NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25217

THIRD DIVISION

Docket Number MW-25198

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Detroit, Toledo and Ironton Railroad Company

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

(1) The Carrier violated the Agreement when it assigned Trackman-Truck Drivers D. Gibson and R. Meek instead of Truck Drivers G. Brown and B. R. Dye to perform overtime service on October 17, 1981 (Carrier's Files 8365-1-133 and 8365-l-134).

(2) As a consequence of the aforesaid violation, Truck Driver G. Brown shall be allowed seven (7) hours of pay at his time and one-half rate and Truck Driver B. R. Dye shall be allowed seven and one-half (7-1/2) hours of pay at his time and one-half rate.

OPINION OF BOARD: This case deals with pay claims filed by the two Claimants on October 18, 1981 and November 11, 1981 respectively. Both of these claims deal with substantially the same issues and will herein be treated as one case. The claims allege Carrier violation of current Agreement Rules 8(A) and 22(G). These Rules read, in pertinent part, as follows:

> Rule 8-(A):
>
> "An employee's seniority in each classification in a sub-department will begin at the time his pay starts in that classification."
>
> Rule 22-(G):
>
> "Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee. If practicable, preference for overtime work will be given to qualified and available employees in the order of their seniority on the gang on which they work. In emergencies, the first available employees may be called."

The facts of the case are that a derailment occurred on October 16, 1981. The Carrier then proceeded to use its regularly assigned employes on the first, second and third tricks to get operations back to normal. When it became clear to local supervision that the work would not be finished by the end of the third trick. the Carrier elected to use the regularly assigned third trick employes to work overtime in order to finish the work. Two of the regularly assigned third trick employes who worked overtime were junior in seniority to the Claimants who had worked an earlier trick. The claims center on the contention of the Claimants to overtime rights under Rules 8(A) and 22/G/.

Rule 22(G) permits the **Carrier** to use available extra or unassigned employes for overtime work. Otherwise regular employes must be used. The facts of record do not apply to the former, but only to the latter. The overtime issue at bar must, therefore, be related to seniority. In denying the claim on property the Carrier's officers argue variously that first of all it was not 'practicable" to have called the Claimants for overtime in lieu of the junior employes actually used, and secondly that an emergency existed. The reasoning set forth by the Carrier on the first point is considerably **confusing** in view of the unambiguous requirements of Rule 22(G). The Division **Engineer** states, in his declination letter to Claimant Brown:

> "(i)t is sometimes necessary to call additional people for work on derailments. The Supervisor then tries to contact the senior employees first. Apparently, in this case he did not feel it was necessary to call in extra people and elected to use the 3rd shift who worked past their assigned hours.
>
> Since this is at the discretion of the Supervisor, your claim is therefore denied."

The implication here appears to be that since the Supervisor did not feel that "extra" employes were necessary he then felt it his "discretion" to use third trick employes. In so doing, however, the Board notes that the Supervisor did not try to contact the senior, regularly assigned employes first, as required by Rule 22(G), and as the Division Engineer himself says should be the case. This line of reasoning can be dismissed, therefore, as unpersuasive. Likewise can the reasoning of the Chief Engineer be dismissed who stated in his letter(s) to the Vice Chairman of the Organization the following:

> "(a)s the work was already in progress and the gang was working toward completion of the repairs, it was not feasible nor was it a violation of our working Agreement to work the third shift gang..:

There is no denial on property that the claims for seven and a half (7 1/2) hours are accurate ones albeit the Carrier does consider such claims "excessive and improper for service not performed". Nor does the **Carrier** ever deny that the **Claimants were** available as they contended in their original letters of claim. Since such is the case the Board is not persuaded that it was not "feasible" to have contacted the Claimants for overtime purposes as their place on the seniority roster required the Carrier to have done.

Nevertheless, it still would not have been necessary for the Carrier to have called employes in order of seniority if an emergency existed. 'Then the first available employe(s) could have been called under Rule 22(G). Such could have been, logically, the third trick employes already on the job. But did an emergency exist? The issue of an emergency is not raised on property until the claim reaches the Carrier's Director of Labor Relations. In his letter(s) to the General Chairman of the Organziation he states that "it was (his) **understanding that an emergency situation** existed...". A close study of the record fails to provide the Board with any additional details beyond this assertion with respect to the existence of an emergency. In fact, if an emergency did exist **it** could reasonably be expected that the **Carrier** would have taken some type of extraordinary measures to cope with such emergency. It did not take such measures until it discovered, during the third trick, that additional personnel on overtime basis was needed to finish the work. The Board can find nothing in the record to have relieved the Carrier, at the end of that third trick, of its contractual responsibilities under current Agreement Rules 8(A) and 22(G). The Carrier should have called the Claimants as qualified, available and most senior on the seniority roster for overtime work. The claims must, therefore, be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties wavied 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.

A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1985.

CARRIER MEMBERS' DISSENT

TO

AWARD 25217, DOCKET MW-25198

REFEREE EDWARD L. SUNTRUP

To reach its decision in Award 25217, the Majority has obviously exceeded its statutory authority and proceeded to write a new rule amending the parties' Collective Bargaining Agreement.

The record, as established by the Organization, shows that Carrier maintains three (3) consecutive shifts of track maintenance employes Monday through Friday at its Flat Rock Yard; that on Friday afternoon October 16, 1981, a derailment occurred at Flat Rock causing track damage.

Day-shift employes (7:00 A.M. to 3:30 P.M.) were relieved at the end of their shift and the evening shift employes (3:30 P.M. to 12:00 Midnight) were assigned to continue the work of repairing damaged track until the close of their shift at which time they were released and the night shift employes (12:00 Midnight to 8:30 A.M.) were assigned to continue repairs to the track. When track repairs had not been completed by 8:30 A.M., the Carrier exercised its prerogative to continue the night shift employes until the work was completed.

No Rule of Agreement, past practice or other understanding was cited by the Organization prohibiting the Carrier from continuing its regularly assigned night shift track force in service on overtime to complete the repairs.

The rule cited by the Organization, Rule 22, applies only where it is necessary for the Carrier to call employes for overtime service. In this instance, none were called and it was not necessary to do so, because the Carrier had sufficient employes on duty who could be continued in service. Further, it was not "practicable" to call employes in seniority order for overtime, particularly when the Agreement does not prohibit using on-duty employes already assigned to and performing the work to complete it.

The award is palpably erroneous and defective by the obvious writing of a new rule for the parties.

We, therefore, dissent.

J. E. Yost, Carrier Member

W. F. Euker, Carrier Member

P. V. Varga, Carrier Member

T. F. Strunck, Carrier Member

M. W. Fingerhut, Carrier Member