Award No. 7858
Docket No. MW-7389

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Dwyer W. Shugrue, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

UNION PACIFIC RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it failed to utilize the regular forces assigned to and holding seniority on Section No. 227 at Kamela, Oregon, to perform work on their assigned and designated territory during overtime hours from December 22, 1952, to January 22, 1953, (both dates inclusive) and in lieu thereof, utilized the services of a newly established temporary extra gang No. 751, consisting of newly hired employes as extra gang laborers and newly assigned temporary extra gang foreman G. D. Frizzell;

(2) Section Foreman George King and Sectionmen Ocie Lacy, Ernest Hager, Jasper Casuse, Bernon La Forge, and Harry Williams each be allowed 176 hours pay 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: The Claimant Section Foreman and Section Men were regularly assigned to and held seniority on Section No. 227 on the Oregon Division as listed in Rule 4 of Article 2 on Page 18 of the instant Agreement. Headquarters for this gang are at Kamela, Oregon.

The Claimant employes were assigned to regularly work Mondays through Fridays (designated holidays excepted) and were assigned working hours from 8:00 A. M. to 5:00 P. M. with one hour meal period daily.

Under date of December 5, 1952, the Carrier issued Bulletin MW No. 171, advertising a vacancy open for bids for the position of extra gang foreman in temporary Extra Gang No. 751. Copy of this bulletin is attached hereto and identified as Employes' Exhibit "A-1".

Account of erroneously identifying the aforesaid bulletin by No. MW-171, and account of referring to "vacation" instead of "vacancy", bulletin was issued under date of December 11, 1952, which was correctly identified as Bulletin MW-271 and which referred to "vacancy" instead of "vacation", copy of which is attached hereto and identified as Employes' Exhibit "A-2".

employes are available for **promotion.** It does not, in any way, apply to the situation involved herein. As was stated in **First Division Award No. 12332,** F v M&StL, with Referee O'Malley,

> "The title of a section of a contract, determines the subject the contract, must have been to write the sections, under such title, in order to cover all matters considered with reference to that subject matter. * * *"

Furthermore, if Rule 34(g) were applicable to this type of situation, it would be in direct conflict with Rule 4, Note 3, discussed above, which recognizes that temporary and seasonal extra gangs may be used for such emergency work occasioned by inclement weather provided only that they are not worked in place of regular section gangs. Such a strained interpretation, which would only result in a conflict with another unambiguous provision of the Agreement, would be totally unwarranted.

Even if it could be said that Rule 34(g) were applicable to this type of situation, however, it still would not have been violated in this instance, since it would only prohibit the hiring of non-employes for positions for which qualified employes already in the service were "available." As we have indicated above, the regular section forces were not "available" for this night snow removal work in addition to their regular daytime duties.

The extra gang was properly used during this period for emergency work consisting of night snow removal, and such use was in no way violative of the provisions of the Agreement. Moreover, the regular section gang worked their regular shift on each work day and, in addition, worked overtime on 18 days of this 31-day period. If, in addition to this work, they had been used to perform the night snow removal performed by the extra gang, as the Organization now contends would have been proper, it would have required their working in excess of two eight hour shifts per day.

This claim for overtime pay for work they could not have performed, and which was properly performed by the extra gang, is entirely without merit. It is requested that it be denied.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants were regularly assigned to Section Gang on Section 227 with headquarters at Kamela, Oregon, with tour of assignment from 7:30 A. M. to 4:00 P. M., with one hour for lunch, Mondays through Fridays.

On December 5, 1952, Carrier issued a bulletin as a result of which there was established a temporary extra gang, No. 751, with assigned hours from 9:00 P. M. to 6:00 A. M., to work in the vicinity of Kamela "account snow". Gang No. 751 commenced work on December 22, 1952, and worked up to January 22, 1953.

