NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22893
THIRD DIVISION Docket Number MW-22969

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Elgin, Joliet and Eastern Railway Company

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

(1) The Agreement was violated when on January 14, 1978, an employe junior to Trackman R. G. Guajardo was used to perform overtime service on Section No. 35 at Chicago Heights, Illinois (System File SC-6-78/UM-4-78).

(2) As a consequence of the aforesaid violation, Trackman R. G. Guajardo shall be allowed fifteen (15) hours of pay at his time and one-half rate."

OPINION OF BOARD: Claimant, R. G. Guajardo, holds seniority as a trackman and was assigned as such to Section Gang No. 35, headquartered at Chicago Heights, Illinois. He was assigned to work Monday through Friday with Saturday and Sunday designated as rest days.

Effective January 2, 1978, Claimant accepted the position of acting track foreman of Section Gang #44, headquartered at McCool, Illinois, until the regular foreman returned from vacation on January 16, 1978. Gang #44 has the same work week and rest days as Gang #35.

On Saturday, January 4, 1978, Gang #35 performed track work for fifteen (15) hours. Carrier, instead of calling Claimant (who was home, available and fully qualified to perform the work), called and used a junior trackman to perform the overtime work.

The Organization contends that Carrier violated Rule 53(a) of the Agreement, as well as a Letter of Understanding dated May 5, 1978, when it failed to call Claimant to perform the overtime work. It asks that Guajardo be allowed fifteen (15) hours of pay at his time and one-half rate.

Rule 53(a) in relevant part states:

"(a) Employes notified or called to perform work not continuous with the regular work period, will be allowed a minimum of two (2) hours and forty (40) minutes at time and one-half rate for two (2) hours and forty (40) minutes of work or less, and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on minute basis."

The Letter of Understanding states:

"..... when an employe is temporarily assigned to another position, the employe does not forfeit his rights to be notified or called to perform work accruing to his regular assignment pursuant to the terms of Rule 53 of our agreement."

Rule 53(a) is clear and unambiguous. It requires that an available senior employe in the respective gang be given preference for overtime service. Under the terms of the Letter of Understanding, the parties have agreed that an employe temporarily assigned to another position does not forfeit his right to be called to perform work accruing to his regular assignment. This Letter of Understanding is a special agreement. As such, it outweighs any general rule. See Awards 1816, 4475, 8150, 8151, 8345, and 19577.

Here, Claimant was temporarily assigned to assistant track foreman. Under the plain meaning of the Letter of Understanding, Claimant, while in that temporary assignment, did not give up his right to be notified and called for work accruing to Gang #35, his regular assignment.

Carrier, contended that the Letter of Understanding applies to temporary vacancies but not to vacation absences. In its view, temporary assignments to fill the position of a vacationing employe is not covered by the Letter of Understanding.

This contention must be rejected. There is no evidence, whatsoever, to indicate that the interpretation argued by Carrier is correct. In effect, Carrier asks us to amend the plain meaning of the May 5th Letter of Understanding. It asks us to create the exception "except that of a vacationing employe." This we are neither inclined nor authorized to do. Surely, if the parties meant for there to be such a limitation, they would have so provided.

Since Claimant was home, available, fully qualified to do the work and senior, he should have been called to perform the work. When Carrier failed to do so, it violated Rule 53(a) and the Letter of Understanding signed May 5, 1978.

One final point. Carrier also argued that the Letter of Understanding cannot be applied to this claim because it was not entered into until after the claim was filed. It argued that the Letter of Understanding was not meant to be retroactive. This contention was raised by Carrier, for the first time, in its submission to this Board. It was not raised during the on-the-property handling of the claim. It is well settled that issues and contentions not raised in the handling on the property may not

be raised for the first time before this Board. See for example, Awards 17329, 20607, 21394, 21447. As such, we must disregard Carrier's contention that the May 5, 1978 Letter of Understanding was not intended by the parties to be applied retroactively.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 18th day of June 1980.