Award No. 1963
Docket No. 1784
2-MP-CM-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1) That under the current agreement other than a Carman was improperly used to fill the position of Car Inspector A. P. Burnett while he was off on his annual earned vacation during the period September 15th, 1952 and September 26th, 1952 at Pleasant Hill, Missouri.

2) That accordingly the Carrier be ordered to compensate a Carman designated by the Organization in the amount of ten (10) eight (8) hour work days' pay at the applicable rate of pay.

EMPLOYES' STATEMENT OF FACTS: Pleasant Hill, Missouri, is located a distance of 35 miles east of Kansas City, Missouri, and is termed a one-man point, having only one car inspector employed, namely, Carman A. P. Burnett.

On September 15, 1952, Carman Burnett went on his annual earned vacation, completing same on September 26, 1952.

Furloughed Machinist C. E. Hurley was sent to Pleasant Hill to fill the position of Carman Burnett during his absence on annual earned vacation.

The dispute has been handled with carrier officials designated to handle such affairs, who all declined to adjust the dispute.

The agreement effective September 1, 1949, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is submitted that furloughed Machinist C. E. Hurley was not a carman under the terms of Rule 116 which reads as following:

> "Any man who has served an apprenticeship, or who has had four years' experience as a carman, and is capable of performing car work, and who with the aid of tools with or without drawing

It is clear that the agreement was not violated and that Car Inspector Burnett was properly relieved by C. E. Hurley.

The employes' confusion over this claim is revealed by their inability to find a claimant. As stated above, the claim was originally filed on behalf of C. E. Pace. Investigation revealed that Carman Pace was regularly assigned as car inspector at Jefferson City, Missouri, 124 miles from Pleasant Hill, working in the yard from 8:00 A. M. to 4:00 P. M. Since Carman Pace was working regularly and suffered no wage loss, the employes dropped the claim on behalf of Pace and changed it to a claim for a carman to be designated by them. This confirms the fact that there was no employe of the carman's craft available to perform the work.

Since there was no violation of the agreement in connection with this claim, the problem of designating a claimant becomes academic. However, the fact that the employes are still trying to attach a monetary claim to their complaint indicates that they are pressing the fallacious argument that a monetary penalty is always permissible no matter what the nature of the claim or the provision of the agreement. See Third Division Award 6417. In this case, not only was no wage loss suffered by any carman but no provision of the agreement specifies a penalty under any circumstances. The carrier must register its vigorous dissent to this theory. Not only does such a theory violate the basic principles of contract law but the carrier feels that the best interests of the rank and file employes are served by securing to them those rights which they have obtained through contract, however many or few, and not jeopardize those rights by weakening the base on which those rights depend through personal edict.

The claim is clearly without rules support and is entirely without merit. The claim should be denied.

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.

Carman Burnett, a regularly assigned car inspector and only carman employed at Pleasant Hill, Missouri, was relieved for his vacation period by a furloughed machinist holding seniority at another point. Before doing so, the carrier canvassed its entire system for a furloughed carman to fill the position but without success. Pleasant Hill is a "one-man point."

We do not agree with carrier that its action in using a furloughed machinist to fill the vacation vacancy of a regularly assigned carman was proper. See Awards 1825 and 1951. The essential duty of the position involved was that of car inspecting and carrier by its regular assignment has recognized the work at this one-man point as basically that of a carman. True, a carman was unavailable on the system to take the assignment, but no effort was shown by the carrier to up-grade a carman helper under Decision No. SC-88-1 to handle the assignment. The aforementioned memorandum agreement seemed to be specially designed to handle a man power shortage even for temporary periods such as we have involved here.

The record shows that Mr. Hurley was used in filling this vacation vacancy for two prior years, and no question was raised by the Organization to dispute the implication that he was qualified by experience to perform the duties required of him in connection with this particular assignment. This is not to say that he was qualified under Rule 116.

We are not to be understood as impinging upon the latitude given to the carrier under Rule 26(b). We do not believe that it has intended application to the circumstances here present.

Section 3(i), Title I of the Railway Labor Act recognizes that disputes growing out of interpretation or application of agreements may exist between either an employe or **group of employes** and a carrier. Here the carmen as a group are aggrieved and ask compensation for a carman to be designated by the organization. Of course under the Act a monetary award is payable to an employe rather than the organization, but we find nothing in the examined legislation to prohibit statement of claim in the manner adopted herein. We have in other awards refused to recognize the defense that the wrong employe holding seniority under the violated agreement is making the claim. We see no reason to rule otherwise here as the Organization and the Board will protect against dual claims for the same violation.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1955.

CARRIER MEMBERS' DISSENT TO AWARD NO. 1963

In the present case, Burnett, a car inspector at Pleasant Hill, Missouri, a one-man point, was relieved for his vacation by a furloughed machinist who was hired as a carman to fill this vacation relief vacancy. This same furloughed machinist had been used as vacation relief in at least two previous years without complaint.

The Vacation Agreement provided that vacation relief could be afforded by the hiring of a regular relief man, blanking the job, or assigning some regularly assigned employe to fill the vacancy. In the present case, there was no one holding seniority at that point; therefore, no one had a contractual right to the job. The carrier canvassed the system and was unable to find a laid-off carman who could be offered the job; therefore, Hurley was hired as a vacation relief employe. While the finding admits this, it goes to great length to say that no effort was shown by the carrier to upgrade a carman helper under Decision No. SC-88-1 to handle the assignment. There were no helpers employed at Pleasant Hill, and the upgrading agreement was not negotiated for the purpose of taking care of such vacation reliefs. Neither did it give a helper a contractual right to upgrading, nor did it obligate the carrier to upgrade a helper.

We take particular exception to the last paragraph of the Findings, which reads:

> "Section 3(i), Title I of the Railway Labor Act recognizes that disputes growing out of interpretation or application of agreements may exist between either an employe or **group of employes** and a carrier. Here the carmen as a group are aggrieved and ask compensation for a carman to be designated by the organization. Of course under the Act a monetary award is payable to an employe rather than the organization, but we find nothing in the examined legislation to prohibit statement of claim in the manner adopted herein. We have in other awards refused to recognize the defense that the wrong employe holding seniority under the violated agreement is making the claim. We see no reason to rule otherwise here

as the Organization and the Board will protect against dual claims for the same violation."

There is no provision in the Act for assessing a monetary award. The Act provides only that agreements will be interpreted, and if and when a money payment is specifically provided for in such agreement, then the award can properly include payments; but the Act itself does not provide for penalties, nor does it authorize a division to write a rule or change an agreement to include penalties.

Part (2) of the claim reads:

"That accordingly the Carrier be ordered to compensate a Carman designated by the Organization in the amount of ten (10) eight (8) hour work days' pay at the applicable rate of pay."

It was pointed out to the referee that this was a one-man point; that there was no carman that had contractual rights to a claim for money payments; that the agreement made no provision for run-around payments or for payments for time not worked except in an unwarranted discharge case. These agreements have been in effect for a good many years, and not until some comparatively recent awards of this Division were payments ever allowed to employes who were already working and under pay. There is no showing in the record that any employe was damaged or that any employe had a contractual right to the job, let alone payment because not used.

For the above reasons, we dissent.

/s/ J. A. Anderson
/s/ D. H. Hicks
/s/ M. E. Somerlott
/s/ R. P. Johnson
/s/ T. F. Purcell