

Award No. 4301
Docket No. 4154
2-P&LE-TWUOA-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Harvey Daly when the award was rendered.

PARTIES TO DISPUTE:

**TRANSPORT WORKERS UNION OF AMERICA,
RAILROAD DIVISION, A. F. of L.-C. I. O.**

**THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY
AND THE LAKE ERIE & EASTERN RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

On September 27, 28, 29, 1960, M. Tatich, junior helper was employed while a senior helper, G. Jencik was furloughed. This is in violation of Rule 39, paragraph (a) and (c). The organization requests that the carrier compensate helper Jencik, eight (8) hours at the pro-rata rate of pay for each day mentioned above that was worked by the junior helper.

EMPLOYES' STATEMENT OF FACTS: This case arose at McKees Rocks, Pa., and is known as Case M-319.

Mr. G. Jencik is an employe of the carrier and he is covered by the Railroad Division, Transport Workers Union of America, AFL-CIO contract as a helper.

The Railroad Division, Transport Workers Union of America, AFL-CIO does cover the helpers on the property of the carrier but in no way represents the laborer's on the property.

The organization does have the right to process case that involves helpers on the property of the carrier.

The carrier did use a junior helper, who was working as a laborer, while a senior helper was furloughed.

That the organization has no control over other contracts, but only its own contract and the carrier should abide by the contract that was negotiated with this organization.

That the Railroad Division, Transport Workers Union of America, AFL-CIO does have a bargaining agreement, effective May 1, 1948 and revised

AWARD 6641:

"This Division is without jurisdiction to award payment without a rule or agreement. * * *"

AWARD 8251:

"* * * A penalty rule is not shown. 'As penalties may not be awarded upon implication, but only under express contract provisions, claimant cannot prevail' * * *"

AWARD 12608:

"* * * even assuming that Article 23 was violated, no penalty rule is shown."

See also First Division Awards 15294, 15295, 15858 and numerous others.

CONCLUSION: Carrier's position may be summarized as follows:

1. There is no provision in the Carmen's Agreement requiring the carrier to recall an employe from furlough to fill day-to-day vacancies;
2. The claimant in the instant case, who had been displaced from his position, elected to take a furlough rather than exercise his seniority and thus removed himself from the opportunity to work as a carman helper;
3. Since carrier was not obligated by the agreement to recall claimant from furlough, it was within its rights to fill the vacancy on a day-to-day basis by using a laborer, having seniority as a carman helper, and
4. Carrier's right to exercise such managerial prerogative is upheld by numerous awards of the National Railroad Adjustment Board.

Carrier respectfully submits, therefore, that the claim is absolutely without merit and requests that same 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.

An analysis of this record and the applicable rules of the agreement leads us to conclude that the carrier violated the recall and seniority rules when it used a junior employe on the dates in question. However, in view of the circumstances there will be no pay allowance made.

AWARD

Claim disposed of in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September, 1963.