Award No. 2332
Docket No. 2222
2-SP(PL)-MA-'56

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Machinists)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES: 1. That the Carrier violated Section 1, Article II—Holidays—of Agreement signed at Chicago, August 21, 1954, by declining to allow Machinist Raymond Hawkins, Ogden, Utah, eight (8) hours pay at pro rata rate for New Year's Day Holiday, January 1, 1955.

2. That accordingly the Carrier be ordered to additionally compensate Machinist Raymond Hawkins in the amount of eight (8) hours compensation at pro rata rate, for January 1, 1955, in accordance with agreement provisions referred to hereinabove.

EMPLOYES' STATEMENT OF FACTS: Raymond Hawkins, hereinafter referred to as the claimant, entered the service of the Southern Pacific Company (Pacific Lines), hereinafter referred to as the carrier, on October 24, 1950, as a machinist at the carrier's shops located at Ogden, Utah.

Claimant was furloughed in reduction of forces on January 1, 1954, was recalled to service and reported for work on December 6, 1954.

On being recalled to service claimant was assigned by the carrier to work on the diesel pit. He was placed on a regular established position, with hours of service 7:00 A. M. to 3:00 P. M., rest days Thursday and Friday. He was subsequently moved by the carrier to another assignment with the same hours of service, having rest days of Monday and Tuesday, which assignment he was working on January 1, 1955.

The assignment claimant was working on January 1, 1955, was bulletined to work on holidays, as are all running repair assignments at the Ogden Shops.

Claimant reported for work, and did work on January 1, 1955, which was a work day of the work week of the regular assignment the carrier had assigned him to work.

Claimant qualified to receive eight (8) hours' pay at the pro rata rate, as provided for in Section 1, Article II of the aforementioned agreement, by

"This case, boiled down, presents one question for our determination. Were the claimants in the instant case 'regularly assigned' employes as contemplated by Section 1, Article II of the August 21, 1954 National Agreement and entitled to pay for holidays?

The claimants had both been laid off as a consequence of a reduction in force. Both were notified to and did fill vacancies of regularly assigned men who were on vacations.

The Presidential Emergency Board's recommendation was to the effect that regularly assigned employes should be able to maintain their regular amount of take home pay and still have the benefit of holidays. Employes who hold no regular assignments do not have a regular or usual amount of take home pay. Their work is dependent upon the occurrence of temporary vacancies, or work of a temporary nature.

In the instant case the claimants had been removed from their regular assignments as the result of force reduction. Their seniority was not sufficient to permit them to displace regularly assigned employes. Following the claimants' separation from their regularly assigned positions, their take home pay from thence forward became irregular—dependent upon work of a temporary nature when such existed.

The claimants temporarily filled regular positions. The Agreement of August 21, 1954 is clear in its provisions wherein it is stated that '* * * each **regularly assigned** hourly and daily rated **employe** shall receive eight hours' pay * * *'. (Emphasis ours). Thus, the agreement limits payment to regularly assigned employes and does not provide for payment to an employe who is temporarily filling a position."

The petitioner in this case is simply attempting to secure through an award of this Division a new agreement provision over and above that which was agreed to by the parties. It is a well-established principle that it is not the function of this Board to modify an existing rule or supply a new rule when none exists.

CONCLUSION

The carrier asserts that it has conclusively established that the claim is without basis under the provisions of Section 1, Article II, of agreement dated August 21, 1954, and it is requested that said claim 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 waived right of appearance at hearing thereon.

Having qualified under Section 3 of Article II of the National Agreement of August 21, 1954, Machinist Raymond Hawkins contends carrier violated Section 1 of Article II of the foregoing agreement by not paying him for eight (8) hours at the pro rata rate applicable for New Year's Day, a holiday falling on Saturday, January 1, 1955, which was a work day of the work

week of the position he was then occupying. The relief asked is that we direct carrier to do so.

Claimant entered carrier's service at its Ogden shops on October 24, 1950. Due to a reduction in force he was furloughed on January 1, 1954. He was recalled to service on December 6, 1954, and assigned to work in the Diesel pit. On December 31, 1954, carrier advertised for bids a regular position for a machinist in its Ogden Diesel shop which had Monday and Tuesday as rest days.

