Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37465
Docket No. MW-36458
05-3-00-3-700

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein 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 Carrier violated the Agreement when it failed to call and assign Storage Facility Mechanic G. Helgeson to overtime service at the Two Harbors Storage Facility on June 19 and 20, 1999 and instead assigned junior employe M. Halvorson (Claim 35-99).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. Helgeson shall now be compensated for ten (10) hours and forty (40) minutes' pay at the storage facility mechanic's time and one-half 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.

The Claimant held a regularly assigned position of Mechanic at the Two Harbors Storage Facility. On Thursday and Friday, June 17 and 18, 1999, the Claimant was on vacation; his rest days were Saturday and Sunday. According to the record, on Saturday, June 19, 1999, the Carrier required the services of a Mechanic to fill a vacancy on the 3:00 P.M. shift. On Sunday, June 20, 1999, a Mechanic was needed for relief work beginning at 6:00 A.M. There is no dispute that junior Mechanic Halvorson worked both assignments, for a total of ten hours and 40 minutes at overtime.

Rule 20(a) and (b) of the parties' Agreement addresses overtime allocation. The Organization asserts that because the disputed overtime was not continuous with the Claimant's assignment, paragraph (b) is of particular relevance, as follows:

> "RULE 20
>
> Division of Overtime
>
> (a) During the regular assigned workweek, an employee assigned to a particular job during the workday at a point where overtime is required continuous with his shift will be given all the overtime connected with that job.
>
> (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."

Also at issue here is the parties' interpretation of certain provisions of the March 29, 1994 Letter of Agreement (LOA) concerning overtime, which reads as follows:

> "1. An employee who takes vacation, personal business leave, personal leave or days off sick 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."
>
> 2. Rule 20(b) is clarified in accordance with the following:
>
> 3. Overtime will be offered in seniority order to those employees working in the classification bid to the location, or whose bid includes the location, where overtime is required."

The relevant paragraph of Supplement No. 22 referred to in the first paragraph of the above March 29, 1994 Letter of Agreement reads:

> "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."

According to the Organization, the Carrier ignored the clear and unambiguous language of Rule 20(b) and the seniority principle upon which it was founded, when it failed to consider the Claimant for the weekend overtime work in dispute. In the Organization's view, Rule 20(b) is controlling, and the Carrier's reliance upon paragraph 1 of the March 29, 1994 Letter of Agreement and Supplement No. 22 was misplaced because the Claimant had taken vacation on a single day basis. Moreover, the Claimant specifically conveyed his desire to work weekend overtime by telling Foreman Pappas, that he "was going to work around the house," not that he was going to work around the house on Saturday and Sunday.

In response to the General Superintendent's contention that "one had to assume" the Claimant wanted to be off for the weekend, continuously, with his Thursday and Friday vacation days, and that if he had been interested in weekend work he should have told Pappas, the Organization emphasizes that the record shows that the Claimant did inform Pappas of his desire for weekend work, as

stated above. According to the Organization, although the Claimant clearly communicated his availability to the Foreman, he was not required to do so under Supplement No. 22, which applies to employees who desire weekend work at both ends of a workweek (five-day) vacation.

Thus, the Organization stressed that Rule 20(b) unambiguously spelled out the Claimant's entitlement to the weekend overtime work in dispute, even if it were not a fact that the Claimant had told Foreman Pappas he was available. Alternatively, by the Foreman's not "testing his assumption" that the Claimant would have preferred to not have been called for rest day overtime under the circumstances, by the simple act of asking the Claimant, and by not contacting him and offering him the overtime, the Carrier clearly violated Rule 20(b) of the Agreement. See Third Division Awards 13327, 14052 and 19954.

The Carrier asserts that the instant case is one of contract interpretation. As a result, the Organization had the burden of establishing a prima facie case by proving the essential elements of its claim. According to the Carrier, neither the Agreement nor any evidence supports the claim. Therefore, it should be denied by the Board for lack of foundation and proof, the Carrier submits.

It was furthermore the Carrier's position that paragraph 1 of the March 29, 1994 Letter of Agreement established that the Claimant had no entitlement to the rest day overtime work because his vacation time did not begin on the first day of his workweek. Given that undisputed fact, and in light of the clear language provided in paragraph 1 of the March 29, 1994 Letter of Agreement, the Carrier was correct that it was not required to consider the Claimant as available for overtime calls until he had returned to his regular service, it contends. Citing the "well-established principle of contract construction," the Carrier stressed that the Board must apply the "clear language of the contract" and to not consider "other evidence." See Third Division Awards 18064 and 33843.

