NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25302
Docket Number CL-25287

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks
(Freight Handlers, Express and Station Employes
(
(The Denver & Rio Grande Western
(Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9820) that:

"1. The Carrier violated Rules 10, 12-P, 26-E, 28A4, 33-C1, and 33-C2 and other related Rules, when on April 20, 1982, the Carrier forced Mr. R. Mitchell to work operator's Position 11 pm to 7 am North yard, at eight (8) hours pro-rata pay. Mr. Mitchell was assigned Top End Clerks position 11 pm to 7 am on April 20, 1982.

2. The Carrier will now be required to pay Mr. R. Mitchell four (4) hours pro-rata in addition to eight (8) hours pro-rata."

OPINION OF BOARD: The instant Claim was filed on April 27, 1982, by the Local Protective Committee of the Brotherhood on behalf of the Claimant, R. Mitchell. The Claim alleges that the Claimant was forced to work an Operator's Position, 11 PM to 7 AM on April 20, 1982, when he was in fact assigned, at that time, to the position of Top End Clerk, same hours. The Claim is for four (4) hours pro rata because "(t)his type of move has been payed at time and one half (1 1/2) every time in the past". The Claim alleges that the Rules at bar are 10, 12(p), 26(e), 28(a) (4), 33(c) (1) and 33(c) (2) and other related Rules although the original letter of Claim only cites Rule 12(p). This Rule states the following:

> "Regularly assigned employes occupying Clerical positions will not be required to suspend work on their own position to fill short vacancies on a telegrapher's position."

In denying the Claim on property the Carrier asserts that no compensation was due because the Claimant was "duly compensated at the higher rate of pay for working (the) Operator position on April 20, 1982," and that the applicable Agreement provision is not Rule 12(p) nor any of the others cited by the Claimant but rather Rule 43(g). This Rule reads:

> "It will be optional with the Carrier to fill or not fill the position of an employee who is absent account personal illness. The Carrier will have the right to distribute work on a position vacated by illness among other employees on duty at that location."

The other Rules cited by the Organization in its original Claim read as follows:

> "Rule 10: Positions or vacancies including leaves of absence of ten working days or less duration shall be considered short vacancies and may be filled without bulletining.
>
> Rule 26(e): Regular Relief Assignments. All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned under individual Agreements.
>
> Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.
>
> Assignments for regular positions may on different days include different starting time, duties and work locations for employees of the same class of the same seniority district, provided they take the starting time, duties and work locations of the employee or employees whom they are relieving.
>
> Rule 28(A) (4) No such contract provision exists in the current Clerical Agreement.[1/]
>
> Rule 33(c) (1) and (2): Short vacancies as defined in Rule 10 will be filled in the following order:
> (1) By an available extra or unassigned employee with sufficient fitness and ability not having forty straight-time hours in his work week.
> (2) If an employee is not available under Item first above, when vacancy occurs on a regular position and it is the regularly assigned employee's rest day, he will be used."

An analysis of the record on property fails to show that any of the Agreement provisions cited above which deal with leaves of absence, relief assignments, or short vacancies are applicable to the instant case. Further, as moving party, the Organization shoulders the burden of proof with respect to the past practice of paying time and one half for the "type of move" at bar, on assumption that Rule 12(p) of the current Agreement is controlling (Second Division Awards 5526, 6054, PLB 3529, Award 1). Nowhere in the record can such proof be found, however, beyond mere assertion that such had been the case.

The Carrier states in its letter to the Organization dated January 10, 1983, the following which is not disputed by the Organization on property:" (i)n conference of December 31, 1982, this Claim was discussed...(and)...Carrier's payroll records reflect that the regular occupant of the 11:00 PM - 7:00 AM (position), Operator G.J. Bradbury, was paid sick leave on April 20, 1982...".

[1/] Only in the Organization's Submission to the Board is the Board apprised, for the first time, that this cite really references a different Agreement. As noted at the end of this Award, such information is inadmissable.

By requesting the Claimant to fill the Operator's position the Carrier reasonably applied, in view of the record on property, the correct Agreement provision by resorting to the directives found in Rule 43(g). On merits, the Claim cannot be sustained.

Reference to issues which go beyond those cited above which are presented to the Board in the Organization's Submission are inadmissable as they were not submitted during the handling of the case on the property (Fourth Division Awards 4132, 4136, 4137). These issues deal with an Agreement which is a different one than the current Clerical Agreement and with the distribution of work to a craft or class which is different from that in which a vacancy occurs. While it is up to the parties to consider whether these issues may be in search of solution, such cannot be considered within the context of the instant case because of the manner in which facts relevant to it have been framed in its handling on property.

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; and

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: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 28th day of February 1985.