Award No. 3903
Docket No. 3781
2-PULL-EW-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 122, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. - C. I. O. (Electrical Workers)

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the current agreement was violated when the Carrier used furloughed Electrician G. Holt to perform extra work on September 8, 9, 10, 11 and 12, 1959.

2. That accordingly the Carrier be ordered to compensate Electricians R. Bergman, W. Logan, S. Hindman, E. Rom and A. Spanagel who were prevented from performing this extra work, 8 hours each at the time and one-half rate of pay.

EMPLOYES' STATEMENT OF FACTS: The Pullman Company, effective August 11, 1959, reduced its electrical force in the Cincinnati District, to ten electricians, whose positions were bulletined and filled in accord with Rules 23 and 42 and the agreed to interpretation of these two Rules.

On September 8, 9, 10, 11 and 12, 1959, there was extra work in the Cincinnati District. The carrier instead of complying with the rules of the agreement and assigning this extra work to the employe who were working, they used furloughed Electrician G. Holt to perform the extra work. Due to this a claim was submitted to Foreman O'Brien requesting a hearing which was held on October 27, 1959.

Under date of November 20, 1959, Foreman O'Brien denied this claim.

We appealed this decision to Mr. Dodds, Appeals Officer.

Mr. Dodds denied our appeal.

We notified Mr. Dodds that we intend to appeal his decision.

This dispute has been handled in accordance with the agreement effective July 1, 1948, as subsequently amended, which is the controlling agreement in this dispute.

require or permit the allowance of a claim is upon him who seeks its allowance." Also see Awards 5418, 4758, 3523, 3477, 2577.

The Company submits also, that the organization properly may not claim payment on the basis of time and one-half for work not performed. In Second Division Award 1601 (Carroll R. Daugherty, Referee), the Board stated:

> "We think also that the pro rata rather than the overtime rate is the proper one to apply to the two hours and forty minutes. We follow the principle set forth in many previous awards of this Board that, when some employe other than a claimant has performed at a pro rata rate work properly belonging to the claimant at an overtime rate, the pro rata rate is sufficient to penalize the carrier and to make whole the claimant, who actually did not perform the work.

See also Awards:

4888	5853	5855	5871
5893	5899	5914	5998
6011	6015	6083	6093
6099	6102	6109	6112
6123	6137	6154	6158

CONCLUSION

In this ex parte submission, the Company has shown it properly established the position occupied by Electrician Holt, that Holt properly was recalled from furlough under the applicable rules of the current agreement, and assigned to perform work on September 8, 9, 10, 11 and 12, 1959. Also the Company has shown that Electricians Bergman, Logan, Hindman, Rom and Spanagel were not entitled to the work performed by Electrician Holt and are not entitled to compensation. Additionally, the Company has shown that the organization has failed in its responsibility to establish that the rules of the current agreement were violated. Finally, the Company has shown that awards of the National Railroad Adjustment Board support the Company in this dispute.

The organization's claim in behalf of Electricians Bergman, Logan, Hindman, Rom and Spanagel is without merit and should be denied.

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.

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

The facts are undisputed that the employment was temporary. The call back notice was given August 31, 1959 for duty on September 8, 1959. On September 3, 1959 a furlough notice effective September 13, 1959, was given.

The issue is whether the Pullman Company may recall a furloughed employe to perform special work for a five day period where it appears that regular employes are available for overtime service.

The pertinent rules are 36, 42 and 50. Rule 36 declares that all time worked outside of bulletined hours shall be distributed as equally as possible between the employes. Rule 50 sets up the procedure for recalling furloughed employes. They must report for service within seven days. Here the order was to report on a day certain. Rule 42 has to do with "filling new or vacant jobs" of more than 10 days duration. These must be bulletined.

Carrier argues that Rule 42 impliedly recognizes the validity of the procedure here followed because it is limited to jobs or more than 10 days duration. It thus does not require positions of less than 10 days to be bulletined. They cite us to Award 3367 which dealt with a claim for time and one-half of an employe who was called back on a temporary basis. His claim was denied on the ground that his situation was not covered by Rule 23; that the rule pertained to regular positions only. That ruling tends to show the work here in issue was extra work and that a position was not effectively created.

The rules are silent in temporary positions, but a showing is made in the record that this has been a negotiation subject. A note appended to the National Agreement of August 21, 1954 declares a temporary job provision contained in that agreement inapplicable to these employes.

We must conclude that the agreement has failed to provide for the creation of temporary jobs and that such a rule can not be read into it by implication. Rule 50 contains an exclusive definition and exclusive procedures for recall of furloughed employes. It follows that the work in question was extra work which belonged to claimants. Compensation shall be paid to the employes who had a right to be called and who were not called, and payment shall be at the pro rata rate.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

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

DISSENT OF CARRIER MEMBERS TO AWARD NOS. 3903 AND 3904

The majority have sustained the claims in these dockets on an erroneous premise. Basically they conclude the company is restricted from establishing a position of 10 or less days' duration. This is contrary to contentions previously expounded wherein in all cases it has been recognized that additional positions may be established as needed without any limitations whatsoever. The abolishment of any such position is also entirely within the discretion of the Company, subject, of course, to the rules of the applicable agreement.

Rule 42 of the controlling agreement is a revision of Rule 18 of the so-called National Agreement, which reads:

"All vacancies or new positions created will be bulletined."

The change, as contained in Rule 42, requires the Company to only bulletin those positions of more than 10 days' duration, and contrary to the findings of the majority that "We must conclude that the agreement has failed to provide for the creation of temporary jobs and that such a rule can not be read into it by implication." We submit there is nothing in the agreement to forbid the establishment of temporary positions of ten or less days' duration, but in doing so, the bulletining of such positions is not necessary.

While it is evident Rule 42 does not specifically provide for the bulletining or establishment of positions of 10 or less days, neither does it or any other rules of the applicable agreement preclude establishment of such positions. The Company is restricted only insofar as they have bargained away their rights. There is no evidence whatsoever to show that the Company bargained away the right to establish positions of 10 days or less.

These claims were prompted by additional work required in the Cincinnati and Chicago areas. The claimants have a demand right, under the agreement, to work only eight hours per working day and it is strictly the prerogative of the Company to determine when and if they will pay a penalty rate for additional work to be performed, or to conclude there is sufficient work to justify the establishment of a new additional position.

For these reasons we dissent.

H. K. Hagerman

F. P. Butler

David H. Hicks

P. R. Humphreys

W. B. Jones