Award No. 5937
Docket No. 5828-I
2-PULL-I-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

MR. FRANK J. HOGAN (ELECTRICIAN)

THE PULLMAN COMPANY

DISPUTE: CLAIM OF EMPLOYES:

(a) The employee, Frank J. Hogan, claims a separation allowance in accordance with the provisions of the Memorandum Agreement between The Pullman Company and System Federation No. 122, Railway Employees' Department, dated January 16, 1969, a copy of which is attached hereto and marked "Exhibit A'; and

(b) The employee, Frank J. Hogan, claims a coordination or "transfer of work" allowance in accordance with the provisions of the agreement dated July 19, 1966, Article One, Sections Two and Six, a copy of the relevant provisions of which is attached hereto and marked "Exhibit B".

PETITIONER'S STATEMENT OF THE FACTS: In October of 1967. after more than forty (40) years of faithful service as an employee of The Pullman Company, Mr. Hogan received written notice for the first time that he was to be deprived of his employment.

Thereafter Mr. Hogan was assigned to work for the company on two occasions in October and November of 1968. He was employed for a Fourteen- (14) day period from on or about October 12, 1968, to on or about October 25, 1968, and from on or about November 9, 1968, to on or about November 22, 1968.

After completion of the latter period, Mr. Hogan received and commenced a four (4) week paid vacation which had accrued to him in accordance with his 1967 work schedule.

At no time after either of the aforementioned fourteen- (14) day work periods did Mr. Hogan receive notice of furlough pursuant to rule 48 of the agreement between The Pullman Company and the electrical workers, dated July 1, 1948, and amended as of April 1, 1958.

The Pullman Company has for a substantial period of time anticipated the transfer of work and has in fact turned over all of the servicing of its sleeping cars to the individual railroads.

Despite forty (40) years seniority with The Pullman Company, Mr. Hogan did not receive any severance pay, coordination or transfer of work al-

In the absence of Electrician F. J. Hogan presenting his dispute on the property as required by article IV, section 1 of the January 16, 1969 memorandum of agreement, The Pullman Company is limited in commenting regarding the merits of this case as it has no way of knowing what Mr. Hogan's contentions may be beyond the brief statement contained in his letter to the Railroad Adjustment Board of April 30, 1969.

CONCLUSION: In this ex parte submission the company has shown that the claim filed by Frank J. Hogan, in his behalf, with the Second Division, National Railroad Adjustment Board, was not previously presented on the property as required by section 1 of article IV of the January 16, 1969 agreement. It has also been shown that had Mr. Hogan's claim been properly presented as stipulated in such agreement, there is no merit to the contention set forth by him in his letter to your Honorable Board, dated April 30, 1969.

This dispute not having been properly submitted to the Second Division, National Railroad Adjustment Board it should be dismissed for lack of jurisdiction. In any event, the record does not disclose any misapplication of the January 16, 1969 memorandum of agreement as alleged, and on that basis the claim is lacking in 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.

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

Claimant is contending that he is entitled to (1) a separation allowance under the January 16, 1969 Agreement, and (2) a transfer of work allowance under the July 19, 1966 Agreement.

Claimant, an electrician, with approximately 40 years' service was furloughed from Carrier's employment in October of 1967. Claimant worked two 14 days' work periods during 1968, namely from October 12 to October 25, and from November 9 to November 22.

Claimant's position is (1) that inasmuch as Claimant did not receive notice of furlough after his two 14 days' work periods in 1968 pursuant to the requirements of Rule 48, then he was in active service on January 1, 1969 and thus can be considered as an employe holding an assignment or in the process of transferring from one assignment to another; (2) that any job vacancy of more than 10 calendar days' duration is permanent as evidenced by Rule 42, and therefore Claimant held a permanent job when he worked both 14 day periods in 1968; (3) that since Claimant was first deprived of employment in October of 1967 as involuntary discontinuance of contracts", thus he comes within the scope of the protective benefits set forth in Section 2 of Article I of the July 19, 1966 Agreement; that the burden of proving otherwise is on Carrier under Section 3 of Article I of the July 19, 1966 Agreement.

Carrier's defense to this claim is based on: (1) paragraph (b) is an additional claim not included in Claimant's original notice to this Board thus constituting an enlargement of his claim and thus contrary to Circular No. 1, the Board's Rules of Procedure; (2) Claimant was furloughed and not in active service on January 1, 1969 and therefore precluded from the benefits

of the January 16, 1969 Agreement; (3) that any dispute involving the July 19, 1966 Agreement must be referred to the Special Board of Adjustment No. 570 under Article 5 of said July 19, 1966 Agreement.

In regard to paragraph (a) of the Statement of Claim, Claimant is relying on Article I, Section 1(a), of the January 16, 1969 Agreement, captioned "Protected Employes", and provides as follows:

> "Section 1(a)—All employes who were in active service on January 1, 1969, will, if furloughed, be entitled to a separation allowance as hereinafter provided unless or until retired, discharged for cause or otherwise removed by natural attrition. For the purpose of this Agreement, the term 'active service' is defined to include all employes working, or holding an assignment, or in the process of transferring from one assignment to another (whether or not the effective date of this Agreement was a work day), or in military service."

