NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25114

THIRD DIVISION

Docket Number NW-25049

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Missouri-Kansas-Texas Railroad Company

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

(1) The Carrier violated the Agreement when it failed and refused to return Machine Operator B. J. Lawson to his regularly assigned position as Ballast Regulator Operator on Gang 363 when he returned from vacation on July 20, 1981 (System File 200-10/2579).

(2) The Carrier also violated the Agreement when it assigned a junior machine operator to perform overtime service operating a ballast regulator on July 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, 1981 instead of using Machine Operator B. J. Lawson who was senior, available and willing to perform that service.

(3) Because of the aforesaid violations, Machine Operator B. J. Lawson shall be returned to his regular position as Ballast Regulator Operator on Gang 363 and he shall be allowed thirty-five (35) hours of pay at the Ballast Regulator Operator's time and one-half rate.

OPINION OF BOARD: Claimant contends that Carrier violated the Controlling Agreement, particularly Article 3, Rule 1, Article 5 and Article 26 when it did not permit him to return to the Ballast Plow Operator position on Gang 363 following his vacation in July, 1981. Prior to taking his regularly scheduled vacation during the first part of July, 1981, he operated regularly the ballast plow on Gang 363, but he was reassigned as a machine operator to operate a different machine in the mechanized extra gang when he returned. Claimant asserts that Carrier improperly assigned overtime work to the junior employe on the dates cited in the petition and vitiated his seniority rights to the position. He argues that Carrier is estopped from considering a position where the incumbent is on vacation as a vacancy position, and avers that a machine operator's position assignment is made to a particular machine.

Carrier contends that his petition is invalid since the claim was untimely filed. It asserts that it was not filed within 60 days from the date of the alleged occurrence, which in this instance from Carrier's perspective, ran from July 20, 1981, but was not filed until September 29, 1981, some 9 days after the appeals period limitation. Carrier asserts that his untimely filing violates Article 28, Rule 1, Paragraph (a), and as such, his claim is moot.

Moreover, with respect to the merits issue, Carrier avers that up until January 1, 1982, bulletins or circulars advertising Machine Operator positions did not list the name of the particular machine or machines, but instead employes were simply assigned as machine operators and not to a specific machine. Apart from the machines assigned to the positions of Weed Mower and Brush Cutters on a seasonal basis, Carrier argues that there was no Agreement provision nor definable past practice that required the assignment of employes to a particular machine.

In our review of this case, we find no indisputable evidence that Carrier consistently observed the practice of assigning employes to a specific machine. We do find that the January 1, 1982 letter Agreement required Carrier to list the machine or machines in position bids, but this Agreement was consummated after the asserted violation herein and was not retroactive. We have carefully assessed the data submitted by Claimant to demonstrate that past position bids listed machines, but this information was more suggestive than persuasive. In the absence of a clear Agreement provision providing for such a procedure or an unmistakable observance of long term uniform past practice, we have to conclude that listing machines in a position bid was not normative practice before January 1, 1982. Claimant had noted in his rebuttal submission that Carrier's reference of the January 1, 1982 Letter Agreement in its Ex Parte submission was improperly-introduced new evidence, but we do not share this view. Carrier's April 8, 1982 letter to the General Chairman mentions the existence of a recent agreement to assign machine operators to machines advertised in position bids and this explicit notation pointedly indicates that this information was appropriately exchanged on the property. It was not surprise data.

Accordingly, upon this record and for the reasons aforesaid, we do not find an Agreement violation and the claim is hereby denied. In light of this finding, we will not address the correlative time limits procedural issue since the question is now academic.

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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1984.