the Maintenance of Way Department, Copies of which are on file with the Board, and is by reference hereto made a part of this Statement of Facts.

That Mr. Sam Marenkovich is an employe of the Maintenance of Way Department.

That the Carrier has always taken the stand that Foreman are to supervise and not do the work of the employes of any class or craft.

That the Carrier has also always taken the stand that Signalmen may transport their own material, men and equipment that is used by them, but the Track Equipment do the same for their class of employes.

POSITION OF EMPLOYES: That the Carrier does have a procedure to follow in filling of Track Equipment Operators jobs, but the men that were used in these claims do not come under this procedure.

It is respectfully submitted that the work of Track Equipment Operators belongs to a class of employes who received these rights by seniority and that no employe can do this work of the Track Equipment Operators unless they have seniority in this class except when they do have seniority in the class but are not active in this class then the procedure now set-up by the Carrier must be followed in filling of these jobs.

Nowhere in the agreement are there any provisions that employes of any one class have the right to perform the work of another class.

CONCLUSION: Original time claim for Mr. Marenkovich for November 6 and 7, 1954 was presented to Mr. L. E. Smith, Supervisor of Maintenance of Way Department and denied by him under date of November 30, 1954, Employes Exhibits No. 1 (a) and No. 1 (b).

Original time claim for Mr. Marenkovich for December 4 and 5, 1954 was presented to Mr. L. E. Smith, Supervisor of Maintenance of Way Department and denied by him under date of January 3, 1955, Employes Exhibits No. 2 (a) and No. 2 (b).

Claims of Mr. Sam Marenkovich for November 6 and 7, 1954 were then appealed to Mr. M. S. Rose, Assistant General Superintendent under date of December 29, 1954, Employes Exhibit No. 3.

Claims of Mr. Sam Marenkovich for December 4 and 5, 1954 were then appealed to Mr. M. S. Rose, Assistant General Superintendent under date of January 29, 1955, Employes Exhibits No. 4 (a) and No. 4 (b).

Claims for Mr. Sam Marenkovich for November 6 and 7, 1954 were denied by Mr. M. S. Rose under date of February 7, 1955, Employes Exhibit No. 5.

Claims for Mr. Sam Marenkovich for December 4 and 5, 1954 were denied by Mr. M. S. Rose under date of March 31, 1955, Employes Exhibit No. 6.

Claims for Mr. Sam Marenkovich for November 6 and 7, 1954 were then appealed to Mr. G. J. Lais, General Superintendent under date of February 19, 1955, Employes Exhibits No. 7 (a) and No. 7 (b).

of the three claims here presented as a matter of general practice, still it was not required, under the peculiar circumstances relating to Mr. Marenkovich, to call him to perform the extra work involved in these instances. In this connection it should be borne in mind that all of the claims are for extra work which he claims he was entitled to on his rest days.

Claimant Marenkovich has contended for some period of time that he cannot work where there are fumes. Whenever he is assigned to a job involving burning or work at some location such as the cinder dump or the garage where he alleges there are fumes, he requests relief and goes home rather than perform the job. The Carrier has attempted to cooperate by assigning Marenkovich to "fumeless" jobs during his regular scheduled work week. However, because of his contention that he cannot work where there are fumes, the Carrier does not consider him as available for extra work, as the Carrier is not able to foresee all that may be required of a track equipment operator when he is called out for extra or emergency work. Thus, extra and emergency work is distributed among the other track equipment operators on a rotating basis to equalize the overtime among the participants within the group.

III

The Penalty Payment Would Not Be Eight Hours At The Punitive Rate

If the claimant is entitled to any payment, it would not be for eight hours at the punitive rate but, under the call rule, only four hours at the pro-rata rate.

The call rule is found in Section (b) of Article 2 and reads as follows:

> "Employes called or required to report for work and reporting either before or after their regular assigned hours will be allowed a minimum of four (4) hours at pro-rata rate if non-continuous, either before or after, with their regular assigned hours. The portion of this time actually worked will be paid for at the time and one-half rate and the balance at pro-rata rate."

As the longest time required to perform any of the work for which the claims are herein made was considerably less than 30 minutes, the claimant, if he were entitled to payment at all, would only be entitled to the time provided in the above-quoted rule, and as he performed no work it would be paid at the pro-rata rate. Further, the Third Division has consistently held that overtime is not to be allowed for duties or work not actually performed.

CONCLUSION

The Carrier has shown that there was no violation of the agreement and there is no consistent past practice which would support the claim of the employes. Even if the decision is that the agreement was violated, the Carrier has shown that the claimant is not available for extra or emergency work. Therefore it is respectfully submitted that he is not entitled to the compensation claimed and the claim should be denied.

Oral hearing is requested.

All data contained herein has been presented to the employe involved or his duly accredited representative.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is here made that the carrier violated terms of the effective agreement on November 6 and 7 as well as December 4 and 5, 1954, when it permitted employes not covered by such agreement to haul employes and material. Reparations of 8 hours pay at the punitive

rate for each date set out above is sought. The claimant is classified as a Track Equipment Operator, with assigned work days Monday through Friday with Saturday and Sunday designated as rest days.

The organization asserts that the effective agreement and prevailing custom and practice require that employes classified as Track Equipment Operators be assigned the duty of transporting either or both materials and employes.

The respondent takes the position that no provision in the agreement can be construed as placing the work of hauling men and materials solely with track equipment operators, but rather that the performance of such duties has historically been performed by the various crafts as incidental to the performance of other assigned duties.

An examination of the effective agreements fails to disclose any provisions that either directly or by inference place the work of transporting men and materials within the sole purview of Track Equipment Operators.

The organization's assertion that this condition and practice have prevailed in the past is completely unsupported by evidence to sustain such allegation. To the contrary evidence of record indicates that employes of other crafts and classifications have in the past performed such of these duties as were necessary to facilitate the accomplishment of their assignments.

This Division stated in Award 6748 that:

> "* * * the Carrier asserts the rule is that the burden of establishing facts sufficient to permit the allowance of a claim is upon the party who seeks its allowance * * * There is such a rule, which is frequently applied, and we think the instant case is one requiring its application * * * Claimant has failed to maintain the burden of establishing his claim and it must be denied."

A similar burden has not been discharged here, so therefore, this claim must be denied.

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 did not violate the effective agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December, 1956.