Award No. 1667

Docket No. 1590

2-PRR-URRWA-CIO-'53

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

PARTIES TO DISPUTE:

UNITED RAILROAD WORKERS OF AMERICA—C. I. O.

THE PENNSYLVANIA RAILROAD COMPANY
(Central Region)

EMPLOYES' STATEMENT OF CLAIM: That within the meaning of the Controlling Agreement, and in particular, Regulation 9-A-1 (Vacation Regulation) Car Inspectors A. D. Ault; L. A. Homan; and, L. R. Henderson, have been unjustly dealt with by the Carrier in that they were denied the right to fill vacation vacancy in order of their seniority.

Therefore, we claim these employes should be compensated at the punitive car inspector rate in a rotary manner for the period in question, June 6 to June 18, 1949, due to the fact that junior employe E. H. Swishelm, oiler, was assigned to this vacancy instead of the senior Claimants.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties hereto dated September 1, 1946, which is controlling, a copy of which is on file with the Board and is by reference hereby made a part of this statement of facts.

At East Pittsburgh, Pennsylvania, Pittsburgh Division, Central Region, the company employs and maintains a group of carmen and helpers. Car Inspectors A. D. Ault; L. A. Homan, and L. R. Henderson, hereinafter referred to as the claimants were denied the right to work a vacation vacancy in seniority order. A junior employe, E. H. Swishelm, an oiler, was assigned to the vacation vacancy.

The instant dispute is known as Pittsburgh Division Case WP-547 and was processed on the property of the carrier as provided for in the controlling agreement.

Said dispute was denied at every step up to and including general manager.

POSITION OF EMPLOYES: The claimants were from June 6 to June 18, 1949, working as car inspectors, first trick, at the seniority point where the dispute arose.

During the above mentioned period of time, June 6 to June 18, 1949, there existed at the designated seniority point a vacation vacancy tour of duty, second trick, and oiler helper, first trick, was assigned to fill said vacancy.

The employes maintain that although provisions of the effective regulation provide that it is a self contained regulation, other provisions of the

Furthermore, the claim is predicated on the basis that the claimants were not permitted to perform certain work. Your Honorable Board has held that even if an employe has been improperly deprived of work for which he was available and which he was entitled to perform since he had not performed the work he is entitled only to pro rata rate. This principle has also been aptly stated in the opinion of the Board in Award No. 4244, Third Division, Referee Edward F. Carter, which reads in part, as follows:

> "The right to perform work is not the equivalent of work performed insofar as the overtime rule is concerned. Whether the overtime rate be construed as a penalty against the employer or as the rate to be paid an employe who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform has not done the thing that makes the higher rate applicable."

It is respectfully submitted, therefore, that if your Honorable Board should decide that the claimants are entitled to be paid for the time not worked by them on the dates in question compensation therefor should only be granted to one of the claimants and such compensation should be based at the pro rata rate for each day.

IV. Under the Railway Labor Act. the National Railroad Adjustment Board, Second Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act to give effect to the said argeement effective September 1, 1946, which constitutes the applicable agreement in this dispute between this carrier and the United Railroad Workers of America, CI.O., and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it. To grant the claim of the organization in this case would require the Board to disregard the agreement between the parties, hereinbefore referrd to, and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to the applicable agreement. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has established that the use of Swisshelm, the senior demoted mechanic, to fill the position of the vacationing employe, was proper and in accordance with the long continued practice in effect at the location in question, that even if the use of Swisshelm was improper there has been no violation of the agreement insofar as claimants are concerned, and that the claimants are not entitled to the compensation which they claim.

Therefore, the carrier respectfully submits that your Honorable Board should deny the claim of the organization in this matter.

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 question before the Division is whether or not the carrier violated the agreement when it assigned E. H. Swishelm, who was working as an oiler (helper), to fill the position of a car inspector while he was on vacation.

At East Pittsburgh, Pennsylvania, Pittsburgh Division, Central Region, A. D. Ault, L. A. Homan and L. R. Henderson were regularly employed as car inspectors on the first trick. On account of a car inspector employed on the second trick taking his vacation, the carrier found it necessary to fill the vacation vacancy. The carrier elected to assign E. H. Swishelm, who was working at this location as an oiler (helper) on the first trick, to the second trick car inspector vacation vacancy.

The granting of employes' vacations, etc. is covered in Regulation 9-A-1. Filling vacation vacancies is covered by Paragraph (p) which reads:

> "Absences of employes from duty on vacation shall not constitute 'vacancies' in their positions. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority in filling the position."

Regulation 2-A-1 subject to the provisions of Regulations 3-A-1, 3-B-1 and 3-B-3 permits of the assignment of employes from lower to higher-rated positions whether or not they hold seniority in the higher-rated class.

According to this record E. H. Swishelm was a demoted mechanic. Under the Regulations of the agreement he maintained his mechanic's seniority rights; at least there is no contention in the record by the employes that he did not hold mechanic's seniority rights at this location. Whether or not he is a demoted mechanic is not controlling in view of the provisions of Regulation 2-A-1.

We do not find that the carrier violated the Regulations of the controlling agreement.

AWARD

Claim of the employes denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April, 1953.