

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24663  
Docket Number MW-24768

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Toledo, Peoria and Western Railroad Company

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

(1) The Carrier violated the Agreement when it laid off Extra Gang Laborers R. K. Wilson, E. W. Greear, K. J. Shafer and E. W. Watts on August 31, 1981 without benefit of five (5) working days' advance notice.

(2) The Carrier also violated the Agreement when it failed and refused to allow Extra Gang Laborers R. K. Wilson, E. W. Greear, K. J. Shafer and E. W. Watts holiday pay for Labor Day, September 7, 1981.

(3) The claimants shall each be allowed forty (40) hours of pay at their respective straight-time rates because of the violation referred to in Part (1) hereof.

(4) Each of the claimants shall be allowed eight (8) hours of holiday pay at their respective straight-time rates because of the violation referred to in Part (2) hereof.

OPINION OF BOARD: It is well established that the National Railroad Adjustment Board will not consider materials which were not submitted by the parties during the handling of a claim on property. This firmly established doctrine, which is codified in Circular No. 1, has been articulated in numerous Awards, including Awards 20841, 21463 and 22054 of this Division. A review of the instant case before the Board shows materials present which were not presented on property. Such materials will not be considered by the Board.

The record does show that on September 14, 1981 the four (4) Claimants, Messrs. Greear, Shafer, Watts and Wilson, filed a claim with the Carrier on the basis of Rule 12 of the current Agreement. Alleging contract contravention by the Carrier since they had not received a five (5) day notice prior to their lay-off on August 3, 1981 the four (4) Claimants each requested relief in the form of six (6) days straight-time pay as so outlined in the Statement of Claim. By letter dated September 17, 1981 to each of the Claimants the Carrier denied all claims on the grounds that Rule 12 did not hold since, it was the position of the Carrier, the Claimants were not regularly assigned employees on August 31, 1981 but were employees filling temporary positions on a temporary gang at that time.

A ruling in the instant case must, therefore, hinge on the status of the employees in question on August 31, 1981. With respect to Rule 12 of the current Agreement, this Rule states the following, in pertinent part:

- "(N)ot less than five (5) working days' advance notice will be given to regularly assigned employees, not including casual employees or employees who are substituting for regularly assigned employees who are subject to the rules of the existing collective bargaining Agreement, whose positions are to be abolished before such reductions in force are made, except as provided in Rule 12(A)."

(Rule 12(A)(1-4) outlines seniority rights under reduction in force conditions and need not be cited here.) There is nothing in the record to show that the employees in question were substituting for regularly assigned employees. Further, the record shows that the Carrier interprets the term "casual" as it refers to employee status in Rule 12 to be synonymous with the phrase "extra gang laborers". Thus the basic argument of the Carrier is that as "extra gang laborers" the Claimants were indeed "casual" (or "seasonal" or "temporary" employees which are other terms used by the Carrier) when the incident at bar took place and that they were not covered by the pertinent provisions of Rule 12 of the current Agreement.\*

The Board can find nothing in the record to reasonably substantiate the Carrier position, beyond its mere assertion, that "extra gang employees" are casual employees. If there is a past practice to the effect that extra gang employees who work for this Carrier are casual employees as the Carrier states in its rebuttal statement, substantial evidence of such practice requires more than mere assertion. Nor has the Carrier ever denied on property that the Claimants had been assigned to positions of thirty (30) days or more prior to the incident at bar although the Carrier did deny, again by assertion alone, that this did not mean that the Claimants were "regularly" assigned. The Board finds no basis for denying Parts 1 and 3 of the claim. In addition, there is nothing in the record to show Claimants' disqualification for holiday pay for Labor Day, 1981 under the applicable Agreement. Since this is the case, the Board also finds no basis for denying Parts 2 and 4 of the claim.

Each Claimant shall, therefore, be paid forty-eight (48) hours of pay at their respective straight-time rates.

\* In Carrier's ex parte submission dated September 16, 1982 and again in the Carrier's rebuttal dated December 20, 1982 the argument is used that the Claimants were "casual" employees because they were not assigned by bulletin. This is a new argument introduced by the Carrier after the handling of the case on property and as such cannot be considered by the Board.

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 Employees involved in this dispute are respectively Carrier and Employee 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

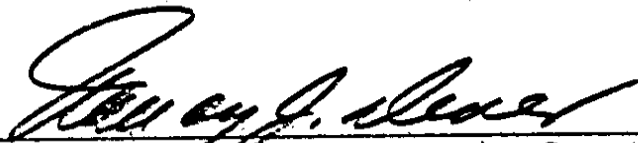
That the Agreement was violated.

A W A R D

Claim(s) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 30th day of January, 1984