Rules cited by the Employes are as follows:

"Note 3: (to Rule 4. Track Department)

> "Laborers in seasonal or temporary extra gangs, engaged in work not customarily done by section or maintenance gangs, such as reballasting and rail relaying, including tie renewals in connection therewith, bank widening, grade and line changes, or emergency work occasioned by inclement weather, will not be worked in the place of regular section or maintenance gangs."

"Item 2—Rule 1. (Scope)

"This agreement will not apply to laborers not carried on the payrolls of the Maintenance of Way Department temporarily employed for emergency work incident to floods, washouts, snow or fires. Such temporary emergency men will not be used to displace or take away work from regular forces, or otherwise to evade the application of this agreement to employes included therein."

We have before us for determination two questions: One, was this "emergency work occasioned by inclement weather" and, if the answer to one is in the affirmative, two, was the temporary extra gang "used to displace or take away work from regular forces, or otherwise to evade the application of this Agreement to employes included therein" or "worked in the place of regular section or maintenance gangs".

The Employes maintain that this was not an emergency and also that the restrictions on use of temporary extra gangs as set forth in two above was violated.

The Carrier maintains that there was an emergency and it had the right under the Agreement to establish the temporary extra gang and that it did not violate the restrictions referred to above.

It is not disputed that the regular section gang was fully employed during the period in question and as a matter of fact worked considerable overtime on snow removal work, including work on rest days and holidays. They also performed snow removal work during regular hours but surely this is a function customarily performed by them when the need for it is present. It is only when work not customarily done by section gangs or emergency work occasioned by inclement weather is required that Carrier may assign temporary forces and then of course subject to certain restrictions.

With the exception of December 22nd, the day the extra gang started to work and the regular gang worked 8½ hours overtime, we cannot find from this record the existence of an emergency for the remainder of the period worked by the extra gang that could not have been handled by the regular gang. Claimants state that this was the first time an extra gang was assigned to the section. This is denied by the Carrier pointing out the establishment of extra gangs in previous years, 1950, 1951, and 1952 but without indication of any specific dates or periods of time. The Carrier's records could have clearly established the basis for its denial but strangely we do not find them spread on the record in this docket.

We agree with Carrier when it says "Obviously whether or not the extra gang performed 'emergency work occasioned by inclement weather' is dependent upon the situation existing at the time it started work." We go further and state that the emergency only continues when the situation originally existing is shown to have continued and that evidence is not present here.

We do not quarrel with the Carrier anticipating inclement weather and having an extra gang available but we do not hold with using an extra gang when the emergency is not shown to exist. We cannot find from this record that an emergency existed for 5 days a week between the hours of 9:00 P. M. and 6:00 A. M. for a period from December 23rd to January 22nd.

As we view it an emergency is suggestive of a sudden occasion; pressing necessity; straight; crisis. It might also be described as an unforeseen occurrence or condition calling for immediate action. Such situation is not present here.

Having found that the emergency did not exist, it will not be necessary to resolve question two. However, in passing, we believe the following com-

ment indicative: On January 23, 1953 (Carrier's Exhibit "B") the Employes' Assistant Chairman in writing to Carrier's Division Engineer and referring to the extra gang said "It developed that this gang was used to clean switches, tend switch heaters, and perform other work usually recognized as section work. None of the work performed could be classified as emergency work due to inclement weather. Inasmuch as this gang was used to deprive section forces of work customarily done by them, the section gang at Kalmela submitted a claim for the hours they were deprived of. This claim is still being progressed for payment."

Carrier denied that the extra gang did anything but snow removal work. In spreading on the record here the actual time and work record of the regular gang to show that they worked overtime and did snow removal work, it could just as easily have supplied us with an authoritative record of the extra gang's time and work record. It did not do so.

We therefore conclude that the effective Agreement was violated and claimants are entitled to a sustaining award for 168 hours each. On familiar principles the proper rate to be allowed, as pointed out by the Carrier Member in panel argument, is the pro rata rate and not the penalty 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 involved herein; and

That the Agreement was violated as set forth in the above Opinion.

AWARD

Claim contained as per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 9th day of May, 1957.