

Award No. 5531
Docket No. 5356
2-PULL-EW-'68

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George S. Ives when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 122, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Electrical Workers)

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

That on Friday, February 18, 1966 The Pullman Company violated Rule 22 when they issued instructions to Electrician L. F. Mathers filling job SE-9 to take gravity readings of batteries on trains ACL 1, SAL 57, COF-M 5 and SW 5 each day.

That accordingly, this being a continuing violation, the Carrier be ordered to pay a call of two (2) hours and forty (40) minutes to an Electrician each day, starting with J. W. Dawsey and continuing down through the following list in rotation:

- | | |
|------------------------|-------------------|
| 2. L. F. Mathers | 10. L. L. Petty |
| 3. R. D. Freeman | 11. A. L. Haney |
| 4. W. L. Taylor | 12. M. Schuster |
| 5. E. T. Dumas | 13. J. T. Tiedge |
| 6. W. J. Van Steenburg | 14. B. F. Curry |
| 7. W. F. Eberhardt | 15. W. C. Beatley |
| 8. W. H. Woodson | 16. C. J. Herrera |
| 9. J. P. Wimberly | 17. J. D. Bonadio |

EMPLOYEES' STATEMENT OF FACTS: The Pullman Company, herein-after referred to as the Carrier, through its Foreman J. M. Keene, posted at Hialeah, Florida, Bulletin No. 4, dated January 26, 1966, listing the following positions for bid:

"Position Number	Title	Duties	Rate of Pay	Scheduled Hours of Service	Assigned Rest Days
SE- 9	Elect.	Starts SAL Station — Precool Trains SAL 22 & ACL 88 Get incoming test trains ACL 1 — SAL 57 — 6 C of M & S W		3:45 P. M. to 11:45 P. M.	Tues. and Wed.

If the parties had intended to confine the duties of an "Exception" position to those named in the "Exception" paragraph, language readily could have been found to express such an intention.

In numerous awards, the various Divisions of the National Railroad Adjustment Board have held firmly to the principle that the burden of proof in a dispute of this kind rests upon the Organization. One of the cornerstone awards bearing on this principle is Third Division denial Award 7362 (Larkin). In that Award the Board stated as follows:

"The burden of establishing facts sufficient to require the allowance of a claim (and proper language in the agreement covering the situations), is upon those who seek the allowances * * *."

Another award is Third Division denial Award 9633 (Johnson), in which the Board stated as follows:

"The burden of proving the claim admittedly rests upon the Claimants. Upon the record we must conclude that no violation of the Agreement has been shown."

Also significant in the instant case is Third Division Award 350 (Coffey), in which Award the following language appears:

"The Statement of Claim amounts to no more than the allegation that the contract has been or is being violated. It is not evidence. The charge, as laid, must be supported by fact. On the theory that the one affirmatively charging a violation is the moving party, and, therefore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called 'burden of proof' doctrine. See Awards 3469, 5345, 5962, 6929, 6839."

CONCLUSION

In this submission the Company has shown that no violation of the "Exception" within Rule 22. Limited Starting Times of the Agreement was violated when the incumbent of the position was temporarily required to perform the additional duty of taking gravity readings. Further, the Company has shown that the provisions of Rule 42. Filling New or Vacant Jobs confirm the correctness of Management's position in this dispute. Rule 42 requires that the normal duties of a job shall be shown on the bulletin and that such bulletining procedure does not require that the miscellaneous duties associated with a job shall also be shown. Finally, the Company has shown the Organization has not brought forward sufficient facts to prove its claim that there was any violation of any contract provision in the matter complained of.

Inasmuch as there has been no violation of Rule 22 of the Agreement or of any other provision of any applicable Agreement, the Organization's claim in this case is without merit and it should be denied.

(Exhibits not reproduced.)

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.

Parties to said dispute were given due notice of hearing thereon.

The fundamental facts involved in this dispute are not in issue.

The incumbent of position SE-9 at Hialeah, Florida, and "Exception" position established under Rule 22 of the effective Agreement between the parties, was required to take gravity readings of the batteries on certain trains in addition to performing service such as station duty, precooling or incoming tests which are the only specified duties set forth in the "Exception" paragraph to Rule 22. Petitioner contends that Rule 22 of the Agreement was violated, and that Claimant Electricians were damaged as Carrier's action reduced the work opportunities available to them on a call basis outside of the regular bulletined hours. Accordingly, Petitioner requests that each of the employees named in the claim in succession be credited with 2:40 hours under Rule 33 of the Agreement for each date on which the violations continued.

Carrier contends that Rule 22 of the Agreement is concerned only with limited starting times and not the particular duties of various positions, including the duties assigned to the "Exception" position. Furthermore, the Carrier insists that Rule 42 of the Agreement is controlling as to the duties of bulletined positions, and that miscellaneous duties may be assigned to bulletined positions in addition to the normal duties thereof.

In the first instance, the record reveals that the disputed assignment was confined to the period between February 18 and February 25, 1966, inclusive. Consequently, only the first eight named claimants would be entitled to damages arising out of the alleged violation of Rule 22 of the Agreement by Carrier.

Rule 22 is entitled "Limited Starting Times" and is primarily concerned various starting times required in a Pullman yard to handle the work load in a satisfactory manner. The "Exception" paragraph enables the Carrier to negotiate with the Petitioner for the performance of certain service at starting times not provided for in the Rule, which starting times shall not be established between the hours of 12:00 midnight and 6:00 A. M. The particular services encompassed by the "Exception" are described in the following manner:

"Exception: Where the requirements of the service necessitate the assignment of employes (in any case not to exceed two employes) to perform service such as station duty, precooling or incoming test, commencing at starting times not provided for in this rule, * * *."
(Emphasis ours.)

Carrier urges that only the starting times are subject to mutual agreement and not the duties assigned to the "Exception" position. Moreover, Carrier avers that the words "such as", which precede the specific duties set

forth in the Exception to Rule 22, are simply used to introduce examples and are not restrictive.

Petitioner contends that if duties other than station duty, precooling or incoming tests are assigned to the incumbent of the "Exception" position, such duties must be like or similar to those specified in the "Exception" paragraph. Furthermore, Petitioner avers that taking gravity readings is not a service that can be considered as like or similar to station duty, precooling or incoming tests because the latter are all running repair work, whereas gravity reading on batteries is work performed in the service yard in connection with scheduled inspections and repair of Pullman cars.

Analysis of the record reveals that it is commonplace for bulletins issued by Carrier in advertising vacancies to show the normal duties and also to include the following general words "and other duties as assigned." The bulletin posted on January 26, 1966, advertising the "Exception" position involved in this dispute, contains no such general words, but merely describes the particular duties specified in the "Exception" to Rule 22.

The presence of the words "such as" immediately preceding specified types of service in the "Exception" to Rule 22 clearly indicates that the parties intended to confine or restrict application to service of the same general nature or class as those types of service enumerated therein. This conclusion is further supported by the fact that the bulletin advertising the "Exception" position did not include the general words "and other duties as assigned," which normally are included in Carrier's bulletin advertising vacancies. Moreover, Petitioner avers that Electricians holding the "Exception" position had never been required to take gravity readings in the past, which is a duty regularly assigned to Electricians holding service yard positions. In view of the foregoing, we find that the doctrine of ejusdem generis is applicable, and that Carrier violated Rule 22 of the controlling Agreement. Therefore, the claim will be sustained as modified herein.

AWARD

Claim is sustained as modified by the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1960.