Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37202
Docket No. MW-36383
04-3-00-3-621

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior employe R. Menzel to perform track equipment repair shop foreman overtime service on July 5, 1999 instead of calling regularly assigned Foreman G. Berg (Claim No. 40-99).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Berg shall now be compensated for sixteen (16) hours' pay at his respective time and one-half rate of pay and for three and one-half (3.5) hours' pay at his respective double time rate of pay.'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This claim involves the Carrier's assignment of work on the Independence Day holiday celebrated on July 5, 1999. The Claimant, who held the Track Repair Shop Foreman position, had been on vacation the prior week, from June 28 - July 2, and was replaced by afternoon shift Track Foreman Menzel. The Claimant asserts that he notified his Foreman that he would be available for work on the weekend following his vacation. There was no need for such overtime work. The Carrier determined that it required a Track Repair Shop Foreman to work on July 5, 1999 and assigned Menzel, rather than the Claimant, resulting in the instant claim.

The pertinent provisions of the Agreement relied upon by the parties on the property are:

"Rule 2 - Division of Overtime

(b) All other overtime will be given to the senior qualified available employee working in the classification at the headquarters point where the overtime is to be performed.

Letter of Agreement, March 24, 1994

1. An employee who takes vacation . . . will not be considered available for overtime calls until he has returned to regular service. Exception: An employee beginning vacation on the first day of his work week may make himself available for rest day overtime in accordance with Supplement No. 22.

Supplement No. 22

An employee who commences his vacation on the first day of his work week is eligible for overtime on the rest days prior to the first day of his vacation and the two rest days subsequent to the last day of his vacation. Employees desiring to work overtime on such rest days must make their availability known to their immediate supervisor."

The Organization contends that, because the Claimant was admittedly senior to Menzel in the Foreman position and met the requirements of Rule 20(b) he should have been assigned the overtime work on July 5, 1999. The Organization asserts that the Claimant's vacation lasted from June 28 to July 2, and that his regular schedule began on July 5, 1999 when all employees were scheduled to observe a holiday. It notes that

the Letter of Agreement does not require that an employee must work his regular schedule to be available for overtime calls, but only that he has returned to regular service, which the Claimant had as of the date of the holiday. The Organization also argues that, even though the Claimant notified his Foreman that he was available for rest day overtime after his vacation, he was not required to do so to be available for holiday work during his regular schedule, because Supplement No. 22 only applies to rest day overtime, not holiday work. It contends that the Carrier may not be permitted to imply further exceptions than those specifically included in both the Letter of Agreement and Supplement No. 22, citing Third Division Awards 20693 and 31300.

On the property the Carrier asserted that the Claimant was not available for the July 5, 1999 holiday overtime because his regular assignment did not begin until July 6, 1999 when he returned to work from vacation. It also argued that the Claimant did not meet the requirements of Supplement No. 22 to make himself available for the overtime assignment because, if he notified anyone of his availability, it was not his immediate supervisor as specifically required by Supplement No. 22. The Carrier avers that the Organization's assertion that Supplement No. 22 is not applicable to holidays is a new argument not presented on the property, and should not be considered by the Board. In its Submission, the Carrier argues that the case should be dismissed because it is not covered by Rule 20(b) and the Letter of Agreement relied upon by the Organization, inasmuch as this was not an assignment for overtime work, but rather an assignment for work on a holiday not covered by those provisions, relying on Second Division Award 10855 and Third Division Award 12241.

Initially we note that the Organization did assert on the property that Supplement No. 22's requirements of notice did not apply to the Claimant becuase he was not seeking a rest day overtime assignment, but rather holiday work during his regular schedule, and thus its assertion that Supplement No. 22 is not applicable cannot be considered a new argument. On the other hand, nowhere in the correspondence on the property does the Carrier make the argument that the Rules relied upon by the Organization do not apply because the disputed work is not an assignment of overtime, but rather, of holiday work. In fact, the Carrier' argument on the property was clearly that Supplement No. 22, which by its language applies to rest day overtime, requires that the Claimant make his availability known to a specific supervisor, which he failed to do. Thus, the contention in the Carrier's Submission is new argument that cannot be considered by the Board.

A careful review of the record convinces the Board that the Claimant, as the senior qualified employee working in the classification at the headquarters where the

overtime is performed, was entitled to the holiday overtime assignment on July 5, 1999, absent a showing that he was unavailable for such assignment. The language of the Letter of Agreement requiring that an employee "has returned to regular service" does not disqualify the Claimant, because his regular schedule commenced on Monday, July 5, 1999, and he was to be considered in the same position as all other employees who were scheduled and not working due to the holiday. The Agreement does not require that an employee be physically at work to have "returned to regular service." Further, Supplement No. 22, by its language, applies to the procedure for making oneself available for rest day overtime preceding or following an employee's vacation. As we are not here involved with a rest day overtime assignment, the fact that the Claimant did not notify the correct individual that he was available for rest day overtime does not disqualify him from a holiday assignment during his regular schedule. Absent a contention that the amount of the claim does not correspond to the holiday overtime paid to Menzel for working the assignment to which the Claimant was entitled on July 5, 1999, the claim will be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of September 2004.