Claimant also cites Section 1(b) of said Article I of the January 16, 1969 Agreement as follows:

"Section 1(b)—The term 'employes who were in active service' does not include any employe who was on furlough on January 1, 1969 . . ."

Thus, we must determine whether or not Claimant was in "active service" on January 1, 1969. If he was, then we must sustain this portion of the claim, or vice versa, if he was not in active service as of said date.

Claimant relies on Carrier's alleged failure to give him notice of furlough after working said two 14 day periods in 1968, as required by Rule 48 of the Agreement, which states as follows:

> "Rule 48. Not less than five working days' notice (exclusive of day notice is served) shall be given to employees to be furloughed before a reduction in force is made and names of employees to be furloughed shall be furnished the Chairman of the local committee.
>
> "Should the services of an employee who has been notified of a furlough be required temporarily to fill the place of an absent employee he may be retained in the service until the return of the absent employee and then furloughed without being given a second notice of furlough."

Claimant contends that the key issue is whether or not his employment in 1968 based on custom, usage and usual understanding between The Pullman Company and the Electrical Workers was a permanent or temporary position, and that if this Board determines the position was permanent, then Carrier failed to comply with said Rule 48 in regard to notice of furlough and Claimant therefore is entitled to the separation allowance as provided by the January 16, 1969 amendment to the July 19, 1966 Agreement. Claimant further argues that Rule 42 of the Agreement lends support to the interpretation that any job vacancy of more than 10 calendar days' duration is permanent.

In support of his position, Claimant has filed an affidavit in which, among other things, he states that he was recalled on or about October 12, 1968 to fill a permanent position known to be of more than ten (10) calendar days' duration (i.e., up to and including on or about October 25, 1968) and on or about ten (10) calendar days' duration (i.e., up to and including November 22, 1968). Claimant does not state whether or not the positions he filled on these days were permanent vacancies. Carrier, in its ex parte submission to this Board alleged that Claimant, on the dates in question, relieved electricians, who were on vacation or ill, on the dates in question; that Rules 48 and

42 are not applicable herein because of no increase or decrease in the number of assignments or vacancies in such assignments; that Article 17 of the Vacation Agreement specifically provides that the absence of an employe on vacation will not constitute a vacancy on his position.

Claimant did not refute these assertions of carrier that Claimant temporarily relieved electricians who were on vacation or ill, and thus under Rule 48 of the Agreement involving a furloughed employe who is temporarily required to fill the place of an absent employe, Carrier is not required to give a second notice of furlough. Thus, Claimant's contention in this regard is without merit and must be denied.

Therefore, inasmuch as Claimant was on furlough on January 1, 1969 and this not in active service on such date, paragraph (a) of his claim is denied.

Concerning paragraph (b) of the Statement of Claim, Claimant is contending that Article I, Section 2, of the July 19, 1966 Agreement, involving "transfer of work" provisions, was violated. Carrier argues that inasmuch as Article V of said July 19, 1966 Agreement specifically provides for dispute involving said Article I of said Agreement to be submitted to a Shop Craft Special Board of Adjustment, namely No. 570, then this Board is without jurisdiction to hear any dispute concerning said provision of the July 19, 1966 Agreement. With this contention, we agree. Therefore, we conclude that we cannot consider the merits of the dispute as set forth in paragraph (b) of this Statement of Claim inasmuch as said claim should be brought before the Special Board of Adjustment No. 570 for determination. We are compelled to dismiss said portion of the claim, i.e., paragraph (b) of the Statement of Claim, without prejudice to Claimant bringing said portion of his claim before said Special Board of Adjustment No. 570 for determination.

AWARD

Paragraph (a) of the claim is denied.

Paragraph (b) of the claim is dismissed without prejudice.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 20th day of May, 1970.

CARRIER MEMBERS' CONCURRENCE TO AWARD 5937, DOCKET NO. 5828-I

REFEREE PAUL C. DUGAN

We concur in the dismissal of Item (b) of the Employe's claim, but not for the reason stated. Had Item (b) been procedurally properly before the Division, dismissal for the reason stated would be correct; however, Item (b) was not procedurally properly before the Division.

Claimant was advised of the procedure to be followed in referring disputes to the Division and pursuant to Circular No. 1 he filed a notice of intent, setting forth therein the question involved. The substance of this notice, while in different form, corresponded to Item (a) of the claim and this was the dispute on which the Division requested the Company to file a submission. The Company responded accordingly; however, Claimant, in his submission

enlarged the claim to include a dispute (Item (b)) which was not a part of and totally unrelated to the dispute set forth in his notice of intent. This was contrary to Circular No. 1 and it was improper to consider Item (b) in any respect.

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J. R. Mathieu

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