

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi H. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

FLORIDA EAST COAST RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Assistant Foreman E. V. Fretwell at the section foreman's rate of pay, assigning him to perform eighty-six (86) hours of service as a foreman during overtime hours on February 1, 2, 3, 4, 5, 6, 7 and 8, 1961.

(2) Assistant Foreman E. V. Fretwell now be allowed the difference between what he was paid at the assistant foreman's rate of pay and what he should have been paid at the section foreman's rate of pay, for the service referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Due to a derailment at Mile Post 102.5, located on the territory of the New Smyrna Beach section, the Carrier required the services of a section foreman during overtime hours to supervise repairs to the track. Inasmuch as the regularly assigned Section Foreman worked during the regularly assigned hours of his crew, the Claimant was required to perform the work of a section foreman during overtime hours.

The Claimant satisfactorily performed all of the work he was directed to do by supervisory officials. He made out work and time reports and reported directly to the Carrier's supervisory officials. The Claimant was solely and fully responsible for all of the work performed by the employes under his supervision. The Claimant holds seniority rights as a section foreman and is fully capable of performing all work of that class.

The Agreement in effect between the two parties to this dispute dated February 1, 1942, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

Section, including Nora Spur, other than that of an Apprentice Foreman." (Emphasis supplied.)

4. In local handling the Employees relied for support of their claim on the premise that the Railway pays all qualified employes filling the pace of a Section Foreman while supervising a gang in the Foreman's absence the higher Section Foreman's rate and contend that because, in this instance, the Section Foreman was absent during the night to obtain his rest and the claimant was on duty supervising the previously described patrolling and occasional minor repair of tracks, he should be paid the higher rate. However, this argument will not bear the weight of scrutiny for the following reasons: First, the claimant was in charge of but a few laborers and assigned the limited task of patrolling a single run-around track and surfacing, gauging and lining parts of that track if it was found necessary to do so, all time and other reports being kept by Foreman Goodson. Second, the claimant was not charged with the overall responsibilities of a Section Foreman as would have been the case had he relieved a Foreman on a regular assignment. Instead, he was merely assigned the specific duty of supervising patrolling and minor maintenance of a small area at night while the major work of reconstruction and clearing of the wreckage supervised by the Section Foreman was suspended. Finally, the claimant performed no work at night during the period here involved other than that which he normally performed as a regularly assigned Assistant Foreman and under conditions in all respects comparable since it is not at all unusual for an Assistant Foreman to take a portion of a gang to accomplish some specific work while the Foreman is performing other work. The New Smyrna Beach gang, in charge of Foreman Goodson, is comprised of eleven (11) laborers and Assistant Foreman Fretwell. This is a larger gang than some because of the work required of them within the New Smyrna Beach Terminal Yards.

Frequently, Foreman Goodson is in one area on the right-of-way performing maintenance work with part of the 11-man crew while Assistant Foreman Fretwell is at another some miles distant with four or five men to accomplish other work. The single difference in the normal working conditions of Foreman and Assistant Foreman in this instance is that, rather than being separated by distance to accomplish the same kind and type of work, the Foreman was working during the daylight hours with a larger gang of men while the Assistant Foreman with a small group of laborers patrolled the area of the wreck at night, performing only such minor maintenance as was found necessary. Certainly he did nothing more than he normally does as Assistant Foreman and he was properly paid at the rate of that position. Nothing more is due him.

For the reasons stated the claim is without merit and should be denied.

OPINION OF BOARD: Though the record in this case leaves much to be desired — from the submissions we find the following facts are substantially established: On January 31, 1961, due to an accident, a Diesel Unit of a three unit locomotive and thirteen (13) cars were derailed, both main tracks were blocked and the track extensively damaged. To clear the derailment and open the main line for operations the Carrier's Maintenance of Way forces in charge of Section Foreman Goodson were pressed into service to clear the wreckage and construct temporary tracks during the daylight hours. To insure that the track remained in a safe operating condition, Assistant Foreman Fretwell, the Claimant herein, and five extra laborers were assigned to patrol and maintain it at night except for the night of February 2, when seven laborers worked with the Assistant Foreman.

It is the contention of the Claimant that inasmuch as the regularly assigned Section Foreman worked during the regularly assigned hours of his crew, the Claimant was required to perform the work of a Section Foreman during overtime hours; that he performed all the work he was directed to do; that Claimant was responsible for all of the work performed by employees under his supervision; that he received no directions as to the work to be done at any time from Foreman Goodson. This is denied by the Carrier who contends Claimant remained at all times under the general direction and supervision of the Foreman.

The fact is undisputed that Claimant and the crew working with him patrolled the track, and when, in Claimant's judgment, surfacing, gauging and lining of the track was required. Such work was performed by Claimant and the crew to insure the safe passage of trains routed over the temporary track. Nowhere in the record is it contended by the carrier that the instruction to perform this type of work came from the regularly assigned Section Foreman who at the time such decisions were required of Claimant, was at home and off duty.

Claimant relies on Rule 35 of the Agreement which reads, as follows:

"An employe required to fill the position of another employe when the latter is off duty shall receive the rate of the position filled if higher than his regular rate, but in no event shall the relieving employe receive less than the rate applicable to his regular position."
(Emphasis ours)

Claimant Fretwell was required to fill the foreman's position during the overtime hours as the Foreman was off duty and the Foreman exercised no supervision over him during his, the Foreman's, off hours. Claimant should now be compensated in accordance with the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving 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 1, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the 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 5th day of February 1965.