

SPECIAL BOARD OF ADJUSTMENT NO. 1048

MAILED 10
JUN 21 2001

Award No. 99

OFFICE OF VICE PRES.
SOUTHEASTERN REGION

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

Statement of Claim:

Claim on behalf of G. L. Marston, for six (6) hours at the double time rate account, on March 11, 1998, while assigned as a Foreman-Track Patrol, he was used to assist the maintenance gang in working a 27-car derailment between MP-N-121.8 and N-122.4, but was released at 12:00 midnight while three machine operators remained on duty assisting the maintenance gang until 6:00 a.m.

(Carrier File: MW-ROAM-98-45-LM-149)

Findings and Opinion:

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and this board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

Claimant, on March 11, 1998, was regularly assigned to and performed service as a Track Patrol Foreman on the Crewe Territory which encompasses Mile Posts N121.8 and N122.4. On that day, within the parameters of Mile Post 122, a derailment occurred involving twenty-seven coal cars. The magnitude of the work to restore the track and clean up the debris caused by the derailment exceeded the capacity of the Section Gang. Consequently, the Carrier assigned all available track forces from this area to assist the Section Gang in performing the necessary laborer type duties of restoring the track and cleaning up the derailment site. Since the Claimant had no scheduled FRA track inspection obligations on the day in question, the Carrier assigned him to work at the derailment. Also assigned to assist the Section Gang was a machine operator and two brushcutter operators who had regular assignments outside the territory where the derailment took place. These operators were not operating their assigned machines but were performing normal section work. The emergency work involved in restoring the track and cleaning up the debris caused by the derailment continued into overtime, and each employee performing this work was compensated at the applicable rate of pay of his regular assigned position. For example, the Claimant was paid at the Track Patrol Foreman rate.

Claimant performed this emergency overtime service until 12:00 midnight, at which time the Carrier determined that he, as the regular assigned Track Patrol Foreman, and the Assistant Track Supervisor, should be sent home so they could get proper rest before beginning their track inspection duties at 7:00 a.m. on March 18, 1998.¹ The machine operator and two brushcutter operators from outside the territory where the derailment occurred continued to perform overtime emergency service until 6:00 a.m. the next

¹ As the regular assigned Track Patrol Foreman on the Crewe Territory, it was the Claimant's primary function to perform the regularly scheduled FRA inspections on this territory. Such inspection work involves careful observation of the track structure in order to detect any defects in the track. This work involves patrolling the track structure throughout the day.

day. On April 22, 1998, the Organization filed a claim on behalf of the Claimant for six hours of overtime calculated at his Track Patrol Foreman's double time rate. The claim here is grounded on the contention that the Claimant had been improperly released from performing overtime emergency service at the derailment while the three machine operators junior in seniority to him continued to perform such service at this site. According to the Organization, the Carrier violated Rules 1, 2, 3, 4, 5, 39 and 42 of the Agreement because the Claimant was the "senior laborer" among the three machine/brushcutter operators.²

In denying the instant claim, the Carrier argued that it had the prerogative of using and then releasing the Claimant from overtime emergency service since service of this nature, which was performed by various forces, did not accrue to his Track Patrol Foreman's position. The Carrier asserted that the Claimant's release from this emergency work after performing six hours of overtime was consistent with Rule 42; that the other rules cited by the Organization did not entitle him to remain on the assignment merely because he was senior to the machine operators who continued to work the derailment. Insofar as the Carrier was concerned, there was no language in Rule 42 requiring that when more than one force or gang is delegated to assist the lead unit or gang in performing laborer type tasks that the Carrier must consider

² The rules most directly related to this dispute are as follows:

RULE 39 - OVERTIME

(a) - NW only - Except as otherwise provided in the sub-paragraph of this Paragraph (a), of Rule 39, time worked preceding or following and continuous with a regularly assigned eight-hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen continuous hours of work in any twenty-four hour period computed from starting time of the employee's regular shift. In the application of this Paragraph (a) to new employees temporarily brought into the service in emergencies, the starting time of such employees will be considered as of the time that they commence work or are required to report. This shall not affect the present provisions of this agreement covering meal periods.

* * * *

RULE 42 - AUTHORIZING OVERTIME

(a) No overtime work will be required except by direction of the proper authority, except where advance authority is not obtainable in case of emergency. The proper officer of the Company will determine when overtime work is required and will designate, subject to the provisions of this rule, the employee who will perform such overtime work.

