



Award No. 14946
Docket No. MW-15976

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, on or about April 1, 4, 5, 6 and 8, 1964, it used Track Laborer R. Gerber as a track foreman instead of using Track Foreman A. Hilbrich. (System Case No. TG-7-64 — VM-6-64.)

(2) Track Foreman A. Hilbrich now be allowed forty (40) hours' pay at his straight time rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant and Mr. Kimberlin were both regularly assigned as track foremen on Section No. 18 with headquarters at the Gary Mill Yard. Their respective work weeks extended from Monday through Friday (Saturday and Sunday were rest days). The claimant's assigned hours were from 7:30 A. M. to 4:00 P. M. while Foreman Kimberlin was assigned to work from 4:00 P. M. to 12:00 midnight.

On April 1, 4, 5, 6 and 8, 1964, Track Foreman Kimberlin was absent from work because of the illness of his wife. Instead of notifying and using the claimant to perform the work of the absent foreman's position, the Carrier used a section laborer (R. Gerber) from Foreman Kimberlin's gang, who did **not** hold any seniority as a track foreman. Said track laborer worked eight (8) hours on each of the aforementioned dates in the performance of such work.

The claimant was available, willing and qualified to perform the subject work.

Claim was timely and properly presented and handled 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 August 1, 1952, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: In this submission, the Elgin, Joliet and Eastern Railway Company and the Brotherhood of Maintenance of

OPINION OF BOARD: On April 1, 4, 5, 6 and 8, 1964, the regularly assigned Track Foreman on the afternoon shift was absent from duty with permission due to the illness of his wife. Carrier assigned a Section laborer, the senior member of the Foreman's gang, to fill the temporary vacancy as Section Foreman. Claimant is the regularly assigned Track Foreman between the hours of 7:30 A. M. to 4:00 P. M., Monday through Friday, and Petitioner contends that Carrier violated the seniority provisions of the Agreement between the parties by refusing to offer the temporary vacancy to the Claimant. The pertinent provisions of the Agreement are as follows:

"Rule 3. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad as hereinafter provided."

"Rule 6. (a) Except as provided in paragraphs (b) and (c) of this rule, vacancies or new positions will be filled first by employees holding seniority in the group and rank in which the vacancy or new position occurs; if not so filled, they will be filled by qualified employees in succeeding lower ranks in that seniority group in accordance with Rule 8. In the event that vacancy or new position is not so filled by employees in the seniority group in which it occurs, then it will be filled by qualified employees from other seniority groups in the respective sub-department desiring it before employing new men. Employees so assigned will retain their seniority rights in their respective groups from which taken."

"Rule 12. (c) New positions or vacancies of thirty (30) calendar days or less duration shall be considered temporary and may be filled without bulletining except that senior unassigned employees in the seniority rank will be given preference in assignments, if available. Such assignment not subject to displacement."

"Rule 12. (h) It is understood and agreed that where preferred positions occur, which are not bulletined, the senior employees in the gang capable of performing the duties shall be entitled to the position."

Petitioner asserts that Claimant was available to perform the work of his own position as well as the work of the position temporarily vacant and that Carrier was required to give preference to Claimant because of his seniority rank under Rule 12(c) of the Agreement between the parties.

Carrier contends that Rule 12 (c) is inapplicable because Claimant held an "assigned" position and that the preference contained in said Rule applies only to "unassigned" senior employees holding seniority in the grade in which the vacancy occurs, if available. Furthermore, Carrier contends that Claimant was not "available" for such assignment as the hours of the two shifts overlap between 3:30 P. M., the starting time of the afternoon shift, and 4:00 P. M., the end of Claimant's regularly assigned shift.

Carrier maintains that the controlling provision of the Agreement is Rule 6(a), which authorizes Carrier to fill vacancies with qualified employees in succeeding lower ranks in the group in which vacancies occur if senior unassigned employees in the seniority rank are unavailable.

The parties are in disagreement concerning the starting time of the afternoon shift. The Petitioner asserts without supporting evidence that the assigned hours commence at 4:00 P. M. and Carrier asserts that the hours of the position are between 3:30 P. M. and 12:00 midnight. Carrier submitted in evidence a copy of a letter dated May 1, 1964 from Petitioner's General Chairman to Carrier's Division Engineer concerning the instant dispute, which supports Carrier's position that the afternoon shift commenced at 3:30 P. M. Subsequent bulletins advertising the position in September 1965 were also offered by Carrier to support its position. Therefore, we find that Petitioner failed to prove that the afternoon shift commenced at 4:00 P. M. and that Claimant was actually "available" to undertake the assignment.

This Board has previously considered Rules similar to Rule 12 (c) relied upon by Petitioner in support of the instant claim and has found that employees holding "assigned" positions, such as the Claimant, cannot claim a preference of seniority in assignment to temporary work. Here, Claimant was regularly assigned to a position and Rule 12 (c) has no application in this dispute. (Awards 1774 and 13085.)

In view of the foregoing, we find that Claimant was neither "available" nor "unassigned" at the time the temporary vacancy occurred on the dates involved in the claim and that Carrier did not violate the Agreement by using the senior laborer as Section Foreman to fill the temporary vacancy created by the incumbent's absence.

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.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of November 1966.