

Award No. 1401

Docket No. 1323

2-LI-EW-'50

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 156, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Electrical Workers)**

**THE LONG ISLAND RAILROAD COMPANY, Debtor
David E. Smucker and Hunter L. Delatour, Trustees**

DISPUTE: Claim of Employees: 1. That under the current agreement electricians of the emergency crews were unjustly dealt with and thereby damaged when the carrier used an electrician helper to fill a vacancy of relief electrician in the emergency crew during the period of November 5 to November 15, 1948.

2. That accordingly the carrier be ordered to additionally compensate the available electricians to fill such vacancy by equally dividing among them at the time and one-half rate all hours worked during the aforementioned period by said electrician helper.

EMPLOYEES' STATEMENT OF FACTS: A vacancy of relief electrician existed to relieve electricians of the emergency crews on the three tricks, during the period November 5 to December 29, 1948.

During the period November 5 to November 15, 1948, the carrier covered this vacancy with Electrician Helper P. A. Xenakis, on a high rate stamp.

A verbal protest was registered about using a helper on this assignment which resulted in Xenakis being returned to his own position, and for the remainder of the vacancy, November 16 to December 29, 1948, the vacancy was blanked whenever possible, and when this was not possible, it was covered with an electrician at the time and one-half rate.

This vacancy was advertised on Bulletin No. 266 dated November 3, 267 dated November 23, 268 dated December 3, and 269 dated December 15, 1948.

The bulletins Nos. 266, 267 and 268 were cancelled due to no qualified bidders. The advertisement on bulletin No. 269 was awarded to Electrician Helper Joseph Nizza, who had passed the examination, and was effective as an electrician December 28, 1948.

The agreement identified as "MAINTENANCE OF WAY DEPARTMENT", effective March 16, 1945, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: Rule No. 37 explains what is electricians' work, the bulletining of the vacancy was for an electrician, the helper was

some agreements on other railroads with the same organization covering the same crafts or classes of employes which include the provision that "None but Mechanics regularly employed as such shall do mechanics work". (Emphasis supplied).

To summarize, we desire to reiterate that there is no provision of the applicable agreement as written or interpreted by the parties thereto that supports the general chairman's position in this case. In fact, the practice under the present agreement, which has not been previously protested, has been to use helpers to fill temporary vacancies in mechanic's positions. Further, that in the absence of an electrician's extra list or furloughed or demoted employes with electrician's seniority, there was no means available to us to fill this position except by upgrading a helper or by utilizing a mechanic on an overtime basis and we categorically deny there is any provision of the applicable agreement or the interpretations thereof that required us to adopt this latter course. To have acceded to the employes' demands would have necessitated using a mechanic on an overtime basis even though a competent helper was available to perform this work at the straight time mechanic's rate of pay. Such practices cannot be condoned in the operation of a solvent railroad and are of course, unthinkable on a bankrupt one.

This claim is in effect an effort to require us to have work of this nature performed at overtime rates by mechanics despite the fact helpers are available to perform this work at the straight time mechanics' rate of pay. This is, of course, contrary to the fundamental principles upon which overtime rules are predicated, i.e., to prevent management from using employes outside their assigned hours by making it unattractive and expensive to do so.

In conclusion, we desire to point out that even if the employes' position were sustained, and nothing has been presented to justify such a decision, only one of the claimants would be entitled to recovery and then only at straight time rates since it is a well settled principle of your Honorable Board that punitive time will not be paid for time not actually worked (See Third Division Awards 3504, 4224).

Further, since it has been established that this claim is not supported by any provision of the applicable agreement or the agreed upon interpretations thereof to allow the employes' claim in this instance would be to write a new rule, which is something we respectfully submit your Honorable Board does not have authority to do. (See Awards 2343, 4739, Third Division).

The Trustees of the Long Island Railroad Company, debtor, demand strict proof by competent evidence of all facts relied upon by the claimant, with the right to test the same by cross examination, the right to produce competent evidence in its own behalf at a proper hearing of this matter, and the establishment of a proper record of all of the same.

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.

The parties to said dispute were given due notice of hearing thereon.

The record discloses that although electricians were respectively available, the carrier used an electrician's helper to fill the vacancy of a relief electrician from November 5, 1948, to November 15, 1948, inclusive, pending advertisement and award of the position. The primary question presented

for decision is whether or not such action by the carrier was improper under the agreement.

In light of the record, "Assignment of Work" Rule 15, "Special Classification of Work" Rules 37 and 39, "New Positions and Vacancies" Rule 16 and "Seniority-Rosters" Rule 17, the Division concludes that it was improper for the carrier to assign an electrician's helper to fill the vacancy of an electrician pending advertisement and award of the position, when, as here, electricians having seniority as such were available to do the work. To hold otherwise would give assignment of work, special classification and seniority rules no force or effect, and require the Division to supplement the agreement which it has no authority to do.

Therefore the Division concludes that the claim should be and is sustained because one electrician then available was, on each date the position was filled by an electrician's helper, unjustly deprived of work belonging to him. In other words, the carrier is liable for one day's pay for one electrician each day the position was filled during the period involved. However, not having performed the work he was entitled to be paid only the pro rata rate of the position each day during the period of November 5, 1948, to November 15, 1948, inclusive.

AWARD

Claim sustained per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1950.