* * * *

(d) Except as provided for in Section (e) of this Rule 42, when employees are notified or called to perform work not continuous with the regular work period, the employee or employees working in the immediate force or gang delegated to perform the work, will be notified or called on seniority basis. The provisions of this Section (d) shall not apply in cases of emergency.

(e) When overtime work is required immediately following the regular work period, the particular employee or employees performing such work during the regular work period will perform the work on seniority basis.***

the respective seniority of the members of each of these other forces or gangs delegated to perform the work. Simply put, the Carrier opined that there is no contractual provision entitling an employee assigned as a Track Patrol Foreman to continue to perform laborer type duties in emergency service based solely on the employee's seniority ranking on the laborer's roster. Here, as observed by the Carrier, the seniority of the employees performing overtime emergency service on the day in question was respected in accordance with Rule 42. According to the Carrier, seniority in the assigned position classifications among the gangs delegated to perform the work involved must be considered and not seniority in the laborer classification among all the employees used. Based on its interpretation of Rule 42, the Carrier averred that neither the Claimant nor the junior employees were assigned in this instance to emergency service as laborers; i.e., the Claimant was not a member of the same gang or force as the so-called junior employees complained of, nor was he assigned in the same classification. From this perspective, the Carrier held to the view that supervision had the discretion to release members from the work being performed at the derailment on the basis of their seniority in their regular assigned position classifications. As corroborative proof of this arrangement, the Carrier pointed out that the laborer tasks the Claimant and the junior employees performed in emergency service were accomplished while they remained in their regular assigned position classifications and were paid the respective rates of those classifications rather than the laborer rate.

In its penultimate argument, the Carrier alleged that the Claimant was released from emergency service earlier than the machine operators so that he could obtain proper rest to perform his track patrol inspections the next morning. On this point, the Carrier posited that it would have been absurd to keep the Claimant on overtime service where he was not needed to the detriment of his ability to competently perform his regular scheduled assignment.

Lastly, the Carrier, without conceding its position, maintained that if the Board were to uphold the claim, the appropriate remedy to which the Claimant might be entitled for the overtime he did not work would be compensation at the straight time rate and not the double time rate as requested.

The Organization, in advancing the instant claim, sharply differed with the Carrier's position on all accounts. Specifically, the Organization argued that the Carrier was required to observe the principle of seniority when assigning the overtime service at issue. According to the Organization, the Carrier apparently realized this contractual obligation because it initially assigned the Claimant to perform the emergency work at the derailment site. The Organization disputed the Carrier's assertion that it had a managerial prerogative to release the Claimant from this overtime assignment, notwithstanding his seniority rights. It was abundantly clear to the Organization that no such prerogative existed in this circumstance; that the Carrier, instead, was contractually required to apply the controlling seniority rules of the Agreement. Further, the Organization took exception to the Carrier's practice of relieving the Claimant from performing laborer's work at a derailment on his assigned territory while junior employees from outside the territory were allowed to continue to perform overtime emergency service for six more hours on the day in question. In this same vein, the Organization held to the view that the Carrier's practice violated the Claimant's seniority rights to this overtime work.

Moreover, the Organization refuted the Carrier's attempt to defend its "managerial prerogative" on an unprecedented concern for the Claimant's rest time and then arguing that the remedy sought by his claim was excessive since the overtime/double time emergency service was not "exclusively" reserved to him but could be assigned to anyone performing work at the derailment site. The Organization argued that the Carrier's defenses were unfounded. Turning to the initial defense, the Organization noted that the Carrier, despite its belated concern that regular track inspection duties require a minimum amount of rest, never showed a concern for the Claimant's rest time in light of his prior round-the-clock assignments. Here, the

Organization opined that other positions like machine operator or laborer, in addition to Track Patrol Foreman, similarly required employees in either position minimum rest before assuming their regular assignment. From the Organization's standpoint, the putative concern expressed by the Carrier in this instance was nothing more than an excuse to prevent the Claimant from pursuing a valuable overtime/double time opportunity. With respect to the remedy itself, it was the Organization's position that the compensable relief being sought by the Claimant was not excessive but fully supported by companion arbitral authority entitling him to receive compensation equivalent to the amount he would have received had the Carrier not violated his seniority rights under the Agreement.

