

Award No. 1268

Docket No. 1174

2-Erie-FO-'48

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 100, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Firemen & Oilers)

ERIE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That the assignment of machinist helper to fill coal pocket vacancy from 7 A. M. to 3 P. M. on August 13, 1946, was improper under the current agreement, and that accordingly the carrier be ordered to compensate Coal Pocket Laborer Louis Ulterale therefor in the amount of 8 hours at the time and one-half rate.

EMPLOYES' STATEMENT OF FACTS: Louis Ulterale, hereinafter referred to as the claimant, was employed by the carrier from 7 A. M. to 3 P. M. at Secaucus, New Jersey, as a laborer to regularly perform coal pocket work. His seniority date is December 23, 1930.

Tuesday, August 13, 1946, was the claimant's assigned day off. The carrier made the election to fill this vacancy, and without retaining or calling the claimant to do so, the carrier selected and assigned Machinist Helper Joseph Piszko to fill said vacancy, or perform coal pocket work from 7 A.M. to 3 P. M. on August 13, 1946.

These factual operations at the coal pocket from 7 A. M. to 3 P. M. on August 13, 1946, are substantiated by copies of the statements submitted, identified as Exhibits A, A-1 and A-2, signed, respectively, on August 15 and 16, 1946, by coal pocket Laborers William Franke and V. Morelli and Machinist Helper Joseph Piszko.

The agreement dated effective January 1, 1944 is controlling.

POSITION OF EMPLOYES: It is submitted that the words "and coal pocket men" in Rule 1 (a) of the collective bargaining agreement brings coal pocket work, such as was performed by Machinist Helper Piszko from 7 A. M. to 3 P. M. on August 13, 1946, specifically under the terms of the aforesaid agreement, not only on certain days of the week but 24 hours a day, 365 days per year.

Moreover, no emergency existed on August 13, 1946, which authorized or warranted the carrier to disregard the calling of this claimant to protect his own six-day assignment on the seventh day, in lieu of using Machinist Helper Piszko, and it is predicted that the only reason that this was done was for the purpose of evading the payment of the time and one-half rate to the

"17(c) If an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on account of sickness or for any other good cause must notify his foreman as early as possible."

"23(c) Cases must be filed with the Foreman in charge, preferably in writing, within 30 days after the date of occurrence or the situation is known to exist. Date for conference will then be set within 10 days and such date to be within 30 days after notice is received or if no conferences required decision in writing will then be made within 30 days. If case is not satisfactorily disposed of, appeal to the next highest officer may then be made within 30 days. If case is not satisfactorily disposed of, appeal is made in writing within 15 days after date of last previous decision. Each subsequent appeal to the next highest officer must be in accord with procedure outlined above."

In this case it is alleged that Machinist Helper Joseph Piszko represented Coal Pocket Man Louis Ulterale on August 13, 1946, but the carrier's payroll records do not support this claim.

* * * *

There is no merit to this claim and it should be denied by the Second Division because:

1. There is no showing or proof by the Brotherhood that Joseph Piszko was assigned by carrier and did work full 8 hours as a coal pocket man at Secaucus, N. J., on August 13, 1946. Daily time card record shows otherwise.
2. Even if the claim was a good claim it is always permissible to use any such available employes under Rule 1(b) of the agreement January 1, 1944.
3. The claimant, Louis Ulterale, performed no service on August 13, 1946, and there is no sound basis that he should now be compensated 8 hours at time and one-half rates because such rates are paid only when employes are **required by carrier** to work outside regular assigned hours or when they are **required by the carrier** to work on their regular assigned off duty day. There is no rule compelling the use of any man on his assigned off duty day.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

The parties to said dispute waived right of appearance at hearing thereon.

The record establishes that on August 13, 1946, Machinist Helper Joseph Piszko was assigned to and did, during the hours of 7 A. M. to 3 P. M., perform the duties of a coal pocket laborer. This work is within the scope of Rule 1(a) of the parties' agreement.

To support its action the carrier relies upon Rule 1(b) of the agreement. It provides:

"Employes other than those governed by this agreement may, as incidental to their regular duties, perform any of the work of employes referred to in paragraph (a) of this rule."

"Incidental," as therein used, means work occurring in the course of and in connection with the principal work of a position but which is only a subordinate part thereof.

The work here performed by Machinist Helper Joseph Piszko was not incidental to Piszko's regular work and therefore not within the scope of Rule 1(b). Consequently it was performed by him in violation of Rule 1(a) of the agreement.

Coal Pocket Laborer Louis Ulterale was eligible to perform this work and would have been available to do it had he been called. He is therefore entitled to have the claim sustained, the carrier having made no effort to call him.

We are, however, of the opinion that this claim should be sustained at the pro rata rate only. While it is true that if claimant had performed the work on his day off his rate would have been time and one-half, however, the penalty rate for depriving an employee of work is the pro rata rate of the position.

AWARD.

Claim sustained on a pro rata basis.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary.

Dated at Chicago, Illinois, this 19th day of July, 1948.