Award No. 15840
Docket No. MW-16014

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Herbert J. Mesigh, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE COLORADO AND SOUTHERN RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, on January 10, 1965, it called and used junior laborer B. A. Labate to perform 17½ hours of overtime work when senior laborer Juan B. Valdez was available for the work.

[Carrier's file: MW-249]

(2) Juan B. Valdez now be allowed 17½ hours of pay at his time and one-half rate because of the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: The claimant was regularly assigned as laborer on Section 40 with headquarters at Denver, Colorado. His assigned work week extended from Monday through Friday, (Saturday and Sunday were rest days).

On or before January 7, 1965, the Carrier notified Section 21 gang, which was also headquartered at Denver, Colorado, that it would be required to work Sunday, January 10, 1965 for the purpose of performing certain work on its territory at that location. Since the consist of Section 21 gang was not sufficient to perform the work involved, the Carrier decided to use part of Section 40 gang to assist with the work.

On January 7, 1965, the members of Section 40 gang, including the claimant, who were to be used to assist Section 21 gang, were so notified. Then on Friday evening January 8, 1965, the claimant was notified that his services would not be required and that he should not report for work on the following Sunday as previously instructed. Despite, this, Section Laborer B. A. Lobato (Labate), assigned to Section 40 gang and who was junior to the claimant, was used for a total of 17½ hours on Sunday, January 10, 1965 to assist Section 21 gang.

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

On February 8, 1965, Superintendent Ackerman properly and adequately affirmed the Roadmaster's previous disallowance (Carrier's Exhibit D) and, in so doing, pointed out to General Chairman Ancell that claimant Valdez is assigned and employed on Section 40, not Section 21 where the overtime work was performed; that Valdez was not the senior man available of those not used, as provided in Rule 6 of the current agreement, and that no rules of the agreement were specified by the General Chairman as having allegedly been violated.

Under date of February 9, 1965, General Chairman Ancell further appealed Superintendent Ackerman's disallowance to the highest officer designated by the Carrier to handle such disputes and, again, the General Chairman merely alleged that the ". . . Carrier violated our Current Agreement . . ." and again without referring to a single rule, understanding or precedential practice in support thereof. (See Carrier's Exhibit E.)

Under date of April 2, 1965, Mr. R. D. Wolfe, the highest officer designated by the Carrier to handle such disputes, replied in minute detail to General Chairman Ancell's further appeal and, in addition to proving by a recitation of the salient factors in the case that the claimant, if actually available as claimed, was not entitled under agreement rules to participate in the special work made subject of dispute, it was also shown therein that the claimant was not the senior Laborer holding an assignment, as such, either in Denver, where the work was performed, or on the Operating District, as referred to in Rule 6. (Carrier's Exhibit F.)

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was regularly assigned as laborer on Section 40 with Saturday and Sunday as rest days. On January 7, 1965 Carrier notified members of Section 40 gang, including the Claimant, they were to be used to assist Section 21 gang on Sunday, January 10, 1965. Friday evening, January 8, 1965, Claimant was notified not to report for work on Sunday as previously instructed. Carrier then called and used on Sunday a Section Laborer, assigned to Section 40 gang, who was junior to the Claimant to assist Section 21 gang.

Carrier first argues that the present claim is improperly before the Board as the Organization did not file or institute proceedings within the 9 month provision of Rule 19, Paragraph (c). This objection will be overruled as the Board finds the Organization has complied with this provision of the collective agreement.

The Organization claims that Claimant being the senior man, who was available, willing and qualified to perform the subject overtime work, should have been used. Carrier maintains that the work in question was performed by Section No. 21, to which the Claimant is not assigned, and that only senior employes in their respective ranks and gangs, will, if available, be called for such overtime work.

The Board has consistently held that where Carrier is not obligated to use employes of a certain class, but chooses to do so, it is obligated to choose from that class according to seniority. See Awards 13833 and 13177.

In the instant dispute, when Carrier decided to use employes of Section 40 to augment and assist Section 21 in the performance of such work, it was ob-

ligated to call and use employes of that gang (Section 40) in accordance with their seniority.

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1967.

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