NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21703
THIRD DIVISION Docket Number MW-21369

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Washington Terminal Company

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

(1) The MofW Agreement was violated on Saturday, May 18, 1974 when junior employe Robert Floyd was assigned to work overtime changing joint bars in vicinity of 'K' interlocking while claimant Howard Bunter was available but not called for the overtime work in question.

(2) Claimant Howard Bunter be allowed eight (8) hours pay at his time and one-half rate account of aforesaid violation.

OPINION OF BOARD: Claimant Howard Bunter was employed as a regularly assigned Trackman by Carrier, headquartered at Union Station, Washington, D. C. On Saturday, May 18, 1974 (Claimant's assigned rest day) Carrier had programmed work involving extensive changes to the existing signal and track circuits at "K" and "C" Interlockings. The employe originally assigned to this work, Trackman I. L. Harvey, failed to report for work on Saturday, May 18, 1974. Carrier therefore called Trackman Robert Floyd, a junior member of Claimant's gang, to perform the work. Floyd resided somewhat nearer to the job than Claimant, the senior employe who resided approximately four (4) miles away. Thereafter, under date of July 24, 1974 the instant claim was filed by the Organization on behalf of Mr. Bunter reading in pertinent part as follows:

"1. That the M.W. Agreement was violated on Saturday, May 18, 1974 when junior employe Robert Floyd was assigned to work overtime changing joint bars in vicinity of 'K' interlocking while claimant, Howard Bunter was available but not called for the overtime work in question.

2. That claimant, Howard Bunter, be compensated eight (8) hours punitive time pay for Saturday, May 18, 1974 account of violation of the M.W. Agreement when junior instead of senior employe was used for punitive time assignment."

It should be noted that no specific Agreement Rule was cited by the Organization as violated in its claim letter nor in any correspondence on the property thereafter. By letter of August 5, 1974, however, the Carrier official denied the claim citing Rule 4-E-2 as follows:

> "My investigation shows that Mr. Howard Bunter was not called account the man needed had to arrive on the job as soon as possible and the fact that Mr. Bunter lives in excess of one (1) hour from the job. On the basis of Rule 4-E-2 of the current Agreement between the Washington Terminal Company and the Brotherhood of Maintenance of Way Employes, the claim is without merit and hereby denied.
>
> Very truly yours,
> M. J. ROSE /s/
> M. J. Rose
> Engineer Roadway, Signals and Communications"

Discussion on the property and in the Ex Parte Submissions of the parties focused primarily upon conflicting interpretation of the words "near" and "available" in Rule 4-E-2 as that provision appeared in the Agreement bearing effective dates December 16, 1946 through July 20, 1949. (Emphasis added). For the first time in its submission to this Board the Organization cited as supportive of its claim as follows:

> "The rules applicable here are quoted below:
>
> '1-A-1. In the assignment of employees to positions under this Agreement, qualifications being sufficient, seniority shall govern.
>
> The word "seniority" as used in this Rule (1-A-1) means, first seniority in the class in which the assignment is to be made, and thereafter in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.'
>
> ---
>
> '4-B-1. Time of employees will start and end at their advertised headquarters.'
>
> ---

'4-E-2. Trackmen residing at or near their headquarters will, if qualified, and available, be given preference for overtime work, including calls, on Section on which employed, in the order of their seniority.'

It is also most important to note that in its Ex Parte Submission the Organization states as follows:

"The Agreement between the two parties to this dispute effective December 16th, 1946, together with supplements, amendments and interpretations thereto are by reference made a part of this Statement of Facts." (Emphasis added).

We are met at the threshold of this case by a number of contentions deemed "jurisdictional" or "procedural" by the parties as best suits their theories of the case. As we view this matter, however, these labels are not central to our analysis of the case. In the first place, Carrier's objections to the Organization's citation of Rules 1-A-1 and 4-B-1 for the first time in its Ex Parte Submission are well placed and we shall not consider those rules in our disposition of the case. Secondly, Carrier cites an impressive array of authorities for the proposition that the Organization must specify on the property what Rules of the Agreement it deems violated and may not present at Board level rules and theories of the case not joined and discussed on the property. See Awards 13741, 15835, 18964, 19420, 19857, 20121, et al. On that basis, Carrier seeks to foreclose our consideration of Rule 4-E-2 as well and to obtain dismissal of the claim. We concur with the general principles enunciated in those precedent Awards but conclude that they are not properly applicable in the instant case. Our case readily may be distinguished on two grounds to-wit: 1) Carrier herein never raised the question on the property but argued lack of Rule citation for the first time before this Board; and, 2) The question whether or not Rule 4-E-2 was violated was joined on the property when Carrier cited the rule in its denial letter of August 5, 1974 and the entire dispute was handled on the property by both parties in terms of that Rule. On the basis of the foregoing we reject Carrier's procedural/jurisdictional argument that the merits of the Rule 4-E-2 dispute should be precluded from our view.

Having so determined, however, we still are faced with an issue which is one of first impression for which the authorities provide little guidance. At oral argument before the Referee it was revealed that both parties in handling this dispute have labored under a mutual mistake of fact relative to the contractual language of Rule 4-E-2.

The record shows clearly that both parties have relied upon and argued in terms of Rule 4-E-2 as it appeared in the Agreement dated December 16, 1946 and reading as follows:

> "4-E-2. Trackmen residing at or near their headquarters will, if qualified, and available, be given preference for overtime work, including calls, on Section on which employed, in the order of their seniority."

In point of fact, however, Rule 4-E-2 was amended by Appendix A to the Agreement dated July 20, 1949 and effective September 1, 1949 to read as follows:

> "Employees residing at or near their headquarters will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them, in order of their seniority. The provisions of this Rule 4-E-2 will not apply to such employees on their rest days during hours of their normal working day assignments." (Emphasis added).

From the foregoing it is apparent that the parties argued over the meaning of a Rule which has not been in effect for some twenty-five (25) years. There is no question that Saturday, May 18, 1974 was Claimant's rest day and that the disputed work was performed during the hours of his normal working day assignment. The claim is defeated ipso facto under the express terms of Rule 4-E-2, as amended but arguably viable under the terms of the "old" pre-amendment Rule. Are we to be bound by the mistakes of parties and interpret a non-existent Rule while ignoring the clear language of the existing contract? We think not. We deem it self-evident that we must refuse to perpetuate this comedy of errors. The Agreement we interpret and apply must be the existing Agreement including the amendment of Rule 4-E-2. On this basis we have no alternative but to deny the claim.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1977.