

Award No. 13305

Docket No. MW-14683

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Daniel Kornblum, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DELAWARE AND HUDSON RAILROAD CORPORATION**

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

(1) The Carrier violated the Agreement when it assigned Trackman Harold W. Clark to perform extra gang foreman's work on September 11, 12, 13, 14, 17, 18, 19, 24 and 25, 1962 and failed and refused to compensate him therefor at the extra gang foreman's rate of pay. (System Case No. 3.63 MW).

(2) The Carrier further violated the Agreement when it compensated Claimant Harold W. Clark at straight time rates instead of at overtime rates for service performed during overtime hours (4:30 A.M. to 6:00 A.M.) on a nine and one-half (9½) hour daily work assignment on September 11, 12, 13, 14, 17, 18 and 19, 1962.

(3) -a- Claimant Harold W. Clark now be allowed the difference between what he should have been paid at the extra gang foreman's rate of pay and what he was paid at the trackman's rate of pay for all time he expended in performing foreman's service on September 11, 12, 13, 14, 17, 18 and 19, 1962 (56 hours at straight time rate—10½ hours at time and one-half rate.)

-b- Claimant Harold W. Clark now be allowed the difference between what he should have been paid at the extra gang foreman's rate of pay for all time he expended in performing extra gang foreman's work on September 24 and 25, 1962 (16 hours).

(4) Claimant Harold W. Clark be allowed the difference between what he should have been paid at time and one-half rate and what he was paid at straight time rates for the overtime hours referred to in Part (2) of this claim.

EMPLOYEES' STATEMENT OF FACTS: On September 11, 12, 13, 14, 17, 18 and 19, 1962, the claimant performed the customary and traditional work of an extra gang foreman when he was assigned to supervise, direct and assist a lining machine operator. On each of these dates, the claimant worked from 4:30 A.M. to 2:30 P.M. and was allowed a 30 minute meal period from 11:00 A.M. to 11:30 A.M. The claimant received nine and one-half (9½) hours' pay at the trackman's straight time rate for the work he performed on each of these dates.

necessary. (See Award No. 11075). The Extra Gang Foreman in charge of the work on these two days assigned claimant Clark as an Assistant Extra Gang Foreman and he was paid at the Assistant Extra Gang Foreman's rate to work with the remainder of the gang. The Foreman told him what work was to be performed, where to perform it, and kept all the necessary records, time returns, etc., himself.

It is the position of the Carrier that none of the claims herein are supported by the Agreement rules or past practices under these rules, and claims should be denied.

OPINION OF BOARD: This dispute divides into three separate claims: (1) for Extra Gang Foreman's rate in lieu of Trackman's rate for work performed during the period September 11 through 19, 1962; (2) for overtime rates instead of straight time for the hours spent between 4:30 A. M. and 6:00 A. M. during this same period September 11 through 19, 1962; and (3) for Extra Gang Foreman's rate in lieu of Assistant Extra Gang Foreman's rate for work performed in September 24 and 25, 1962. We take them up seriatim.

(1) The Organization contends that the Claimant was performing Extra Gang Foreman's work when, between and including September 11 through 19, 1962, he was assigned to work with an Extra Gang on a surfacing job about thirty-five miles from his headquarters at Port Henry. It is not denied that the extra gang during this period consisted of a Foreman, three track equipment operators and two trackmen, one of whom was the Claimant. Nor is it disputed that Claimant was assigned to work with the operator of a TL-7 machine, a Track Liner. The Organization simply makes the naked assertion that work of this kind constitutes "the customary and traditional work of an extra gang foreman".

This assertion is vigorously contested by the Carrier. It states that, "The work actually performed by the claimant on the dates specified was actually trackman's work, he was not assigned to supervise or direct a lining machine operator, in fact, he was not capable of doing so". Moreover, after pointing out the conceded presence of a Foreman with the extra gang it argues the absurdity, in the circumstances, of the need for additional foremen in such a crew merely because a worker is assigned "to work directly with the machine".

