Award No. 1754

Docket No. 1695

2-PRR-URRWA, CIO-'54

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY
—Eastern Region—

DISPUTE: CLAIM OF EMPLOYES: 1. It is respectfully submitted that within the meaning of the Controlling Agreement, the Pennsylvania Railroad Company stands in violation thereof, in that J. B. C. Fasick, painter, was unjustly dealt with on the property of the Carrier.

2. Therefore, we claim for J. B. C. Fasick, painter, additional compensation by reason of J. W. Beil, Jr., a junior employe performing work involving payment of overtime rate at Enola Enginehouse, as follows: 8 hours at punitive rate; March 31, April 7, 1951; 7 hours at punitive rate, March 5, 1951; 4 hours at punitive rate; March 12, 13, 14, 22, 23, 1951; 3 hours at punitive rate; March 2, 6, 7, 8, 9, 15, 16, 17, 19, 20, 26, 27, 28, 29, 1951; 11 hours at punitive rate; March 24, 1951, and 2 hours at punitive rate; March 10, 1951.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties hereto, dated July 1, 1949, and subsequent amendments, copy of which is on file with the Board and is, by reference hereto, made a part of the statement of facts.

At Enola enginehouse, Harrisburg, Pa., Philadelphia Division, Eastern Region, the Pennsylvania Railroad Company, hereinafter referred to as the carrier, employs a force of carmen painters.

The aggrieved J. B. C. Fasick, hereinafter referred to as the claimant, is employed at the seniority point in question as a carman painter.

J. B. C. Fasick, with mechanic seniority date of July 13, 1937, was assigned as painter at Enola steam enginehouse, "A" tour; J. W. Beil, Jr., with mechanic seniority date of July 17, 1937, was assigned as painter at Enola diesel enginehouse, on the same trick.

On the dates covered by this claim, Beil was used in the steam enginehouse and Fasick worked in place of Beil at the diesel enginehouse. On certain dates, Beil worked in excess of eight hours and performed service on certain rest days.

This claim was processed on the property of the carrier, in compliance with the provisions of the controlling agreement.

claimed at the rate of time and one-half. The claimant, J. B. C. Fasick, is claiming compensation, not for work which he performed, but for work which he alleges was performed by Beil. 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 the pro rata rate. This principle has been aptly stated in the "Opinion of Board" in Award No. 4244 of the Third Division (Referee Edward F. Carter), which reads 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, contrary to the facts, that the claimant is entitled under the agreement to be paid for the time not worked by him on the dates involved in the instant claim, compensation therefor may not properly be granted at the punitive rate.

III. 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 agreement, which constitutes the applicable agreement between this carrier and the United Railroad Workers of America, C.I.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 referred 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 Beil on the temporary additional supervisory work during the period in question did not constitute a violation of the applicable agreement, and that the claimant is not entitled to the compensation which he claims.

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 waived right of appearance at hearing thereon.

The allegation of the petitioners', that painting was performed during the period of the claim is not supported by documentary evidence. From the record before us, we find no violation of the Controlling Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1954.