Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6885
SECOND DIVISION Docket No. 6655
2-LI-EW-'75

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

Parties to Dispute: (System Federation No. 156, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(The Long Island Rail Road Company

Dispute: Claim of Employes:

1. That the Long Island Rail Road Company improperly removed senior bidder Electrician J. DeLisa from his bid-in and delayed awarded position as Electrician (Maintenance) and placed him back on his former position, which he no longer owned, as Electrician (Power Operator).

2. That, accordingly, the Long Island Rail Road Company be ordered to award senior bidder J. DeLisa Group #10 position on Bulletin #04-72 effective 9:00 a.m., February 21, 1972, and to compensate him $1,652.10 due from March 10, 1972 to and including May 2, 1972. This claim continued until Wednesday, July 26, 1972, the date J. DeLisa displaced Electrician A. Cuttito when Power Operator job was abolished on Bulletin #20-72 due to automating Wantagh Sub-Station. The additional monies due J. DeLisa for this period is $2,515.60, for a total due on this claim of $4,167.70, adjusted to include subsequent wage increase.

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.

At the time this dispute arose in February 1972, Claimant J. DeLisa held a position as Power Operator at Carrier's Wantagh Sub-station, rate of pay $5.35 per hour. Under date of February 11, 1972, Bulletin No. 04-72 was posted advertising, among others, a position of Electrician at Lynbrook, rate of pay $5.30 per hour. Claimant was the senior bidder on the Electrician position by closing date of the bulletin. Carrier tested Claimant on his qualifications of the position on February 17, 1972 and he failed to pass. After intervention by the Organization,

Claimant was given a second test on March 3, 1972 which he passed. It is noted that the claim as originally processed objected to the unilateral testing and sought damages back to February 21, 1972. At the Referee Hearing it was conceded that this aspect of the claim was mooted by Carrier granting a second test at the Organization's request and the monetary claim herein was confined to the period March 10, 1972 to July 26, 1972, the date on which Claimant exercised seniority to take another Electrician position. Accordingly, the actual gravamen of this claim as presented to our Board arises out of the events of March 9, 1972 in connection with the bulletin announcing, inter alia, Claimant's appointment to the Electrician position at Lynbrook.

Claimant was placed in the Electrician's position on March 8, 1972 and, on that date and March 9, 1972 Carrier steprated a Rotary Tender to fill Claimant's former position of Power Operator. The record shows that the Organization's General Chairman objected to that practice and insisted that said former position be covered by overtime pending advertising and award. Claimant again worked the Electrician position at Lynbrook on March 9, 1972 and on that date a Bulletin No. 06-72 was posted announcing that Claimant would take the position of Electrician and advertising his former position effective March 8, 1972. Sometime subsequent to its posting on March 9, 1972 Bulletin No. 06-72, at the direction of Carrier's Assistant Chief Engineer-Power, was hand-cancelled and ordered destroyed. On March 10, 1972 Claimant was removed from the Electrician position at Lynbrook and placed by Carrier back on his former position as Power Operator at Wantagh Sub-Station. Subsequently, on March 16, 1972 another Bulletin, No. 08-72, was posted containing among other things the cryptic announcement "Bulletin 06-72 advertised in error cancelled".

By letter of May 9, 1972, the Organization presented the instant claim in favor of J. DeLisa. By letter of May 30, 1972, Carrier's Assistant Chief Engineer-Power denied the claim as follows:

> "Mr. Delisa was never awarded an electricians position. The Bulletin #06-72 was posted with a cancellation notice written on it. Therefore, no electricians positions were awarded under this Bulletin. The following Bulletin #08-72, cancelled the entire Bulletin #06-72.
>
> Mr. Delisa was temporarily assigned to an electricians' position pending award. However, the electricians positions were cancelled and never awarded due to your insistence that their jobs had to be filled on overtime, and that you would not permit rotary tender to be steprated to fill the vacant positions pending advertisement and award.

"The temporary assignment of personnel to the electricians positions, and subsequent vacant operators positions was discussed with substation representative W. J. McCarthy. We were under the impression that the temporary assignments were acceptable to you. However, we were later informed that you would not agree to the temporary assignments.

In view of the facts presented, your claim is considered to be without merit and denied in its entirety."

Careful consideration of the record indicates that Carrier's position is grounded almost exclusively on the contention that it had an informal agreement with the Organization's Local Chairman that the Rotary Tender could be steprated into Claimant's vacated Power Operator position pending advertisement and award. Carrier maintains that awarding the Electrician position to Claimant was a trade-off for this concession by the Organization. By this line of reasoning Carrier urges that it was justified in cancelling the awarded Electrician position when the Organization insisted upon covering the Power Operator position on an overtime basis. The Organization through its General Chairman denies that it agreed to such a quid pro quo arrangement and that, in any event, the language of the controlling Agreement is contrary. In this latter connection we note that, as if there were not sufficient disputation in this matter already, the parties cannot agree as to what is the controlling Agreement governing Sub-Station employees. The Carrier maintains that the Maintenance of Way Agreement governs whereas the Organization says that controlling herein is the Maintenance of Equipment Agreement.

