

Award Number 9334

Docket Number MW-8424

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
GRAND TRUNK WESTERN RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when it assigned Extra Gang No. 6 to perform work on Section No. 34 on Saturday, September 25, 1954 and on subsequent Saturdays thereto in lieu of the employees regularly assigned to Section No. 34.

(2) The employees regularly assigned to Section No. 34, be allowed eight (8) hours pay each at their respective time and one-half rates for each day in which the agreement was violated as referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The Claimants, Section Foreman J. Haslip and the members of his crew (Sectionmen), were regularly assigned as such on Section No. 34, with headquarters at Port Huron, Michigan. They were regularly assigned to a 40-hour work week, consisting of five days, eight hours each, Monday through Friday, with Saturdays and Sundays as designated rest days.

On Saturday, September 25, 1954 and on Saturdays subsequent thereto, the Carrier assigned Extra Gang No. 6 to perform track maintenance work on the territory comprising Section No. 34.

The Claimants were available to perform overtime service on their assigned territory on each of their rest days here involved, but were not notified or called to do so.

The Agreement violation was protested and suitable claim filed in behalf of the claimants.

The claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated March 1, 1938, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

Gang Laborers) and shall continue in full force and effect thereafter until changed in accordance with the procedure prescribed in the Railway Labor Act, as amended."

The inclusion of extra gang laborers under the Working Agreement was brought about by various requests of the Organization, the first being included in the General Chairman's letter of June 18, 1951, copy of which is attached as Carrier's Exhibit "B". Ultimately the Organization's requests were satisfied by the inclusion of extra gang laborers under the October 1, 1954 agreement with the rules becoming effective for such laborers on January 1, 1956. Inasmuch as the extra gang laborers were working on a six-day week before and during negotiations and the agreement permitted them to continue in such manner until January 1, 1955, certainly this of itself would act to invalidate the instant claim. The fact that regular sectionmen may or may not be working with extra gang employees on a particular work is immaterial, it simply boils down to the fact that the regular sectionmen were on a five-day week under the Working Agreement while the extra gang employees were on a six-day week.

With further reference to the matter of past practice, the Board's attention is directed to Third Division Award No. 6706, involving the same parties as here involved, where it has held that past practice permitted this Carrier to employ an outside contractor to construct a garage at Port Huron, Michigan. Certainly there can be no question that past practice permitted this Carrier to work the extra gang laborers at Port Huron on Saturday, September 25, 1954 and subsequent dates of the instant claim.

This claim has been progressed to the highest officer of the Carrier designated to handle claims and grievances, and has been declined.

All data contained herein have in substance been presented to the employees and are a part of the instant dispute.

OPINION OF BOARD: This dispute concerns the Carrier's use of Extra Gang No. 6 to perform Saturday work at Port Huron, Michigan. The Claimants are the employees regularly assigned to Section No. 34 on a Monday through Friday basis with Saturday and Sunday as rest days. They maintain that they should have been called to perform the Saturday work and that the use of an extra gang in preference to them was improper.

It is undisputed that while both gangs had been used on Mondays through Fridays at Port Huron, the Claimants were the regularly assigned sectionmen working in that area at the times in question and that, unlike the employees of Extra Gang No. 6, they held seniority in the Track Department in accordance with Article II of the applicable Agreement. One of the purposes of their seniority was to preserve for them the right to perform their regularly assigned work first and in preference to those without seniority status. See Awards 5078 and 3860. Accordingly, while the Extra Gang could be employed to augment the Claimants, they could not be used to replace them.

The Saturday work under consideration was not part of any regular relief or other assignment and therefore Section 3(c) of Article 5½ of the Agreement must be considered. It reads as follows:

"Work on Unassigned Days

"Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be

performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

This provision came into existence as part of the Forty Hour Week Agreement and is clear and unambiguous. It permits use on an "unassigned" day — in this case, the Saturdays in question — of employes who are "extra or unassigned" provided they will otherwise not have forty hours of work that week.

There is no question but that Extra Gang No. 6 did not fulfill the eligibility conditions of Section 3(c) since they were not only covered by the Agreement at that time, but in addition did have forty hours of work during the weeks in question. The Carrier accordingly had no alternative but to comply with Section 3(c)'s clear mandate and use the regular employes, those in Section Gang No. 34, to perform the Saturday work.

No uncertainty or unambiguity exists with respect to the applicable rules and facts. There is no occasion, therefore, and it would be inappropriate, to consider evidence of past practice in this case.

In the course of panel argument, Carrier's representatives raised a new point, namely, that the claim must at least be denied so far as the Section Gang No. 34 Foreman is concerned since the Extra Gang Foreman had prior right to work the area in question. If this contention had been timely made and developed, it might have had some merit. As it is, however, it was not raised on the property and neither the record nor the Agreement is sufficiently clear on the question to persuade us to reach the result advocated by the Carrier.

In view of the requirements of Section 2(b) of Article 5 as well as Sections 3(a) and (b) of Article 5½ and the fact that Claimants had worked forty hours during the weeks in question, we are satisfied that the overtime portion of the claim is proper and in order. The claim will be sustained.

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 applicable Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 7th day of April, 1960.

DISSENT TO AWARD NO. 9334, DOCKET NO. MW-8424

The Majority Opinion in this Award is in error in failing to give due consideration to a past practice in effect since September 1, 1949, especially where in the interim between September 1, 1949, and the date this claim was filed with this Board, a new Agreement was entered into effective October 1, 1954. Notice of intent to file this claim is dated January 4, 1956. See Award No. 5884 and numerous other Awards presented in argument of this case, upholding the position of the Carrier.

Furthermore, in sustaining this claim at the time and one-half rate, it is quite apparent no consideration was given to the great number of Awards referred to in the argument presented to the Referee by the Carrier Member, holding that the proper rate of compensation, under the circumstances, is pro rata instead of time and one-half. See Award No. 9044.

For these and other reasons we dissent.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ J. F. Mullen