Award No. 3646
Docket No. 3531
2-B&O-EW-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard Johnson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 30, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (ELECTRICAL WORKERS)

THE BALTIMORE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Baltimore and Ohio Railroad Company violated the provisions of the current agreement, particularly Rule 24 and the interpretation thereof, when it furloughed Electrical Crane Operator H. M. Kuhns.

2. That accordingly, the Baltimore and Ohio Railroad Company (hereinafter called the Carrier) be ordered to compensate Mr. H. M. Kuhns (hereinafter called the Claimant) 8 hours each on May 20, 21, 22 and 23, 1958 as a result of Carriers failure to comply with the provisions of the agreement.

EMPLOYES' STATEMENT OF FACTS: On January 27, 1958, Electrical Crane Operator, H. M. Kuhns, employed by the carrier in its stores department at Cumberland, Maryland reported off duty account illness.

On the same date, January 27, Electrical Crane Operator A. R. Hart was assigned to fill the vacancy left by claimant, and worked the assignment until Wednesday, February 19, 1958, he having been served a written four day notice of furlough under date of February 14, 1958 in accordance with the provisions of Rule 24 of the controlling agreement. A copy of the individual notice of furlough given to Mr. Hart was furnished to the claimant.

On May 20, 1958, Claimant Kuhns reported for duty to his supervisor, Mr. L. M. Gump, and in the presence of the electrical workers local committee was advised that he would not be permitted to resume duty as his position had been furloughed effective February 19, 1958.

The claimant at no time was given an individual four working day furlough notice on Form MP&E 246 as required by the agreement.

some personal reason at that time. To hold otherwise would do irreparable damage to the language and meaning of the rule.

The carrier asserts that this claim at both its parts is without merit. The carrier respectfully requests that this Division so hold and that the claim be declined in its entirety.

FINDINGS: The Second Division of the Adjustment Board, based 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.

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

Claimant Kuhns, an electrical operator, reported off duty on January 27, 1958; A. R. Hart was immediately assigned to the position and filled it until February 19, 1958, the position having on February 14th been furloughed pursuant to Rule 24 by a letter directed to Hart with a copy to claimant, reading as follows:

"THE BALTIMORE AND OHIO RAILROAD COMPANY

SUBJECT: Re' Reduction in forces—

Cumberland, Md.
February 14, 1958.

Mr. A. R. Hart:

In accordance with the bulletin posted today, your position will be furloughed, effective with the close of work hours Wednesday, February 19, 1958.

SIGNED,

L. M. Gump, SK
The Baltimore & Ohio Railroad Co.

Copy to: Mr. H. M. Kuhns
746 Fayette Street
Cumberland, Md."

On May 14, 1958, claimant called on the storekeeper, who had given the notices of furlough, the matter was discussed, and the storekeeper issued a letter to him confirming the notice sent him on February 14th. Claimant nevertheless reported for duty on May 20, 1958, but was not put back to work. Claim was filed for "the four working days to which he would have been entitled had he not reported off sick", and was denied by R. L. Harvey, Manager Labor Relations, Carrier's highest officer authorized to handle claims, because for this one position it would involve four days termination pay for two employes.

The position of Employes is that carrier failed to serve claimant "with proper individual notice under the rules and the accepted practice" thereunder.

In the Employes' Rebuttal their position is further stated as follows:

"The employes wish to call attention to the language in the rule, designed to require the Carrier to serve "INDIVIDUAL" notice upon all employes effected by furlough "IN ALL CASES", and therefore the individual notice served on Mr. Hart with a copy to the claimant did not constitute legal notice served on claimant. The employes wish to further point out that even though the employes agreed that such notice to Mr. Hart sufficed as a notice to the claimant, and was properly served, while he was absent on account of illness, it did not meet the requirements under the rule and its interpretation, as well as the accepted practice and policies followed in similar cases, when employes were absent due to illness and for other reasons.

"The employes propose to prove beyond any doubt to this board that the policy under the rule was NOT to serve notice to employes off duty because of illness or for other reasons, but to permit such employes to return to work at the expiration of such sick leave etc., after which they were served the usual four (4) working day notice and permitted to work out such notices."

