Award No. 9391

Docket No. MW-8230

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ERIE RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on Sunday, October 31, 1954, it assigned junior plumbers to perform overtime service in lieu of senior plumber Joseph Olzewski;

(2) Plumber Joseph Olzewski be allowed eight (8) hours' pay at his respective time and one-half rate account of the violation referred to in part one (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The force to which claimant plumber Joseph Olzewski is regularly assigned has an assigned work week of Monday through Friday, with rest days of Saturday and Sunday.

On Saturday, October 30, 1954, claimant Olzewski, who is the senior plumber in the gang to which he is assigned, was, by nstructions, working on Pier 48, New York City, while the remainder of the gang to which he is assigned, were performing overtime work at Weehawken, New Jersey.

On Sunday, October 31, 1954, the date involved in this claim, junior plumbers of the force to which claimant Olzewski is assigned, were instructed to work eight (8) hours overtime at Weehawken, New Jersey, installing a new steam heating boiler. Claimant Olzewski, having knowledge that junior employes of the gang to which he is assigned were instructed to work overtime hours on October 1, 1954, reported to the job, ready and willing to work. However, his foreman refused to let him work, thereby depriving senior plumber Olzewski of eight (8) hours work, at time and one-half rate of pay.

Claim as set forth herein was filed and the Carrier, during all stages of handling, has denied the claim.

The Agreement in effect between the two parties to this dispute dated January 1, 1952, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

EMPLOYES' POSITION: The pertinent portions of Rule 1, of the effective Agreement, reads as follows:

Thus, the employes have clearly expressed themselves as to who is entitled to perform work on a day which is not a part of any assignment and are in no position to argue that the work here in question should have been given to the claimant simply because he happened to be senior in rank to the employes who had started to perform the work prior to October 31, 1954.

Since the Carrier has shown that the work in question was properly performed by the "regular employe" and that the claimant, therefore, had no exclusive or demand right to perform the work in question, it is not necessary for this Board to decide the secondary issue in this case of whether the penalty rate of time and one-half is proper compensation. However, the Carrier submits that the claimant is not entitled, in any event, to a day's pay at the overtime rate as claimed. This Board has repeatedly held that the right to perform work is not the equivalent of work performed. Stated differently, an employe who may have been deprived of work is not entitled to recover a penalty which accrued to the employe who actually performed the work where such penalty arose from the fact of his performance of the work. This principle has been clearly set forth in Award 5271 wherein it is stated:

> "The basis of these claims is improper denial of the right to work on a rest day. The claimants would have been entitled to the overtime rate had they worked the rest days; but if relief or extra men had worked, they would have been entitled to the straight time work. It is settled by a long line of awards listed in Award 4244 that the claimants are entitled to no more than the straight time or pro rata rate. See also Award 4728."

To the same effect are Awards 4962, 5176, 5261, 5267, 5333, 5967, 5831, 5950, 6262, 6730, and many others.

The Carrier has shown that the plumbers who performed the work on the date in question were properly used in accordance with the provisions of Section 9 of Rule 23(b) of the applicable agreement.

It is submitted, therefore, that the claim is not supported by the applicable agreement and should be denied.

All data contained herein have been presented to or are known to the Petitioner.

(Exhibits not reproduced)

OPINION OF BOARD: Joseph Olzewski, a senior plumber for whom the claim is made, hereinafter referred to as the Claimant, was a member of Gang #76 at Jersey City, New Jersey, all members of which had Monday through Friday as their workweek with rest days on Saturday and Sunday. Claimant had been assigned to several short jobs from October 25th to the 30th, inclusive. The 30th of October was on a Saturday and Claimant finished his assignment on that date. On October 23rd other members of the Gang had begun work preparatory to the installation of a new heater boiler at Weehawken, New Jersey. The actual work of installation began on the 29th of October and continued through Saturday and Sunday the 30th and 31st. Claimant having completed his assignment on October 30th reported to the Foreman of his Gang at Weehawken and requested that he be put to work which request was refused. After Claimant was denied his request for assignment to work, of the Gang retained on the job were plumbers junior in rank to Claimant.

The Claim is that as a member of Gang #76 and senior to plumbers left on the job at Weehawken Claimant was entitled to the work there on the 31st of October.

Carrier defends on a provision of Rule 23 (b) of the controlling Agreement:

> "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.**" (Emphasis ours.)

It is agreed that only that part of the rule which is emphasized is involved in this submission.

Claimant asserts that as a senior employe and "the regular employe" within contemplation of the foregoing rule he was entitled to the work involved in the Claim.

The Carrier maintains that the junior plumber whom Claimant sought to replace was the "regular employe" under the Rule and was properly retained on the job at Weehawken. On this simple question the parties have presented a mass of Awards.

Claimant was a regular member of Gang #76, Jersey City, New Jersey. It must be presumed that all members of this group were qualified to do any work to be assigned to them. Manifestly, they had no fixed point at which to regularly and continuously work, their jobs took them to various places and many times the group would be divided in carrying on and completing the work assigned.

All members of the Gang were properly classified as regular employes but some, including Claimant, had senior rating to others. Basically if work was available to one of two plumbers the one with the senior rating was entitled to the preference.

