Award No. 13177
Docket No. MW-12844

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

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

(1) The Carrier violated the effective Agreement when, on December 23, 1959, it called and used an employe junior to Alvin Williams to perform overtime service from 6:30 P. M. to 6:00 A. M.

(2) Alvin Williams now be allowed eleven and one-half (11½) hours' pay at his time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The Claimant has established and holds seniority as an extra gang laborer and was regularly assigned as such on Extra Gang No. 230.

During the hours from 6:30 P. M. to 6:00 A. M. on December 23, 1959, the Carrier used an extra gang laborer for overtime service who holds less seniority than Claimant Williams and who was assigned to the very same extra gang.

The Claimant was present in the very same outfit car at the time the junior employe was called or notified to perform the subject overtime service and was, therefore, equally available, ready and willing to perform such service.

Consequently, the subject claim was presented and progressed in the usual and customary manner on the property but was declined at all stages of the appeals procedure.

The Agreement in effect between the two parties to this dispute dated May 15, 1953, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 19 reads:

"SENIORITY

(a) Except as otherwise provided in paragraph (c) of this rule, the seniority date of an employe in any class or group is the date of the first paid service in such class.

In addition to Section Gang No. 99, there is located at Chicago Heights Section Gang No. 231, and there is also a number of other regular section gangs located in the immediate vicinity. Extra Gang No. 230 operates over a territory extending 287 miles from Chicago, Illinois to Evansville, Indiana, and was temporarily stationed in the Chicago Heights area at the time of the claim. In presenting claim in behalf of named claimant Petitioner ignores the rights of senior members of Extra Gang No. 230, as well as any rights the members of other section gangs permanently located at Chicago Heights and in the immediate vicinity might have.

The Carrier cannot by its unilateral action establish seniority rights where none exists. Either the members of Extra Gang No. 230 had a preferential right to be used on a seniority basis for extra overtime work on Section No. 99 — or they did not. If the members of Extra Gang No. 230 did not have a contractual right to the performance of overtime work on Section No. 99, then the Carrier did not have any obligation to recognize the rule of seniority as between the members of Extra Gang No. 230 in recruiting someone to help out in the emergency.

The agreement rules here controlling are quite explicit. Rule 21 (c) states: "Extra gang laborers will have seniority rights as follows: 1. Over the entire system for extra gang work." (Emphasis ours.) The work here in question was not extra gang work. Accordingly, the members of Extra Gang No. 230 did not have any seniority right to the work in question and the Carrier did not violate the agreement in failing to observe the relative seniority of the extra gang employes in recruiting a volunteer from Extra Gang No. 230 for overtime work on Section No. 99.

Claimant, who was not used, asks for 11½ hours' pay at the rate of time and one-half. It is Carrier's position the claim is without merit under the agreement rules. Without prejudice to Carrier's position it is pertinent to point out that the Board has repeatedly held that the proper payment to employes not used is the straight time rate.

The claim is not supported by the agreement rules here controlling and a denial award is therefore required.

OPINION OF BOARD: On Wednesday, December 23, 1959, Foreman McFall needed an extra man in the evening hours to clear snow from switches. He went to camp outfit of Extra Gang No. 230 and recruited Extra Gang Laborer A. Peterson who was junior in point of seniority to Claimant.

Neither Claimant nor Peterson had seniority on Section 99 where the work was done and had no right, therefore, to the work. Petitioner's position is, however, that once Carrier elects to recruit from an Extra Gang it is obliged to do so on the basis of seniority.

At issue here is not whether Claimant had a superior right to this work. He did not. When, however, Carrier chose to seek an Extra Gang Laborer to do this work, Carrier made that work extra gang work and was then obliged to assign the work according to seniority. We have frequently held that where Carrier has the choice from which class of employes it should select men to perform work, it is obliged to choose from that class according to seniority. Awards 6306, 7062.

There was no question of an emergency here, and Carrier did not raise this issue on the property. The only remaining question is whether Claimant

should be compensated at the pro rata or time and one-half rate. There are awards holding either way but by far the large majority hold that the pro rata rate is applicable. We agree. The awards which hold the punitive rate applicable seem to be based on the premise that if the employe had done the work he would have been entitled to payment at the punitive rate and that, therefore, he was damaged to that extent. We think this view erroneous because it is based on the assumption that it would have been performed on overtime. Although probable, it is, nevertheless, speculative and Carrier should not be held responsible for damages which are speculative.

The principle behind the time and one-half rate is that overtime work is to be shunned. The rate is called "punitive." Its purpose is to discourage Carrier from working an employe beyond hours. But here the Claimant has not worked beyond hours. Carrier should not, therefore, be punished by being required to pay the punitive 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 Carrier did violate the Agreement.

AWARD

Claim sustained to the extent set forth in the opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of December 1964.