We have examined all of the evidence and arguments on the question of which Agreement governs herein, Maintenance of Way (MofW) or Maintenance of Equipment (MofE). It is noted that even further confusion is engendered on that point by both parties, apparently indiscriminate citation of rules from one of those Agreements as they attempt to argue that the other Agreement should be controlling. Carrier apparently relies most heavily on the Classification of Work Rule No. 37 of the MofW Agreement. The Organization cites the Classification of Work Rule No. 71 in the MofE Agreement, and Rule 92, which is the schedule of rates of pay for Claimant's position as Power Operator in the Sub-Station. Additionally, the Organization cites Award No. 1 of P.L. Board 913 which implicitly holds that Rule 22 of the Maintenance of Equipment Agreement is applicable to Power Operators. Carrier for its part contends that Award No. 1 of P.L. Board 913 is "erroneous" because of a mistake of facts. We have reviewed all of the proferred evidence in detail and must conclude that the MofE Agreement is controlling herein. We are particularly persuaded to this conclusion by the language of Rule 71 thereof which clearly encompasses Claimant's position as Power Operator at the Sub-Station.

Upon analysis of the record there can be no doubt that Carrier's unilateral cancellation of the position awarded Claimant through an exercize of his seniority and after demonstrating his qualifications to Carrier's satisfaction, is violative of Rule 22 of the controlling Agreement. Whatever may have been Carrier's disappointment to find that a concession which it was under the impression the Organization had made would not stand up, such is not justification for removing Claimant from a position in which he had accrued a vested right of occupancy under the Agreement. We do not condone or license sharp practices between parties on the property. We recognize that the dynamics of day-to-day labor-management relations require flexibility and mutual accommodation to situations as they arise. But here we are faced with a conflict between, on the one hand, an alleged oral understanding concededly based upon the "impressions" of Carrier officers dealing with a Local Chairman which is denied by the General Chairman; and, on the other hand, we have the clear and unambiguous written provisions of the system-wide Agreements. Such a choice is no choice at all -- clearly the Agreement must govern. There is no doubt on this record that Claimant's seniority and qualifications resulted in his being awarded the Electrician position by Bulletin #04-72 of March 9, 1972 and that he was unilaterally removed therefrom by Carrier following such award of the position. In these circumstances we must conclude that Rule 22 of the Agreement was violated thereby. See Award 13154, Third Division, Supplemental (McGovern).

Carrier argues that even if arguendo, a violation occurred the damages sought by the claim are excessive because Claimant earned more at his former position than in that from which he was removed. As far as that argument goes it cannot be gainsaid that Claimant did not suffer a loss in hourly wage as a result of Carrier's violation. But in the particular facts and circumstances of this case there is more. The position of Electrician at Lynbrook, to which Claimant was entitled, had rest days of Saturday and Sunday which Claimant would have enjoyed but for Carrier's action in returning him to a position with Monday and Tuesday rest days. Moreover, the position of Electrician was a day job with hours of 7:00 A.M. to 3:00 P.M., whereas the Power Operator to which Claimant was returned worked 11:59 P.M. to 7:59 A.M. The Organization asserts that Claimant is entitled to reimbursement under Rules 5 and 11, respectively, of the Maintenance of Equipment Agreement for having to work Saturdays and Sundays, for working on a changed shift, and for travel time as a result of his improper removal from the Electrician position by Carrier. The Carrier resists such demand citing numerous Awards of the various Divisions denying so-called "penalty payments". Representative of these latter is Award 2255 (Seidenberg) of the Fourth Division:

> "***He is entitled under these circumstances, to be made whole for any loss he suffered. In other words, the Claimant is entitled to reparations but not to a penalty. Here the record discloses no evidence of suffered loss and consequently he is not entitled to the claimed damages." (Emphasis added)

Upon analysis of the whole record we conclude that Claimant is entitled to four hours pay for each Saturday and Sunday he worked during the period March 10, 1972 to July 26, 1972. Such reimbursement is not a penalty payment but represents the difference between the straight time he received and the overtime to which he was entitled under Rule 5 when Carrier worked him on days which would have been his rest days but for Carrier's unilateral removal of him from the Electrician position in violation of the Agreement. In our judgement, similar justification and rule support for the shift change and travel time portion of the claim is not shown on this record.

A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie D. Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 25th day of July, 1975.