Having carefully considered the parties' respective arguments as recounted herein, the Board finds that the issue raised in this case is whether employees, like the Claimant, have a right to being used when performing laborer tasks in emergency service on the basis of their standing on the laborer's seniority roster even though they may be regularly assigned to positions governed by other seniority rosters. In the instant matter, the Claimant was regularly assigned as a Track Patrol Foreman when he was assigned to work overtime to restore the track and clean up debris caused by a derailment. As previously noted, the Claimant was released from this emergency service after working six hours of overtime while others less senior to him on the laborer's roster who were regular assigned machine operators continued to work this overtime assignment. Simply put, the Carrier did not believe that his seniority on the laborer's roster was applicable because he was regularly assigned as a Track Patrol Foreman who performed laborer type tasks while working in the higher classification. Insofar as the Carrier was concerned, the Claimant's entitlement to overtime was governed by his seniority on the Track Patrol Foreman's roster and not the laborer's roster. Conversely, the Organization argued otherwise, maintaining that his seniority on the laborer's roster controlled his right to remain on the overtime assignment at issue; i.e., he was senior to the machine operators who were also on the laborer's roster and performing the same laborer tasks as he at the derailment site. While finding the parties' conflicting arguments equally persuasive, the Board, nevertheless, believes that the Claimant was contractually entitled to remain in emergency service on the day in question in order to complete the work to which he was assigned rather than be released and sent home after working six hours of overtime. Contrary to the Carrier's contention, the Claimant was performing tasks exclusively within the laborer's classification and not that of Track Patrol Foreman. Under circumstances where laborer duties are performed, his seniority rights on the laborer's roster would prevail, notwithstanding the fact that his pay for the overtime work he performed was based on the higher-rated position classification he regularly held. Suffice it to say that the actual tasks performed in this instance, being that of a laborer and not that of a Track Patrol Foreman, govern in the disposition of the instant claim.

Although the Board appreciates the Carrier's stated concern that the Claimant needed appropriate rest before assuming his regular assignment the very day he was released from emergency service, it behooved supervision to have considered this factor before assigning him to work the derailment which involved overtime. Once the Carrier committed him to this assignment to assist other forces in cleaning up and restoring the track after a derailment, it was obligated to comply with Rule 42 of the Agreement in context with his seniority rights as a laborer rather than Track Patrol Foreman. Put another way, the Carrier had a managerial prerogative to establish the gang or forces needed for emergency service, and once that decision was made the seniority of those assigned to this service would be determined by the nature of work actually performed.

Lastly, in addressing the remedy in this case, the Board is mindful of the contrasting arbitral authority each party cited regarding the appropriate payment of overtime for work he had not been able to perform. Yet it should be borne in mind that the Claimant was denied the opportunity to continue working the overtime assignment in emergency service because he was improperly released by the Carrier and sent

home. Due to the Carrier's action which was violative of the Claimant's seniority rights to remain in emergency service on the day in question ahead of junior employees, he is thus entitled under Rule 39 of the Agreement to the compensable relief sought by the Organization in this particular instance. Accordingly, the six hours of overtime, of which he was deprived, will be computed on the basis of Rule 39, which must be applied as written.

The Board will retain jurisdiction over this case for the sole purpose of resolving any problem that may possibly arise over the computation of the Claimant's overtime payment.

AWARD

For the reasons given, the claim is sustained.

ORDER

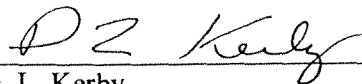
The Carrier shall comply with this Award within thirty (30) days from the date hereof.



C. P. Fischbach
Chairman and Neutral Member



R. A. Lau
Organization Member



D. L. Kerby
Carrier Member

Issued at Chicago, Illinois on April 18, 2001

I DISSENT:
WHILE PROPERLY CONFINED TO A SPECIFIC
CIRCUMSTANCE AND RECOGNIZING THERE
WAS NO INITIAL REQUIREMENT TO USE
THE CLAIMANT, THIS DECISION'S RELIANCE
ON SENIORITY IN A LOWER RANK
THAN ASSIGNED, AND THE CORRESPONDING
PENALTY ALLOWED, ARE INCONSISTENT
WITH THE HISTORICAL PRACTICE
ON THIS PROPERTY.