Award No. 18686
Docket No. SG-18823

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Thomas Rimer, Jr., Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

NORFOLK AND WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Norfolk and Western Railway Company that:

CLAIM NO. 1

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 8(1), when it called a junior employe to perform work between V.M.P. 271 and 273 near Ellott, Virginia, on the Radford Division.

(b) The Carrier now pay Signal Maintainer R. E. Markle for six (6) hours at his overtime rate of pay for the violation cited in part (a).

CLAIM NO. 2

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 8(1), when it called a junior employe to perform signal work at Jarratt, Virginia, on the Norfolk Division.

(b) The Carrier now pay Signal Maintainer J. L. Howard three and five-tenths (3.5) hours at his overtime rate of pay for the violation cited in part (a).

CLAIM NO 3

(a) The Carrier violated the current Signalmen's Agreement, particularly Rule 8(1), when it called a junior employe to perform signal work at Signal 986 on the Norfolk Division.

(b) The Carrier now pay Signal Maintainer S. G. Ingo two and seven-tenths (2.7) hours at his overtime rate of pay for the violation cited in part (a).

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties to this dispute bearing an effective date of October 1, 1957,

OPINION OF BOARD: The claim asserted here on behalf of three employes contends that the Carrier violated the Agreement, specifically, Rule 8 (1), in the assignment of overtime work, which reads:

"RULE 8.

(1) When overtime service is required on a signal maintainer's territory, the regular assignee, or employe filling such position, will be called first. If such an employe is not available, a division leading signal maintainer or a signal maintainer from another territory may be called."

The Carrier moves to dismiss the claim as being vague and indefinite, lacking in the essential information required in its Statement of Claim, as well as in the notice of intent to file an ex parte submission with the Board. It points to the absence of the dates of the alleged violation, the identity of the "junior employe" alleged to have performed the work, and the nature of the work involved.

The Organization contends that the motion to dismiss raises a "new issue" not dealt with in the handling on the property. The record supports the contention of the Organization. At each step in the progress of the claims on the property, including the declination by the highest officer, the claims were treated solely on their merits and the procedural defense was not made. Further, at an early point during the handling on the property the Organization provided the specific facts on which the claims were based and should have left the Carrier with no doubt as to the incidents which gave rise to the claims.

We will reject the motion to dismiss, based upon the general principle that the Carrier's defense as to the procedural deficiency was not raised on the property and appears in the record for the first time in its ex parte submission. The Board has so held in a number of awards. In Award 10985 (Hall) it was said:

"A dismissal of the claim is urged by the Carrier maintaining the claimants are unnamed, but as this objection was not raised on the property, it will not be considered here."

Other awards adhere to this principle, as such cases related to the introduction of key evidence and other matters significant to the resolution of the dispute which were revealed by one or the other party for the first time in their submissions to the Board. See Awards 11080, 12670, 13029, 13139, 13905, 14129, 14605, among others.

We now look to the merits of the claims through interpretation and construction of Rule 8 (1) on which the Organization relies. In doing so we believe it essential to also examine Rule (j) and (k) of the Agreement which treat with overtime calls under different circumstances than those present here.

"(j) When overtime service is required of employes in a signal gang or a car retarder force, the senior available qualified employes of the seniority class involved shall have a preference to such work.

(k) When overtime service is required of employes in the Repair Shop and Reclamation Plant, Roanoke, Virginia, the available employes of the seniority class involved who normally perform the type of work for which overtime service is required, shall have a preference to the work on the basis of seniority."

The Organization has variously argued that a senior maintainer be called for overtime, presumably from any territory, when the regular assignee, or the employe filling such position, is not available, or that he be called from an adjoining territory. A review of the record of its position as advanced on the property and in its submission to the Board combines these arguments which would require the Carrier, under Rule 8 (1), to call the senior adjoining maintainer.

It is contended that past practice supports its case and produces for the record instances where the Carrier has paid claims under this same Rule in similar situations. It is argued as well that seniority must be read into the Rule; else it could have no meaning or value to the employes.

The Organization attempts to establish as an admitted practice in applying Rule 8 (1) through the introduction of these claim settlements which were based on the assignment of junior employes for overtime work, occurring in 1960, 1961, 1965, 1967 and 1968. However, the record also shows that such settlements were of the nature of compromises between the parties and, as then stated by the Carrier, were settlements "without prejudice."

We will reject these isolated settlements over the span of almost eight years as a showing of agreement between the parties in construing Rule 8(1). They were clearly compromises reached for reasons not revealed in the record and may or may not have been resolved as a quid pro quo in the resolution of other disputes handled concurrently. In any case, the Carrier made its position known at the time that payment of the claims would have no precedential effect. We consider the incidents to be lacking as probative evidence of past practice as has been frequently held by the Board. See Awards 16677, 16053, 18045, among others.

The Organization's argument that the word "senior" should be read into Rule 8 (1) is without foundation. The Rule is not ambiguous, and clearly permits the Carrier a range of discretion in making overtime calls. In Rule (j) and (k), no such discretion is permitted the Carrier. There, by specific agreement, managerial discretion was bargained away and seniority is an absolute requirement. It is more than reasonable to believe that had the parties intended that seniority be a factor in the application of Rule 8 (1), they would have so agreed in bargaining. This they did not do, and it must be held that it may not now be inserted through the medium of these claims.

It is a long established principle of this Board that to be sustained the petitioner must establish a violation of the Agreement by competent and compelling evidence. It must do much more than assert a violation; it must be demonstrated beyond any reasonable doubt. See Awards 11467, 13207, 13566–13569, among others. As stated in Awards 13566–13569 (Engelstein) on this point:

> ". . . Although we recognize the importance of Seniority Rules and the need to respect them, we observe that the rights in question must exist under the Agreement before they can be impaired."

In the case before us here, we can find no support for the claims premised on a contractual requirement placed upon the Carrier to call the senior employe from an adjoining territory for calls made under Rule 8 (1). The Organization has not met its burden of proof.

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 Contract was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 10th day of September, 1971.

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