



Award No. 16259

Docket No. MW-16822

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(SUPPLEMENTAL)

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
MISSISSIPPI EXPORT RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it called and used Assistant Section Foreman Horace Walley, instead of Section Foreman J. B. Bradley, to patrol and smooth (surface) track on Saturday, March 5, 1966.

(2) Section Foreman J. B. Bradley be allowed eight 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: The claimant is the foreman of the gang assigned to Section No. 2. He is regularly assigned to work Monday through Friday of each week. Saturdays and Sundays are designated rest days.

On Saturday, March 5, 1966, the Carrier called and used Assistant Section Foreman Horace Walley, who holds less seniority as a foreman than the claimant, to patrol and smooth (surface) track on Section No. 2. Mr. Walley worked eight hours on said date and was compensated for his services at his time and one-half rate.

Although the claimant was available and fully qualified to perform this work, the Carrier made no effort to assign it to him.

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 November 1, 1962, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Horace Walley, referred to in the claim as an Assistant Section Foreman, is in fact a Relief Section Foreman. The Agreement between the parties makes no provision for, and the Carrier does not employ, an Assistant Section Foreman.

On March 5, 1966, relief section foreman Horace Walley was used to patrol track and smooth three or four joints. The practice of having Horace Walley patrol track and smooth joints on Saturday, Sunday and Holidays had prevailed as a matter of common knowledge for approximately 20 years and for 18 years before the current agreement was negotiated. This is the first and only claim ever made that the use of Horace Walley to patrol track or smooth joints on Saturday, Sunday or Holidays was a violation of the agreement.

In presenting the claim on the property, the Brotherhood's representative alleged a violation of Rule 2 of the working agreement. This agreement is one effective November 1, 1962. For ready reference, Rule 2 provides as follows:

RULE 2 — SENIORITY

- (a) The seniority of employes begins upon entering the service in the classification in which employed. Seniority will not be shown on a seniority roster until employe has been in the service forty-five (45) compensated days. Seniority will only begin in a higher classification of service when the employe is assigned thereto, in line with these rules, and has served thirty (30) compensated days.
- (b) Seniority of all employes covered by this agreement extends over the entire territory of the Mississippi Export Railroad Company.
- (c) Seniority rosters showing employes' seniority in each classification will be published each January. General and Local Chairmen will be furnished a copy of each such roster, and copies will be posted on regular bulletin boards, camp cars and tool houses.
- (d) After six (6) months have elapsed without a written protest by employes affected, their seniority as shown on a published roster becomes fixed and cannot be changed in the future.

Attached as Carrier's Exhibit "A" is a copy of current seniority roster. It will be observed from this roster that Horace Walley has seniority as a relief section foreman as of December 31, 1947 and he is the senior relief section foreman. The claimant in this case has no seniority as a section laborer and has seniority as a section foreman as of October 1, 1957 and as a relief section foreman as of November 26, 1962.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Bradley is regularly assigned to position of Foreman and his assigned work week is Monday through Friday of each week with Saturdays and Sundays as designated rest days.

On Saturday, March 5, 1966, Carrier called and used relief section foreman Walley to patrol and smooth track. He was compensated at his time and one-half rate of pay.

Claimant was available and qualified to perform this work but was not called by Carrier.

It is the position of the Organization that Claimant has established and holds seniority rights as a section foreman in accordance with the Provisions of Rule 2—Seniority, and as such was entitled to be called to perform the work involved in preference to other individuals who held less seniority.

It is the Carrier's position that the claim is not supported by the working Agreement and in submission to this Board alleges a past practice of assigning the relief section foreman Walley to performance of the work involved.

The issue presented is whether or not Carrier improperly assigned the work to relief section foreman Walley, who holds no seniority as a section foreman.

On the basis of this Record it appears a specific position had not been established and hours assigned to relief section foreman Walley to patrol track on March 5, 1966. Since this work was not part of a regular assignment it was overtime work. Carrier, during the handling of the claim on the property, did not question that said work is customarily that of a section foreman. It follows therefore, that as the regularly assigned occupant of the section foreman's position, Claimant had a preferred right to perform the overtime work as senior employe and was entitled to be called.

After this claim was submitted to this Board, the Carrier raised for the first time the question of past custom and practice in that relief section foreman Walley had patrolled track on Saturday, Sunday and Holidays for approximately 20 years. Further, this is the first and only claim ever made that Carrier violated the agreement by the use of Walley.

In Award 11027, we held:

"* * * Even though this defense, if timely presented, might have defeated the allowance of the claim we cannot consider it here as it was not discussed on the property.

On the basis of this Record, this Board has no alternative than to sustain this claim." (Emphasis ours)

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 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 26th day of April 1968.

Keenan Printing Co., Chicago, Ill.

Printed in U.S.A.