NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20912
Docket Number MW-20807

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago & Illinois Midland Railway Company

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

(1) The Carrier violated the Agreement when it used H. I. Stott instead of Roadway Mechanic J. V. Tanner to operate the weed sprayer on Saturday, July 7, 1973 /System Case No. MP-BMWE-36, IHH 8/27/73/.

(2) Roadway Mechanic J. V. Tanner be allowed 8.67 hours of pay at his time and one-half rate because of the violation mentioned in Part (1) hereof.

OPINION OF BOARD: The facts out of which this dispute arises are not in dispute. The record shows that Claimant was one of two (2) regularly assigned roadway mechanics, Monday through Friday, 7 A.M. to 4 P.M., whose duties included operation of a weed sprayer from a work train. Of the two regularly assigned roadway mechanics Claimant was No. 2 in seniority. The senior roadway mechanic, one G. W. Prior, was on vacation for the last week of June and first week of July, 1973. The weed sprayer was operated by Carrier on July 5, 6 and 7, 1973. On the first two days, Claimant was not available to operate the weed sprayer because he had been assigned to do necessary repairs to tractor mowers on July 5 and 6, 1973. Carrier used H. I. Stott, a Monday through Friday, 7 A.M. to 4 P.M., lower rated regularly assigned bridge gang mechanic, to work the weed sprayer on those days and paid him the roadway mechanic rate, plus overtime. Claimant was not available on July 5 and 6, 1973 and there is no dispute regarding his non-use on those days.

On Saturday, July 7, 1973 Claimant was available inasmuch as this was his regular rest day. Carrier again used Stott on July 7, 1973 and paid him 7.67 hours overtime at the roadway mechanic rate to operate the weed sprayer. This claim alleges that Claimant J. V. Tanner should have been used and that Carrier violated the Seniority Rule and/or Rule 18(k) relative to work on unassigned days.

Carrier denied the claim on the property and defends before this Board essentially on the ground that Stott achieved the status of vacation relief roadway mechanic when he worked July 5 and 6, 1973 and was thereby entitled to the overtime work on July 7, 1973. Further,

Carrier argues that Rule 3, Seniority, is not relevant hereto and does not support the claim. As authority for these positions Carrier cites numerous awards, all of which we have reviewed and none of which are favorable to Carrier's position in the peculiar facts and issue presented in this case. Numerous awards dealing with Scope Rule violations are furnished but as we read this record no such issue is before us. Many awards go to the question of the vitality of seniority principles absent express contract language, but it is undisputed that we have herein an express seniority rule. Finally, the several awards regarding relief work all beg the question before us regarding Stott's contested status as a vacation relief worker as that phrase is used and understood in the National Vacation Agreement of December 19, 1941, to wit:

> "(i) Section 6:
>
> The carriers will provide vacation relief workers but the vacation system shall not be used as a device to make unnecessary jobs for other workers. Where a vacation relief worker is not needed in a given instance and if failure to provide a vacation relief worker does not burden those employees remaining on the job, or burden the employee after his return from vacation, the carrier shall not be required to provide such relief worker."

Carrier asserts, and we concur, that nothing in the Agreements cited on this record or under interpretations of the above quoted vacation relief rule prohibits the assignment of a relief for a vacationing roadway mechanic. The fault in Carrier's position is that this record does not support Carrier's a priori assumption that Stott achieved the status of vacation relief worker. Rather, as we read this record, the vacation relief theory is not persuasive. Rather, we conclude on this record that Carrier merely temporarily upgraded Stott on the dates in question.

The unrefuted record states that Claimant was the only regularly assigned roadway mechanic available on July 7, 1973 and that he had on every other occasion in 1973, except for July 5 and 6, operated the weed sprayer when it was used. In the facts and circumstances of this claim this made him, in our judgment, the "regular employe" on July 7, 1973, as that phrase is used in Rule 18(k). See Awards 8284 and 9391 et al. Carrier used Stott to perform the work of the "regular employe" on July 7, 1973, a day "not a part of any assignment". In our considered judgment Rule 18(k) clearly and unambiguously supports the claim.

The Claimant seeks 8.67 hours at the overtime rate but the uncontested record shows that the work performed on July 7, 1973 and for which Stott was paid consumed 7.67 hours at the overtime rate. But for the violation of 18(k) Claimant would have received 7.67 hours at overtime and we shall sustain the claim to that extent and not for 8.67 hours.

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.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulin
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January 1976.