# Award No. 3904
# Docket No. 3787
# 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.**

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## 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 R. E. Smith to perform extra work on October 22, 23, 24, 26 and 29, 1959.

2. That accordingly the Carrier be ordered to compensate G. Kennard, A. Fiore, A. Mirallegro, J. McCaffrey, S. Merkle and J. Wells, who were performing this extra work, 8 hours each at the time and one-half rate of pay.

**EMPLOYES' STATEMENT OF FACTS:** The Pullman Company, effective October 15, 1959, furloughed Electrician R. E. Smith.

On October 22, 23, 24, 25, 26 and 29, 1959, there was extra work in the Chicago West District. The carrier instead of complying with the rules of the agreement and assigning this extra work to the employes who were working, they used furloughed Electrician Smith to perform the extra work. Due to this a claim was submitted to Foreman Sheck.

The carrier denied our 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.

organization has not assumed this responsibility. In Third Division Award 4011 (Jay S. Parker, Referee), the Board stated "The burden of establishing facts sufficient to 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, as previously pointed out, 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 |
| 6167 | 6172 | 6188 | 6191 |

## CONCLUSION

In this ex parte submission the Company has shown it properly established the position occupied by Electrician Smith and that Smith properly was recalled from furlough under the applicable rules of the agreement and assigned to perform work on October 22, 23, 24, 25, 26 and 29, 1959. Additionally, the Company has shown that Electricians Kennard, Fiore, et al, were not entitled to perform the work and that no compensation is due. Also, the Company has shown that the organization has failed in its responsibility to establish that the rules of the agreement were violated. Further, the Company has shown that the proper rate for work not performed is the pro rata rate. Finally, the Company has shown that awards of the National Railroad Adjustment Board support the Company in this dispute.

The claim in behalf of Electricians Kennard, Fiore, et al. is without meirt 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.

Here as in Award No. 3903 a furloughed employe was recalled to service on the basis that a temporary job was being created for a period of 5 days.

The claims are filed on the same theory as in Award No. 3903 and the disposition must be identical with that in Award No. 3903.

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 read:

"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 addi-

tional 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**