NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24330
THIRD DIVISION Docket Number MW-24406

William G. Caples, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Seaboard Coast Line Railroad Company

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

(1) The Agreement was violated when Apprentice Foreman A. Powell was compensated at his straight-time rate instead of at his time and one-half rate for the 9th and 10th hours he worked on January 28, 29, 30, 31 and February 4, 5, 6 and 7, 1980 (System File C-4(31)-AP/12-5(80-49) G)

(2) The Agreement was further violated when Apprentice Foreman A. Powell was not permitted to work his scheduled assigned hours on February 1 and 8, 1980.

(3) Because of the violation referred to in Part (1) above, Apprentice Foreman A. Powell shall now be allowed the difference between what he should have been paid at his time and one-half rate and what he was paid at his straight-time rate for the overtime service he rendered on the claim dates mentioned in Part (1) hereof.

(4) Because of the violation referred to in Part (2) hereof, Apprentice Foreman A. Powell shall be allowed sixteen (16) hours of pay at his straight-time rate."

OPINION OF BOARD: **Claimant A. Powell is regularly assigned as a monthly rated apprentice foreman to Section Force 8015 with headquarters at Franklin, Virginia. He was regularly assigned to work eight (8) hours Monday through Friday with Saturdays and Sundays designated as rest days.**

Beginning January 28, 1980 and continuing through February 7, 1980, the Carrier instructed and/or required the claimant to work with a "floating" gang at Boykins, Virginia, the members of which were working "make up time" schedule under Rule 38 which reads:

"Section 1

Employees stationed in camp cars will be allowed, when in the judgment of Management conditions permit, to make weekend visits to their homes. If employees cannot by using regular train service after completion of work on the last day of the work week, arrive home within a reasonable time and return to their camps on the first day of the succeeding work week in time for regular service, they will be allowed to make up time during the week in order to do this, provided that not more than two (2) hours shall be made up on any one day and at no additional expense to the Company. Free transportation will be furnished over Company

lines where service is available, consistent with the regulations of the Company, and any time lost on this account will not be paid for. The total time worked each day must be recorded in the time book on the day worked.

"Section 2

All the men in the gang must observe the same hours. The wishes of a majority of the men in the gang (the Foreman included) shall prevail on the question of working make-up time. Any make-up time is subject to the concurrence of the Division Engineer or Engineer of Bridges."

The work schedule for said "floating" gang during the claim period was as follows:

January 28, 1980	Mon.	10 hrs.
" 29, 1980	Tues.	10 hrs.
" 30, 1980	Wed.	10 hrs.
" 31, 1980	Thurs.	10 hrs.
February 1, 1980	Fri.	OFF
" 2, 1980	Sat.	OFF
" 3, 1980	Sun.	OFF
" 4, 1980	Mon.	10 hrs.
" 5, 1980	Tues.	10 hrs.
" 6, 1980	Wed.	10 hrs.
" 7, 1980	Thurs.	10 hrs."

The claimant was required to work four ten-hour days (Monday through Thursday) followed by three consecutive rest days. The Carrier compensated him therefor at his straight time rate for the time worked in excess of eight (8) hours per day. The claimant was also deprived of working his regular assignment on Friday, February 1, 1980.

It is the position of the Organization that assigning Claimant to a "floating" gang at a 40-hour week schedule, working ten hours each day, Monday through Friday schedule, permissible for the "force" under Rule 38 is a violation of Rules 20 and 21 which continued to apply to the Claimant. When he was assigned by the Carrier to the floating gang the Organization contends he remains subject to Rules 20, 21 and 27 and Carrier is bound by them. All of said rules were cited by the Organization in their submission in support of the claim. Under Rules 20, 21 and 27, the language of which the Organization asserts is clear and unambiguous, a point on which they cite a number of decisions with which this referee agrees; they further contend that Claimant was entitled to two hours of penalty time, each day Monday through Thursday, and 8 hours of pay at the regular rate on Friday.

The Carrier's position was denial of the claim because of the alleged fact that working hours for stationary forces have historically been adjusted when it was necessary for stationary forces to work with "floating" forces. Carrier asserts:

"It is necessary for floating and stationary forces to work together in many instances to safely and satisfactorily perform the assigned tasks. Such need has been met to the satisfaction of both the Carrier and employees as evidenced by the current practice in this connection. The work being performed in this particular instance was no more than that followed in many other instances, and such claim can only be considered punitive."

The main question becomes whether this practice past or present is in violation of the rules. If it is in violation of the rules then there is no doubt that the rules must be followed. Our jurisdiction in this regard is bound to wording of the agreement. However, a careful examination of the agreement and the rules does not show any rule which precisely meets with the particular factual instance of this case. Although almost every other factual situation which can be imagined is covered by a specific rule which leads one reading the agreement to believe that the parties have had experience with all of those situations to which the rules apply.

The Agreement is the law which defines how the parties shall continue their ongoing relationship for a definite period of time. It's changed from time to time, as the experience of the parties in their ongoing relationship is incorporated in the agreement. It is the foundation by which differences in the relationship are determined. This is the foundation for all meetings and because of its nature a part of all meetings and the record thereof whether stated or not. The Organization recognizes this in its submission stating:

"The agreement between the two parties to this dispute effective July 1, 1968, together with supplements, amendments and the interpretation thereto are by reference made a party of this statement of facts."

If from 1968 until the date of this claim the Carrier asserts for many years prior thereto, no rule has been made to cover this particular situation or practice; it is outside the present rules. It is not within the province of this Board to change that situation or bend an existing rule.

The Carrier has given a number of instances in their submission, where at the present time on many parts of the Carrier's system "floating" gangs are working and the stationary forces assigned thereto working the same work schedule and paid on the same basis as the floating gang. The Organization has not seen fit to refute the statements of the Carrier although they have a capability of checking these things on the system if it were in their desire to do so. The situation in this case makes pertinent part of the decision of Referee Lieberman, Third Division Award 20514:

"This evident intent of the parties is buttressed by the challenged practice of the TCU predecessor agreement of the reasoning board 6723 above. We have repeatedly held the conduct of the parties have appeared at times as best evidence of their intent. (See Award 19959 and many others.)"

In this claim the Carrier's action is buttressed by a number of incidences given in the record and since these are not disputed it appears this is a practice that has been going on since 1968. To quote Referee Leroy A. Rader in **Award 6929:**

> "We feel that a practice of 27 years living through negotiations and changes of the Agreement is an established practice showing the intent of the parties as to the application of rules cited therein."

And the cases cited in that decision bear the ruling out. We see no reason to change the practice **nor do** we have authority to do so therefore the claim will be denied.

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 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this **27th day of April 1983.**