



Award No. 16430
Docket No. MW-16960

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Milton Friedman, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when, on December 20, 1965 and January 7, 17, 18 and 22, 1966, it used Section Foreman Cecil F. McKay and four sectionmen from Section No. 647 instead of Maintenance Gang Foreman William T. Hardin and Sectionmen H. W. Beck, L. Trumbley, S. E. Anthony and D. Boehs, to perform track maintenance work on the territory assigned to Maintenance Gang No. 16. (Carrier's File L-126-907.)

(2) Because of the violation referred to in Part (1) of this claim

(a) Maintenance Gang Foreman William T. Hardin be allowed 28 hours' pay at his straight time rate and 3 hours' pay at his time and one-half rate.

(b) Sectionmen H. W. Beck, L. Trumbley, S. E. Anthony and D. Boehs each be allowed 28 hours' pay at their straight time rate and 1½ hours' pay at their time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: On December 20, 1965 and January 7, 17, 18 and 22, 1966, the Carrier required Section Foreman Cecil F. McKay and the sectionmen assigned to Section No. 647, Geary, Oklahoma, all of whom held seniority on Sectionmen's Seniority Territory No. 36, to perform track maintenance work on Sectionmen's Seniority Territory No. 40. Said work consisted of unloading ties with Work Extra No. 1205 on December 20, 1965, unloading ties with Work Extra No. 740 on January 7, 1966, replacing angle bars on January 17, 1966, working with Electro Tamper PB-8 and replacing angle bars on January 18, 1966 and changing rail on January 22, 1966. For this work Section Foreman McKay received a total of 28 hours' pay at his straight time rate and 3 hours' pay at his time and one-half rate. The sectionmen assigned to his gang received a total of 112 hours' pay at their straight time rate and 6 hours' pay at their time and one-half rate.

6. To avoid burdening the record, Carrier has not included copies of the correspondence on the property concerning this claim as it is anticipated the Organization will produce such correspondence as a part of their submission. However, Carrier will refer to various portions of this correspondence, as necessary, and will reproduce pertinent portions of same when appropriate. Carrier will also take exception in its rebuttal statement to any errors or omissions in the Organization's reproduction of such correspondence.

7. The grievance procedures followed and progression of the instant dispute were timely and in accordance with the applicable rules in effect on this property and the Railway Labor Act, as amended.

OPINION OF BOARD: Claimants are members of Maintenance Gang No. 16 and hold seniority on Territory No. 40. On four dates Carrier assigned Maintenance Gang No. 647, whose seniority is on Territory No. 36, to perform work on Claimants' Territory. The issue is whether Carrier violated the Agreement by this assignment of men with seniority in one territory to perform work in the territory of another Gang. Claimants were fully employed on the four dates.

This Board has decided a case between the same parties which is similar in essentials to the one now before us. Award No. 13346 also involved employees from one seniority district who were assigned to the temporary performance of work in another district. That claim was denied.

Claimants here contend that Section 10 of the Memorandum of Agreement between the parties, effective December 1, 1965, subsequently prohibited transfers from one seniority district to another. It provides:

"This agreement will not operate to change existing seniority territories in any respect and does not permit the transfer of employees or work from any existing seniority territory to another or across seniority lines."

Award No. 13346, upon which Carrier relies in part, was issued on February 26, 1965. The Memorandum of Agreement was effective nine months later. Hence the Memorandum, following the cited Award, appears to represent the later policy of the parties, although it is not clear whether the "agreement" mentioned in Section 10 refers to the basic Agreement or to the December 1 Memorandum itself.

In its ex parte submission the Organization contended that the Memorandum was applicable and binding in this case. Carrier did not challenge that claim in its rebuttal or, in fact, do any more than quote the section in passing without discussing it. Since there was no denial of the Union's assertion that Section 10 was violated by Carrier's transfer of men from one seniority territory to another, it must be held that Carrier violated the Agreement. Where the contractual basis alleged by one side in support of its position is relevant on its face and it is uncontested, the Board has no alternative but to sustain the claim.

Carrier contends that Claimants were fully employed and therefore the compensation sought should not in any case be granted. But there was a loss of earnings opportunities and, pursuant to many Awards of this Division

(6063, 6284, 16009), the hours worked by employes who held no seniority in Territory No. 40 are a proper measure of the Claimants' loss and should be paid. However, straight time pay only is awarded.

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 violated by the Carrier.

AWARD

Claim sustained as to the number of hours, but all hours shall be paid at straight time.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1968.