Apparently the Organization sought to bolster its claim by contending that "at the same time that the claimant was performing the subject work at the trackman's rate of pay, another employe, working from the same point, was performing identical work at the extra gang foreman's rate of pay". The only support for this assertion comes from a letter to this effect by the Claimant to the Carrier said to have been referred to for the first time after the dispute was handled on the property. Leaving aside any question as to the admissability of the letter and the propriety of considering it at this time, the Carrier stoutly denies that there is any parallel between the two cases. On the contrary, the Carrier avers that this other worker "who assigned as Extra Gang Foreman of Extra Gang #315 at Willsboro. As such, he was in complete charge of his gang, supervised the work performed therein, kept the time, and made all reports covering the work performed".

It has been repeatedly held by this Board that the burden of showing that the disputed work was truly supervisory in content is upon the Petitioner (e.g., Awards 12415, 12787, 13033), and that "mere assertions do not

constitute proof and will not support a claim" (Award 12787; see also, Awards 12821, 12405, 11834, 11645, 11525, 11118). On the state of this record there is a deficiency of affirmative proof by the Petitioner to overcome the detailed and persuasive denials of the Carrier. This portion of the claim must, therefore, be denied. (See also, Award 13265).

(2) Petitioner claims that on the dates specified (September 11 through 19, 1962) the time spent each day between reporting at Port Henry (4:30 A.M.) and reaching the place of the start of his work assignment (6:00 A.M.) was work time which, under Rule 17(a), must be paid for at premium rates. The Carrier contends that such time was solely and only travel time which under Rule 23(a), is payable at straight time rates.

The Petitioner never showed that this time was utilized by Claimant in any manner other than in traveling from headquarters to the locus of the work assignment. Its claim seems to rest entirely on the contention that the Carrier is not entitled now to contend that this was travel time because it did not specifically say so when it rejected the claim on the property. In other words, Petitioner contends that a "new issue" has been injected into this matter which this Board is not privileged to entertain.

Whether or not the Carrier, in so many words, rejected the claim on the property because it was "travel time", it cannot be gainsaid that this reason for the rejection was clearly stated in its original submission (See, e.g., Awards 8705, 9552, 10132, 10385, 10387). Moreover, in the very nature of this claim this reason for the rejection must have been implicit in the Carrier's decision on the property (See Award 12298). As the Carrier put it: "Claim is denied account of not supported by agreement rules and practices thereunder". The point is that the time in question had either to be work time or travel time and the Carrier's rejection necessarily implied that it was regarded by it as travel time. This is what in established fact it was and, accordingly, it seems to this Board that the claim must be and properly should be dismissed on its merits. (See Awards 3499, 5260, 5942, 6400, 6651)

(3) The remaining portion of this claim rests on the contention of the Organization that on September 24 and 25, 1962, Claimant performed supervisory work which entitled him to the Extra Gang Foreman's rate of pay rather than the rate he was paid, that of Assistant Extra Gang Foreman. The gravamen of this contention rests on the fact that while the Claimant was on the site directing the work of the trackmen assigned to the extra gang, the regularly assigned foreman was placed in charge of a work train.

The Carrier maintains that the regular foreman was still "in charge of the work on these two days", was the one who "assigned" the Claimant to work as an Assistant Foreman at the time and, more importantly, was the person who "told him what work was to be performed, where to perform it, and kept all the necessary records, time returns, etc., himself." The Organization does not dispute the fact that Claimant did not make out reports and time returns as seemingly is normally expected and required of a full fledged Foreman.

Here again the precedents of this Board seem to militate against upholding this portion of the claim. In Award 12310 (Wolf) it was held that a foreman can still exercise supervision some distance away from a job site and "is not required to be in physical proximity in order to exercise supervision over his men. See Award 6582". See also Award 12350 (West). So, too, it appears, even from prior Awards of this Board cited by the Organiza-

tion, that the keeping of time and material records and the duty to make reports covering the work performed has been noted as an essential criterion of whether or not a Claimant is performing a full scale Foreman's job (e.g. Awards 1658, 2992). Accordingly, this portion of the claim must also be dismissed for failure of the Organization to prove that Claimant in fact performed the duties normally required of a Foreman.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of February, 1965.