Notwithstanding the claim's invalidity under paragraph 1, above, from the Carrier's perspective, there additionally is a factual dispute with respect to whether the Claimant had specifically informed his Foreman that he was available for weekend overtime, the Carrier also contended. According to the Carrier, Foreman Pappas reasonably interpreted the Claimant's comment that he had planned to

work around the house to mean that he did not want to be disturbed. Again, as the moving party, the Organization bore the burden of proving that the Claimant's communication with the Foreman in fact clearly conveyed a desire for weekend overtime work. The Carrier essentially emphasized that the parties are at a virtual stalemate with regard to this key point and the Board has no authority to develop the facts to "break the tie." Thus, the Carrier urges the Board to follow the precedent established in Third Division Award 33895 and dismiss the claim for reason of the Organization's lack of satisfying its burden of proof.

The Board carefully considered the entire record before us as developed on the property, and also carefully reviewed the parties' arguments as set forth in their Submissions before the Board. Initially, we emphasize that we are constrained to evaluate this case as it was argued on the property. We are prohibited from considering any evidence or argument raised for the first time in the parties' respective Submissions. For example, we note that the Organization did not argue the relevance of Supplement No. 15 and Article XII of the April 25, 1997 Agreement during the on-property handling of this matter. As a result, those contractual provisions are not properly before the Board, we rule.

Similarly, we note that the last paragraph of the Carrier's Submission referred to a "material fact" that, from our close review of the record, we find was never raised on the property, as evidenced by the parties' correspondence of record. Specifically, in its Submission, the Carrier for the first time asserted that the Organization failed to prove that the Claimant was reachable by cellular telephone and that a Carrier attempt to reach the Claimant in that manner was unsuccessful. Thus, just as we are precluded from considering the Organization's above supplemental arguments as to Rules, we likewise are prohibited from considering the Carrier's belated factual assertions, we hold.

We also note that the Carrier urged the Board to regard this case as one of contract interpretation, as opposed to one hinging on "facts alone." From our close review of the record, however, we find that while the Carrier initially based its denial of the claim on the language contained in paragraph 1 of the March 29, 1994 Letter of Agreement, it did not maintain that position in the processing of this claim on the property. The Claimant was not on a week-long vacation when the overtime arose, we realize.

Because the record convinces us that, as the claim moved through the parties' claims handling process, the Carrier shifted its position from its reliance on paragraph 1 and Supplement No. 22 to the factual matter concerning the Claimant's availability, we conclude that the claim as presented to us is not one of contract interpretation. Given the Carrier's change in its basis for the claim denial, we cannot reach the issue of whether Supplement No. 22 may be deemed to apply to employees taking vacation days that do not begin on the first day of the workweek, we therefore hold.

Again, from our careful review of the on-property record, we are convinced that at the end of the appeal process, the Carrier essentially abandoned the above Rules argument in favor of a defense based solely on the facts. Indeed, from the record, it is clear that the Carrier's ultimate rationale for denying the claim stemmed solely from its position that the Claimant never informed his Foreman that he was interested in working rest day overtime, not that the Rule itself disqualified him from the overtime regardless of his availability.

With respect to the factual question of availability, we find that the assertions by both parties are not supported by any documentary evidence. For example, there are no written statements from either the Claimant or Foreman Pappas documenting the substance of the Claimant's supposed conversation with Pappas regarding his availability for weekend overtime work. Nor is there any statement from Pappas to substantiate the Carrier's affirmative defense that Pappas construed the Claimant's statement that he would be "working around the house" to mean that he did not want to be disturbed on the weekend and, hence, was not available.

Thus, while it is possible to conclude that this case is stalemated from the evidentiary aspect and thus dismiss the claim, we recognize that the burden of proving the essential elements of the claim ultimately rests with the Organization. From our review of the record, we find that the Organization's claim as regards the availability issue, was wholly predicated on the Claimant's purely verbal assertion that he told Pappas that he would be working around the house. In the Claimant's mind this may have meant that he would be available for weekend work. It is far too ambiguous to support the Claimant's contention that such communication was sufficient to establish his availability in the Foreman's view. It is just as reasonable

to interpret the Claimant's statement as Foreman Pappas did, we find. On this narrow basis, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of April 2005.