Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39031
Docket No. MW-37827
08-3-NRAB-00003-030197
(03-3-197)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned junior employe T. K. Collier to work a temporary foreman position on the Midwest Region, S&NA North Seniority District, on February 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 25, 26, 27, 28, March 1, 3, 4, 5, 6 and 7, 2002, instead of Mr. R. L. Johns [System File I59632502/12(02-0322) CSX].

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. L. Johns shall now '. . . be allowed the total overtime hours worked by improper employee T. K. Collier on the dates of February 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 25, 26, 27, 28, March 1, 3, 4, 5, 6 and 7, 2002, (82 hours) at the foreman's respective time and one half rate of pay. * * *"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier raised a procedural objection to our consideration of the instant claim on its merits. It contends that the Organization significantly altered the claim as handled on the property by changing the dispute from an alleged violation of Rule 3, Section 4 to Rule 3, Section 3. The claim was allegedly amended a second time to include a violation of Rule 38, which pertains to discrimination. Therefore, the Carrier contends that the claim presented to the Board is substantively different from the claim handled on the property.

After careful consideration of the Carrier's objection, the record before us requires us to reject it. The addition of an alleged violation of Rule 3, Section 3(a) was first raised in the Organization's May 9, 2002 appeal from the Carrier's initial denial of the claim. The Rule specifies the timing of advertising and awarding positions and vacancies. The Organization said the position should have been advertised. The Carrier acknowledged the amendment in the August 2, 2002 response from its highest designated officer (HDO). The HDO specifically denied there was a vacancy that should have been advertised and went on to note that the total time frame did not exceed 20 days. Significantly, the HDO did not take any exception to the amendment. Thus, the so-called amendment appears to have been properly handled on the property and does not represent a new feature of the claim that is being raised for the first time before the Board. As for Rule 38, while it is true that a violation was referenced in the Organization's final correspondence on the property, which was dated August 19, 2002, it was not advanced as part of the claim before the Board. Indeed, the Organization's Submission does not contain the text of Rule 38, nor does it make any contentions based on that Rule. Moreover, it was raised on the property and the Carrier apparently chose not to respond to it during the nearly nine months that passed before the Organization filed its May 1,

2003 Notice of Intent to progress the claim to the Board. Accordingly, we have no proper basis for concluding that the claim before the Board is materially different from the claim that was handled in the usual and customary manner by the parties on the property.

Turning to the merits, we must note that the Organization cited several Rules, but none of them appear to be quite on point when read in their entirety. For example, Rule 3, Section 3(a) requires that all positions and vacancies be advertised ". . . within twenty (20) days following the dates they occur." The record herein does not establish that the disputed work involved here constituted a position or vacancy within the scope of Rule 3, Section 3(a). While it is true that the total number of days claimed equals 20, those days are spread out over four different blocks of time and four different mile post locations that are several miles apart. There were also work day blocks of six, four, five and five separated by non-work blocks of two, four and two days. Was the work really four shorter vacancies or one longer vacancy? Even if it is considered to be the longer vacancy, it did not exceed 20 days. Given the lack of proof, we cannot conclude that Rule 3, Section 3(a) was violated.

The portion of the claim that relies on Rule 3, Section 4(a) is similarly lacking in evidentiary support. The Rule reads, in pertinent part, as follows:

> "Section 4. Filling temporary vacancies
>
> (a) A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award."

As written, Rule 3, Section 4(a) appears to apply only where it is known that there is a new position or vacancy that requires advertisement and award. It allows the vacancy to be filled temporarily while that process is conducted. Such is not the case here. As discussed previously, the record does not establish that there was a position or vacancy that required advertising and award. Moreover, it was

undisputed on the property that employees working in higher rated positions are not eligible. It was further undisputed that the rate of pay for a position determines whether it is a higher or lower rated position. The Claimant was regularly working in a bid-in position of Track Inspector at all times relevant to the instant claim. The rate of pay for the Track Inspector position is higher than the rate of pay for the disputed Foreman position. Thus, it is not at all clear that the Claimant was eligible for the temporary Foreman work pursuant to Rule 3, Section 4(a). To the extent that this Rule is intended to have a broader application, it was the Organization's burden of proof to establish that broader application. On the record before the Board, it failed to do so.

The Organization also cited Rule 17, which describes the preference for overtime work. It reads in part as follows:

> "Section 1 - Non-mobile gangs:
>
> (a) When work is to be performed outside the normal tour of duty in continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them. When work is to be performed outside the normal tour of duty that is not a continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them." (Emphasis added.)

The Organization's Submission acknowledges that the Claimant was regularly assigned as a Track Inspector and that the junior employee who filled the temporary Foreman vacancies in dispute was regularly assigned as a Foreman when the instant dispute arose. As written, it appears that the Claimant was not eligible for assignment to the disputed work pursuant to Rule 17, Section 1(a) for two readily apparent reasons: First, he was not "in the required class" at the time. Second, the Foreman work was not work "ordinarily and customarily performed" by him. Again, if Rule 17, Section 1(a) was intended to have a more expansive application that would have made the Claimant eligible for the assignment, it was

the Organization's burden of proof to establish that more comprehensive application. On the record before the Board, it has not done so.

Our review of the record warrants one final observation. The Organization and the Claimant provided payroll records ostensibly to show that the Carrier had permitted other Track Inspectors to perform work outside of their class. The observation is this: The records provided are illegible and, as such, do not convey any meaningful information. Moreover, to the extent that some letters and numbers can be ascertained, the information is indecipherable. As such, they cannot be accepted as probative evidence. It is axiomatic that copies of the material exchanged in the on-property record must be both legible and understandable if they are to have probative value. The 28 pages comprising Attachment 1 to Employes' Exhibit A-6 were neither. The copies that were also contained in the Carrier's Submission were even less so.

Given the foregoing discussion, we must deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of April 2008.