On January 6, 1955, Machinist J. A. Maggio, being the successful bidder, was assigned thereto. However, pending its being bulletined and the successful bidder being assigned thereto claimant temporarily occupied the position. The holiday, for which this claim is being made, fell during the period of time claimant was being so used.

By Award 2169 of this Division, Section 1 of Article II of the National Agreement of August 21, 1954, was held to apply only to employes regularly assigned to regular positions or jobs and not to the position or job itself and, consequently, that an employe not regularly assigned within the meaning thereof who is only temporarily filling a regular position would not be eligible to receive the benefits thereof. By Awards 2297, 2299 and 2300 of this Division it was held that an employe who is not regularly assigned but being used to temporarily fill a regular position while it is being bulletined and the successful bidder assigned thereto is not entitled to the benefits thereof. The latter is the situation here.

In view of the foregoing we find the claim should be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November, 1956.

DISSENT OF LABOR MEMBERS TO AWARDS NOS. 2331 AND 2332.

The decision in this case turns on whether the claimants were "regularly assigned employes" within the meaning of the August 21, 1954 Agreement at the time the holidays occurred for which they claim holiday pay. It is admitted that they met all other conditions for entitlement to holiday pay. Both claimants had had their former jobs abolished and were assigned under seniority rights without interruption of work to fill regularly established positions during the vacancy of the usual incumbents of those positions.

This award, if it were accepted as defining "regularly assigned employe" as used in the Agreement of August 21, 1954, would rob the agreement of much of its substance. The term "regularly assigned employe" was used in that agreement only to exclude from the holiday pay rule those individuals who might under the rules of various agreements be hired from time to time to do extra work not embraced in the positions to which employes were regularly assigned. It had nothing whatever to do with the permanence of an assignment of an employe to fill a regularly established position.

It is not our purpose to delineate precisely the full scope of the term "regularly assigned employe" under the varying rules of the several crafts who were parties to the August 21, 1954 Agreement. But it must at least

include an employe who pursuant to seniority rights is assigned in accordance with the rules of the applicable agreement to fill a regularly established position.

The fact that it is anticipated that the assignment will be terminated upon the return of the usual incumbent is irrelevant. During the assignment the employe filling the position is nevertheless "regularly assigned." Should the usual incumbent be unable, as, for example through incapacitation or death, to resume the assignment, the employe who was "regularly assigned" to fill the position on what was thought to be a "temporary" basis would probably be "permanently" assigned—even though further force reductions might result in abolition of the position the next week.

The award completely confuses the distinction between "regularly assigned employes" and "extra employes" with that between "temporary" and "permanent" assignments. The drastic and sporadic nature of force reductions in the industry have made anything called a "permanent" assignment something of a misnomer. Still, so long as a regularly established job is there and it is filled by assignment of an employe who is entitled by seniority rights to be assigned to fill it that employe is a "regularly assigned employe."

The opinion of the majority of the Board rests entirely on the theory that the agreement providing holiday pay grew out of an Emergency Board recommendation designed to maintain "normal" take-home pay of "regularly assigned employes"; from this premise it concludes that an employe whose prior position has been abolished and who is assigned pursuant to seniority rights to fill a regularly established position for a period expected to be of limited duration has no normal take-home pay and therefore is not within the reason for the holiday pay rule. The fallacy lies in ignoring the fact that the employe does have a normal take-home pay from the position for as long as he is filling it. If a holiday occurs during one of the weeks when he is filling the position and he is not paid for the holiday, he suffers the same loss of normal take-home pay as he would if he were "permanently" assigned to a job that was going to be abolished the following week.

One of the most universally accepted rules of the railroad industry is that any employe assigned to fill a job takes the conditions of that job for the time he is filling it. Irrespective of whether a specific rule of the agreement so specifies, that rule is observed—as it should be under general principles of contract law. This award subverts it.

Edward W. Wiesner
R. W. Blake
Charles E. Goodlin
T. E. Losey
George Wright