It is our judgment that, under the operative facts developed here, determination of "the regular employe" within the meaning of the Rule invoked must be made upon consideration of the general duties of the members of the Gang from day to day and not upon the basis of any one particular job, as found at Weehawken. Any other construction would permit the denial of seniority right to a plumber employe by assignment to a job requiring work on rest days to junior employes. The job to be done at Weehawken was probably of short duration and the work on rest days slight. However, if "the regular employe", under the Rule invoked, is restricted to those assigned to a particular job such interpretation must follow as to any job no matter how long it may require to complete it. This construction, in our judgment, is not reasonable and does not accord to employes with seniority rating that protection which such status requires.

On behalf of the Carrier it is also asserted that the work at Weehawken was an emergency because late October brought cold weather which required work on rest days to quickly complete the heating job. The record affords no evidence on the subject. However, if there were an emergency it alone was insufficient reason to keep a junior plumber at work when the Claimant, a senior plumber, was at the site of the job ready and willing to go to work and without delay.

We hold that Claimant was entitled to the work involved by reason of his seniority and also because he was "the regular employe" under Rule 23 (b) 9 of the Agreement.

It would be impracticable to discuss many of the Awards cited. We consider some of them.

In the early Award of this Division No. 105, Samuell, Referee, the subject of seniority and its application is presented:

> "Suffice to say that seniority rights are one of the foundations of the agreement as well as agreements of similar character. Every reasonable interpretation giving recognition to the seniority rule should be given especially when sufficient fitness and ability are admitted by the Carrier and other circumstances and exceptions as provided in the agreement do not intervene."

In the submission resulting in Award 4393, Carter, Referee, two junior members of a steel Bridge Gang, working on a job were continued in employment which Claimant asserted it was his right to perform. Among other defenses Carrier asserted, as here, that

> "There should be considered the fact, as any experienced and practical steel construction man knows, that it is not feasible or practical to make changes in forces for temporary or short periods of time, as is being contended and should have been done in this case."

Going to this contention the opinion reads:

> "The position of the Claimants is the correct one. Seniority applies to all positions, whether it be a regular bulletined position, a temporary position or one that is required to be performed only with overtime work. Awards 2716, 4200."

In Award 4531, Wenke, Referee, a First and Second Class Carpenter with less seniority than Claimants were permitted to do Sunday work in rehabilitating tracks, although Claimants were available to perform the work. All employes involved were members of the same crew, as here. The work performed would have been overtime work for the Claimants. In sustaining the Claim this pertinent comment is made:

> "Admittedly, there are no specific rules in the parties effective Agreement that cover the factual situation here presented. But seniority is of the essence of collective agreements and should be promptly guarded so that employes obtain the full benefit thereof. This Division has often held that it applies to work that Carrier has performed on an overtime basis, although not expressly provided in the agreement. See Awards 2341, 2716, 2994 and 4393 of this Division.
>
> "These Claimants bid for, were assigned to, and held regular positions of the B. & B. Crew at Seattle. When an employe bids for and is assigned to a regular position he is entitled to all of the work of that position.
>
> **"While Carrier usually split this crew into units or segments for the purpose of performing work, it could not thereby destroy or defeat the seniority rights of members of this crew by so doing * * *."** (Emphasis ours.)

See also as supporting the conclusion we reach Awards 3493, 4211, 4432, 4841 and 5029.

Of the many Awards cited by the Carrier there are but two wherein the Brotherhood of Maintenance of Way Employes is a party. Award 8457, one of them, did not involve the right of an employe to work but the amount of compensation claimed to be due for work performed. Award 7399, the other, held that Claimants, Crossing Watchmen, had no seniority rights to the positions in the city where the incident work was conducted, because not included in the controlling Agreement.

Award 5346 concerned a dispute as to whom of two operators was entitled to operate a crane. It appeared that specific cranes were assigned to certain operators and that the crane involved in the Claim had not been assigned to Claimant. Also appeared that in violation of a rule Claimant had not performed extra work at all times when offered to him.

Award 7130 held that work involved was not work on unassigned days under a Rule like 23 (b) 9 of the controlling Agreement here.

Award 8284 supports the theory of Claimant where it is said:

> "We think a reasonable construction of the language 'the regular employe' is broad enough to cover a man who normally and regularly does the work required as one of the duties of his position."

Award 8414 involved a rule similar to Rule 23 (b) 9 here, but the work on the unassigned days was assigned to another than the regular employe—indeed, to one not in a Class included in the applicable Agreement.

Award 8414 is not germane to the issue in this submission but, insofar as it may be given any application, it supports the position of the Claimant.

Without further prolonging this opinion, we are content to say that the following cited awards, all of which we have examined, although some discuss rules similar to that invoked by the Carrier, are not precedents favorable to it in this submission, because of difference in facts, or issues, or inapplicable rules, or variance of nature and locations of positions of employes involved: Awards 3493, 6803, 7091, 7312, 8004, 8006, 8073, 8147, 8219, 8297, 8303, 8337, 8380, 8394, 8422, 8534, 8676, 8692, 8750, 8766, 8827, 8841, 8865, 8872, 9020, 9308 and 3096, Second Division.

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.

AWARD

Claim allowed for time set up in the Claim at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of May 1960.