Rule 24(b) provides as follows:

> "(b) When the force is reduced, four working days' notice will be given the men affected before reduction is made, and lists will be furnished the local committee."

In this printed agreement it is stated under this Rule, apparently as interpretation or understanding:

> "General Notice Form MP&E 245 must be posted on bulletin boards at all stations where furlough is to be made, before the close of the tour of duty on the first of the four days preceding the furlough.
>
> Individual notices will be given each employe affected. Form MP&E 246 is to be used for employes under the provisions of the Shop Crafts' Agreement."

The Employes do not assert that notice was not given in the proper form, but claim that it was not an individual notice to him, because not separately prepared and directed to him.

No precedent, definition or argument is submitted for this technical objection. However the apparent purpose was to prescribe that a general notice form was to be posted and that an individual notice form was to be given each employe affected, rather than that an entirely separate individual notice had to be prepared for each individual employe. The obvious purpose of Form 246 was to notify each individual employe, not to impose some unnecessarily technical, requirement. Certainly if the notice had been directed at the top to both employes no reasonable objection could be made to it; and the fact that it was there directed to "Mr. A. R. Hart" and was concluded "Copy: Mr. H. M. Kuhns," made it no less effective as a notice to claimant. Consequently we must hold the notice valid, without reference to the apparent

admission in the record paragraph quoted above from the Employes' Rebuttal, which in view of the context seems unintended.

In support of the practice claimed the Employes in their Rebuttal Statement set forth as exhibits statements from several General Chairmen to the effect that in August, 1958, relative to this case, Mr. Freeman, the Carrier's Motive Power Personnel Representative, stated that employes off on sick leave or vacation when a furlough notice was given were always permitted to return to duty, were given new four-day notices and were permitted to work out that time, and that he had allowed claims on that basis. These statements are not denied, but it is pointed out on Carrier's behalf that Mr. Harvey, and not Mr. Freeman, has final authority to interpret and apply the Agreement for carrier. Although not an interpretation binding on the Carrier, it constitutes some evidence of practice and is supported as such by other allegations in the General Chairmens' letters.

Practice is pertinent where a rule is ambiguous. But here there is no ambiguity. As noted above, Rule 26(b) provides: "When the force is reduced, four working days' notice will be given the men affected **before** reduction is made, etc. The rule is not ambiguous and was followed. The reduction was made on February 19, 1958, and the four days notice was given the men affected before the reduction was made. Hart was affected because he was temporary incumbent of the position. Claimant was affected because he was the permanent incumbent and would expect to return to it except for the force reduction. The rule does not say that each of the persons affected shall receive four days pay; it says that the four days notice must be given before the reduction is made, which means that the working incumbent will be entitled to four days work and consequently to four days pay. There is no provision for new notice to be given the affected man who is absent from duty at the time; the only notice provided by the rule is required **before** the reduction is made, and the only reduction was in February.

As pointed out by this Board relative to another Rule in Award 2418:

"The provisions for exercise of seniority are identical for employes whose positions are abolished while on duty and those whose positions are abolished while on vacation". The same is true here with regard to sick leaves as well as vacations.

There being no rule requirement for four working days notice to claimant in May, and there being no ambiguity in the Rule, any prior practice by Carrier for such notice was a gratuity and not an interpretation. It is too well settled for argument that gratuities outside of Rule requirements do not normally become a matter of right so as to sustain claims.

Furthermore, as noted at the outset, Claimants claims was for "the four working days to which he **would have been entitled had he not reported off sick.** But he had reported off sick and Hart, the temporary occupant of the position, rather than claimant, was therefore entitled to the four working days after the notice required by Rule 24(b). The claim supplies its own answer; he **would have been** entitled to it if he instead of Hart had been working the position; but under the circumstances Hart was entitled to it and he was not, for only one position was involved. There is no possible basis in the Agreement for the payment of eight days instead of the four required by the rule, nor for two notices, one before the reduction and one afterward. Consequently such prior duplications of notices and payments were pure gratuities and afford no basis for this claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1961.