Award No. 2463
Docket No. 2343
2-SP(PL)-MA-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES:

1. That under the applicable agreements the Carrier improperly denied Machinist Helpers D. J. Gibson and Charles Odd compensation for the July 4, 1955 Holiday.

2. That, accordingly, the Carrier be ordered to compensate the aforenamed employes in the amount of eight (8) hours at the pro rata hourly rate for the July 4, 1955 Holiday.

EMPLOYES' STATEMENT OF FACTS: D. J. Gibson and Charles Odd, hereinafter referred to as the claimants, are employed by the Southern Pacific Company (Pacific Lines) hereinafter referred to as the carrier, as machinist helpers at its Ogden, Utah Shops.

Claimant Gibson was hired as a new employe shortly prior to July 4, 1955, and during the week in which the July 4, 1955 holiday fell he was assigned to the 3:00 P. M. to 11:00 P. M. shift Friday through Tuesday, with rest days of Wednesday and Thursday.

Claimant Odd returned to carrier's service from military service on June 20, 1955, and during the week in which the July 4, 1955 holiday fell, he was assigned to the 7:00 A. M. to 3:00 P. M. shift, Saturday through Wednesday with rest days of Thursday and Friday. The claimants were required by the carrier to render service on the July 4 holiday in accordance with their assigned work week, for which they were compensated at the time and one-half rate. Each of the claimants worked the assigned days of their work week immediately preceding and following the July 4 holiday.

This dispute has been handled with the carrier up to and including the highest officer so designated by the carrier, with the result that he has declined to adjust it.

The agreement effective April 16, 1942, as it has been subsequently amended, is controlling.

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 the dispute were given due notice of hearing thereon.

The issue here involved is identical to that determined by our Awards 2331 and 2332, involving the same parties. Such awards are in conformity with the language of the Agreement of August 21, 1954 and with other awards of this Division. For the reasons there stated this claim is without merit.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of June, 1957.

DISSENT OF LABOR MEMBERS TO AWARD NO. 2463.

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
James B. Zink