Award No. 1457
Docket No. 1382
2-CRI&P-CM- '51

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1—That under the current agreement Boilermaker Howard Hern was improperly assigned to perform carmen's work effective July 5th thru July 12th, and again on July 18th thru July 25, 1949, which thereby damaged carmen regularly employed as such.

2—That accordingly the carrier be ordered to:

(a) Additionally compensate Carmen Harry Wilson, Joseph Acela, John Swann and Orville Chaywood by equally dividing among them at the time and one-half rate all hours worked by Boilermaker Hern on July 5th, 6th, 7th, 8th, 9th, 11th, 12th, 18th, 19th, 20th, 21st and 22nd, 1949.

(b) Additionally compensate Carmen Harry Wilson and Joseph Acela by equally dividing among them at the time and one-half rate all hours worked by Boilermaker Hern on July 23rd and 25th, 1949.

EMPLOYES' STATEMENT OF FACTS: At Des Moines, Iowa, the carrier maintains a force of approximately forty (40) carmen, whereat passenger and freight cars, both wood and steel, are repaired, and this car shop operates during the hours from 8:00 A. M. to 12 Noon and from 12:30 P. M. to 4:30 P. M.

Mr. Hern served his apprenticeship as a boilermaker at this point and established seniority as a boilermaker as of July 12, 1945, and who, in a force reduction, was laid off on July 2, 1949. However, on July 5, 1949, the carrier unilaterally assigned Boilermaker Hern to perform carmen's work during the aforementioned hours of this car department shop and continued him on said work until laid off at the close of his assignment along with other carmen on July 12, 1949, which is affirmed by copy of notice dated July 8, 1949, submitted herewith and identified as Exhibit A.

The next week the carrier increased the force of carmen on the repair track effective July 18, and as of this date Boilermaker Hern was again

of these parties lost any time on the dates mentioned in the claim. Some of these claimants have been car inspectors for a considerable period of time and there may be serious doubt that under such circumstances they would be qualified as steel carmen to perform the work that was performed by Mr. Hearn. In any event, certainly this carrier would not have performed this steel car work on overtime. No need existed requiring that this work be performed on overtime and/or at overtime rates. Therefore, there would certainly have been no need, in any event, to have worked these car inspectors at overtime rates in the performance of the work which was done by Mr. Hearn.

There is no rule in the agreement here controlling which specifies any penalty for work not performed. Penalties must be clearly stated in an agreement. Rule 6 of the current agreement provides:

> "All service performed outside of bulletined hours will be paid for at the rate of time and one-half until relieved, except as may be provided in rules hereinafter set out."

The claimants performed no work to justify or require payment under the aforequoted rule. The right to perform work, if such right did exist in this case, which we contend it did not, is not the equivalent of work performed. Overtime Rule 6, quoted above, is consonant with the principle we have just stated. This principle is well established and has been widely accepted by the several divisions of the National Railroad Adjustment Board. Third Division Award No. 3193 stated in part:

> "The organization claims the time and one-half rate of the position. The Carrier claims, in case a violation is found, that the pro rata rate controls . . . It seems clear that the penalty rate for work lost because it was improperly given to one not entitled to it under this agreement, is the rate which the employe to whom it was regularly assigned would receive if he had performed the work. . . . The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently, time not actually worked cannot be treated at the overtime rate unless the agreement specifically so provides. This conclusion is supported by this division Awards 2346, 2695, 2823, and 3049."

Just as the work which was alleged by the employes in docket No. 1201 to have been improperly diverted would certainly have been performed by employes on the repair track and not car inspectors from the train yard, so, as we have said, the work performed by Mr. Hearn would not have been performed by car inspectors, but would have been performed during the regularly assigned hours of the repair track, which, in fact, was the time during which the work was performed. Nothing we have just said should be construed as a waiver of our contention that our action in the instant case was proper and not inconsistent with the provisions of the agreement nor a violation thereof and therefore the claim should be denied.

It will be noted that in Mr. Fox's notice to Executive Secretary Sassaman dated January 18, 1951, the dates on which Mr. Hearn is alleged to have performed work are dates in June, 1949. Inasmuch as Mr. Hearn did not perform steel car repair work at Des Moines on the dates mentioned in June, 1949, we assume the organization has incorrectly stated its claim to be in June instead of July. However, if the organization has correctly stated its claim, then we assert that such a claim was never handled on the property and was not declined, which is a condition precedent under the Railway Labor Act to appeal to this Board.

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 shows that Boilermaker Hern was assigned to work as a carman from July 5, 1949, to July 12, 1949, and from July 18, 1949 to July 25, 1949. This employe had a seniority date of July 12, 1945 as a boilermaker and was furloughed in force reduction during the periods mentioned. He had no seniority as a carman. Claimants hold seniority as carmen and were available to perform the work assigned to Boilermaker Hern.

The carrier concedes that the work performed by Hern was carmen's work but asserts that it had exhausted the supply of carmen mechanics and helpers. The record shows, however, that Hern was not a qualified carman. Under such circumstances, the carrier cannot properly assign the work to employes of another craft. Carmen's work belongs to carmen as they are defined in the collective agreement. The carrier has contracted that they shall perform all available carmen's work. The removal of such work from the scope of the agreement and the assigning of it to employes not covered by its terms constitutes a violation of the agreement. This is so even if the carrier is compelled to use employes who are entitled to the work on an overtime basis.

Carrier asserts that the work, if it had been performed by carmen, would not have been performed by these claimants. No other claim has been filed for the time lost by the employes under the carmen's agreement. Claimants are employes holding seniority under the carmen's agreement. Since the allowance of the claim for the designated violation will preclude any other for the same work, the claim of these employes is properly allowable to them. The carrier is required to pay the penalty for the violation but once, and it will not ordinarily be permitted to defend on the basis that the wrong employe holding seniority under the violated agreement is making the claim.

The claim is allowable at the straight time rate. The penalty rate for work lost because it was assigned to one not under the agreement, is the rate which an employe regularly assigned to perform the work would receive if he had performed it. In other words, the loss sustained is the value of the work under the agreement if it were regularly assigned. The overtime rate has no application for the reason that work in question was not performed in excess of eight hours on any day as that rule requires.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 12th day of July, 1951.