

Award No. 16162

Docket No. MW-16751

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John J. McGovern, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
FORT WORTH AND DENVER RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it used Section Laborer Ernest Gomez instead of Crossing Flagman J. O. Farmer to perform crossing flagman's work on the third trick (10:30 P.M. to 6:30 A.M.) on July 2, 1965. (System Case W-56/F-3-69.)

(2) Crossing Flagman J. O. Farmer be allowed eight (8) hours' pay at his time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Claimant J. O. Farmer has acquired seniority as a Crossing Watchman (flagman) and is regularly assigned as such to the second shift (from 2:30 P.M. to 10:30 P.M.) with an assigned work week extending from Thursday through Monday (Tuesdays and Wednesdays are rest days).

On July 2, 1965, instead of using the claimant to relieve the flagman on the third shift (10:30 P.M. to 6:30 A.M.), the Carrier called and used Section Laborer Gomez who has no seniority as a crossing flagman but who is a regularly assigned section laborer from 7:30 A.M. to 4:00 P.M. (30 minute lunch period) Mondays through Fridays (Saturdays and Sundays are rest days).

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated January 1, 1955, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: On July 2, 1965, due to an employee who was regularly assigned to five-day crossing flagman position being absent, a Mr. W. R. Pierce, who is assigned the duties of section laborer four days and crossing flagman one day per week, was used to fill the vacancy.

This created a vacancy on Mr. Pierce's position as section laborer-flagman, and Mr. Ernest Gomez was used to fill that vacancy. Mr. Gomez was used in that capacity for that one day and claim was filed by the Organization in behalf of Mr. Gomez based on the contention that he, Mr. Gomez, was required to suspend work on his assignment for the purpose of absorbing overtime.

The claim involving section laborer Ernest Gomez is currently before this tribunal described briefly and for identification purposes only as follows:

"(1) The Carrier violated the Agreement when it required Section Laborer Ernest Gomez to suspend work during his regularly assigned work period (7:30 A. M. to 4:00 P. M.) on July 2, 1965 for the purpose of absorbing overtime work from 10:30 P. M. to 6:30 A. M. on that date. (System Case No. W-56/F-3-71)

(2) Section Laborer Ernest Gomez now be allowed eight (8) hours' pay at his straight-time rate because of the violation referred to in Part (1) of this claim."

Claimant J. O. Farmer in the instant case is a regularly assigned crossing flagman and protected his own assignment on the date named in the claim. He is claiming eight (8) hours' pay at the punitive rate of pay account not being called to work the vacancy which was filled by Section Laborer Gomez, the claimant in the claim currently before this Board as referred to above.

A copy of the currently effective collective agreement between the parties to this dispute, revised effective January 1, 1955, is on file with the Board and by reference is made a part of this submission.

OPINION OF BOARD: A one day vacancy existed on a position as section laborer-flagman and Carrier assigned a section laborer to fill said position. The Claimant is a regularly assigned crossing flagman and protected his own assignment on the claim date. He is asking for eight hours pay at the punitive rate alleging that Carrier violated the Agreement.

Carrier responds that their action in this case is in consonance with the provisions of a letter Agreement, dated April 1, 1960, signed by both parties. We have examined that letter and agree with the position of the Organization that because of the factual situation with which we are confronted in this case, the agreement evidenced by said letter is inapplicable to the principal issue.

A review of the record before us shows conclusively that in the handling of this case on the property, the Organization never specifically charged the Carrier with a violation of a specific rule of the Agreement. The Petitioner always has the burden of submitting proof that Carrier has disregarded the provisions of its contract by its action. We are unable to sustain this claim because of the Organization's failure to cite a rule and prove by a preponderance of evidence that Carrier violated same. (See Award 14081 Dorsey.) We will deny the claim.

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 by the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of March 1968.