NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23305
Docket Number CL-23071

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8836) that:

1. Carrier violated the agreement between the parties when they arbitrarily reduced the work week of D. W. Garman by denying him work on September 19 and 20, 1977.

2. Carrier shall pay claimant two (2) days pay.

OPINION OF BOARD: On September 12, 1977, Bulletin No. 139 was issued advertising a vacancy on job 388, Outside Caller, Bellevue, Ohio, 11:45 P.M. to 7:45 A.M., rest days Friday and Saturday, due to the absence of the regular incumbent who was ill. Bids were accepted from September 12 to and including September 18, 1979. Claimant was the successful applicant and a bulletin dated September 21, 1977 was posted assigning him to that position as of that date. At the time of his bid, Claimant was assigned to position #365, which had Monday and Tuesdays as rest days. Since September 21 was a Wednesday, Claimant argues that he lost two days' pay, in contravention of Agreement Rule 42, when he was assigned to position #388 midweek. He avers that he should have been assigned to this position on September 19, 1977. Rule 42 Workweek is quoted hereinafter for ready reference.

> "Nothing herein shall be construed as permitting the reduction of days for regularly assigned employes and/or positions below five per week except that this number may be reduced in a week in which one of the specified holidays, as listed in Rule 40(a), occurs within the days constituting the assignment and/or position to the extent of such holiday, or unless agreed to by the Management and the General Chairman."

Claimant contends that Third Division Award 21235 is dispositive of this dispute, since the fact patterns of both cases are similar.

Carrier asserts that Rule 12 is applicable herein and that it faithfully comported with its' requirements. It argues that Claimant was awarded position #388 within the time limits specified in this rule and thus there is no liability attached to its selection decision. In fact, it noted that

he was offered overtime work on September 19 and 20, the rest days of position #365, and he refused it. Moreover, it contends that Rule 7 complements and defines Rule 12, since Carrier is not required to incur expenses, when employes exercise seniority rights pursuant to Agreement rules. It avers that Third Division Award 21235 is in error and without judicial effect since Claimant's inability to work the five days was not caused by its' action, but instead was precipitated by Claimant's voluntary act of bidding for position #388.

In our review of this case, we find Claimant's arguments more persuasive. Admittedly there is merit to Carrier's position, that it complied with Rule 12 and thus was estopped from incurring expenses consistent with Rule 7, but we cannot disregard the presence and relational significance of Rule 42 which prohibits the reduction of days for regularly assigned employes and/or positions below five per week. Similar to Third Division Award 21235, we find nothing to suggest that Carrier could not have complied with Rule 42, notwithstanding its' contention that Claimant unilaterally applied for this position and was observing the rest days of position #365 on September 19 and 20. It was possible to assign him to position #388 on September 19 and this failure was not cured when overtime work was offered him on those days. Rule 42 does not address isolated assignments such as ad hoc overtime, but relates to regularly assigned employes and/or positions such as the one Claimant was selected to fill. We recognize the unfortunate conflict that is engendered by the juxtaposition of Rules 7, 12 and 42, but we believe that it was administratively possible for Carrier to assign him to position #388 on September 19 in accordance with Rule 42. In Third Division Award 21235, we stated in our conclusion that:

> "We do not feel that said result rewrites the Agreement in any manner, but rather, it gives effect to the Agreement considered as a whole."

We find that our reliance on this precedent does not rewrite the labor contract but gives effect to the whole Agreement and reflects a fidelity to the Doctrine of Stare Decisis. We will sustain 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 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 29th day of May 1981.