

Award No. 12847

Docket No. MW-12749

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**MISSOURI-KANSAS-TEXAS RAILROAD COMPANY
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEXAS**

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

(1) The Carrier violated the effective Agreement when it failed and refused to compensate Section and Extra Gang Laborers John A. Edwards, Marvin Anthony, Jack C. Scraggs, Willie Rex, Homer Sanders, Sandy Harris, Robert Mohan and E. E. Woods at the accepted and agreed to rate of pay for services rendered during both regular and overtime hours on July 26, 27, 28, 29, 1960.

(2) Each of the above named employees be allowed the difference between what he was paid and what he should have been paid at the accepted and agreed to section and extra gang laborer's rate of pay for services rendered on any one or all of the dates referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On or about July 23, 1960, the tracks and bridges just north of Checotah, Oklahoma, became impaired and impassable as a result of heavy rains in that area. On July 26, Division Engineer J. H. Hughes hired some new employees to temporarily augment the small track gangs regularly assigned to that area. These new temporary employees were hired and used for the purpose of cribbing tracks with cross ties, surfacing and lining tracks, unloading ties, inserting new ties, and all other work normally and traditionally performed by section men and extra gang men in connection with placing tracks and bridges in a passable condition. These newly hired employees performed service as follows:

JOHN H. EDWARDS

| Date | Started Work | Meal Period From | Meal Period To | Quit Work | Total Hrs. Worked | Total Amount Paid |
|---------|--------------|------------------|----------------|------------|-------------------|-------------------|
| July 27 | 6:00 A.M. | 12:00 A.M. | 1:00 P.M. | 7:00 P.M. | 12 | |
| July 28 | 7:00 A.M. | 12:00 A.M. | 1:00 P.M. | 12:00 P.M. | 16 | |
| July 29 | 12:01 A.M. | | | 2:00 A.M. | 2 | \$56.25 |

For each and all of the foregoing reasons the Carrier respectfully requests the Third Division to dismiss this alleged claim or to deny it in its entirety.

Except as herein expressly admitted, the Missouri-Kansas-Texas Railroad Company denies each and every, all and singular, the allegations of the Brotherhood of Maintenance of Way Employees in this alleged unadjusted dispute, claim or grievance.

For each and all of the foregoing reasons the Missouri-Kansas-Texas Railroad Company respectfully requests the Third Division, National Railroad Adjustment Board dismiss or deny said alleged claim, and grant said Railroad Company such other relief to which it may be entitled.

(Exhibits not reproduced.)

OPINION OF BOARD: An emergency condition existed following unusually heavy rains which flooded about 5 miles of main-line track and washed out one rail bridge.

In addition to available railroad forces, track and bridge laborers were hired to repair the damage. These additional laborers were paid \$1.50 an hour, which was below the Agreement rates for laborers.

The issue is whether these additional laborers were newly hired railroad employees, as the Brotherhood of Maintenance of Way Employees contends, or employees of an earth moving contractor, as the Carrier contends. If they were railroad employees, they were entitled to the higher rate of pay.

The record shows that the Carrier's Division Engineer, who was the railroad's hiring agent for such employees, exercised at least general supervision of the laborers and that he personally paid each of the employees in cash or by personal check. The Employees show further, through individual signed statements, that the Division Engineer actually hired the men to work; that he, or another Carrier official, directly supervised the laborers' work; that the contractor's representatives did not at any time supervise such work; and that the men believed they were working for the railroad.

The Division Engineer, also in a signed statement, contends, however, that the laborers were employees of the contractor and not of the railroad and, therefore, were not subject to the Agreement. On the matter of his having paid the employees himself, he states that he did this "to assist the contractor's superintendent."

The Division Engineer's statement is uncorroborated since there are no facts to support his conclusion that the laborers worked for the contractor and not for the railroad. Accordingly, we accept the Employees more concrete showing that these employees actually worked for the railroad.

The Employees' claim for additional compensation is buttressed by the provision in Article 9, Rule 2, providing that in the application of the rule to new employees temporarily brought into the service in emergencies, the starting time of such employees will be considered as of the time that they commence work or are required to report for work.

Obviously, the Agreement contemplated that new employees would be required temporarily in emergencies—as in this case. The Agreement pro-

vides the rates of pay for these employees. The laborers in this dispute should have been paid at those rates.

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 Employees involved in this dispute are respectively Carrier and Employees 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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of September, 1964.