Award No. 2855
Docket No. 2835
2-P&LE-TWUoA-'58

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO

PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND LAKE ERIE & EASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That the Carrier violated a past practice and the present agreement when the Carrier created a new position and did not advertise said position.

That because the Carrier did this, the Carrier be required to compensate Mr. Phillips, Mr. Bacha, Mr. J. C. Parker, Mr. S. Vale, Mr. E. Humphries and Mr. John Janecko as asked for in their claims.

That the Carrier discontinue the practice now put into effect and abide by the present agreement, and past practice that has been in effect on the property of the Carrier.

EMPLOYES' STATEMENT OF FACTS: That in the past bids were posted for all jobs but the foreman jobs. Employes' Exhibit No. 1.

That the jobs were then awarded to employes as per bulletins. Employes' Exhibit No. 2.

That the organization does have a rule that spells out that all vacancies and new positions must be advertised, Rule 39, paragraph (a).

That the carrier did place W. M. Miller on a new position and that even if the carrier claims that this position was a special position such positions have been advertised and awarded in the past. Employes' Exhibit No. 1 and No. 2.

That there are employes who could fill this position given W. M. Miller till such a time that this position was advertised and awarded.

That this dispute arose at Youngstown, Ohio and is known as Case Y-59.

That the Railroad Division, Transport Workers Union of America, AFL-CIO does have a bargaining agreement, effective May 1, 1948 and revised

the work it would have been done at that rate by virtue of the fact that the claimed dates were his rest days. While there is some differences in the awards of this Division upon this point, the better reasoning would seem to support those decisions allowing simply the pro-rata rate. The overtime rule has no application to time not worked, See Awards 1771, 1772, 1782, 1799 and 1825, Second Division. * * * "

When a similar issue was before the Third Division, the Board said in Award 3193:

" * * * In the absence of Agreement to the contrary, the general rule is that the right to work is not the equivalent of work performed so far as the overtime rule is concerned. The overtime rule itself is consonant with this theory when it provided that 'time in excess of (8) hours exclusive of meal period on any day will be considered overtime'. The overtime rule clearly means that work performed in excess of eight hours will be considered overtime. Consequently time not actually worked cannot be treated at overtime rate unless the Agreement specifically provides. This conclusion is supported by this Division Awards 2346, 2695, 3049. * * * "

This same conclusion is also supported by the following Third Division Awards: 3232, 3376, 3251, 3271, 3504, 3745, 3277, 3770, 3371, 3375, 3837, 4073 and 4196.

CONCLUSION

The carrier has hereinbefore conclusively shown that the assignment for which the time is claimed was outside the scope of the carmen's agreement and that work of the nature performed by Mr. Miller between February 6, 1957, and July 1, 1957, has always been performed by employes outside the scope of the carmen's agreement. Further, that there was no loss of assignments under the scope of the carmen's agreement but rather, in reality the carmen gained additional work in view of the fact that on previous occasions the work in question had been performed by regularly assigned gang foremen, piece work inspectors, special inspectors, etc. rather than by establishing an additional special assignment. It has also been shown that there is no rule in the agreement to support payment of the claims.

The carrier respectfully submits the claims are without merit and 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.

The Transport Workers Union claims that the carrier violated a past practice and violated Rule 39 (a) when it utilized employe W. M. Miller, who had been filling "Relief Lead Car Inspector Assignment 501-R" on a special

assignment, determining which bad order cars should be overhauled, and which should be scrapped. It is further claimed that the carrier should discontinue the practice, abide by the agreement and revert to past practice in addition to paying certain employes.

Miller began the special assignment February 6, 1957. On March 26, 1957 assignment 501-R, which Miller had left, was bulletined. Miller was paid an hourly rate equal to that of lead car inspector until July 1, 1957 when he was placed on a monthly salary with the title of special inspector.

Rule 39 (a) provides in part that all vacancies and new positions in the ranks of the employes will be bulletined.

The question which will determine the validity of this claim is: what was Miller's status during the period in question? If he was a car inspector, he was filling a "new position in the ranks of the employes," which should have been bulletined. On the other hand, if he was reinspecting bad order cars which other car inspectors had handled, does such activity make him a supervisor, or management man with discretionary power greater than a regular car inspector and thus outside the ranks covered by the rule.

Many factors must be considered in deciding what a man is and what job title properly describes his occupation. Here the union stresses that he was being paid the same rate as a car inspector. This is good evidence of how a job is rated and classified, but is it not presumptive. Pay is only one factor. Other equally important criteria are the responsibility attached to the task, to whom reports are made by the occupant, how many employes under him, and what supervision is over him, whether his decisions are final or not, and the amount of help given him.

From review of all the evidence, including the past practice showings of both parties, we conclude that Miller was engaged in a subordinate supervisory occupation while he was detached and working on the special assignment of weeding out repairable and nonrepairable cars.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 13th day of May, 1958.