Award No. 4849
Docket No. MW-4801

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the provisions of the effective agreement in November, 1947, by failing to pay to Extra Gang Foreman Frank Gush the monthly rate of Extra Gang Foreman for the entire month;

(2) That Frank Gush be paid the difference between what he did receive at the Section Foreman's rate of pay and what he should have received at the Extra Gang Foreman's rate of pay from November 16 to November 30, 1947, both dates inclusive.

EMPLOYES' STATEMENT OF FACTS: Prior to November 15, 1947, Frank Gush was temporarily working as an Extra Gang Foreman at Elmira, New York. He had been employed in such a capacity through the entire period of November 1 to November 15, 1947, but effective on that date, November 15, 1947, the Extra Gang Foreman position was abolished. Proper notification was given Foreman Gush and he subsequently as of November 17, 1947, displaced on a position of Section Foreman at Ithaca, New York.

During the periods referred to Foreman Gush was paid as follows:

During the period November 1 to November 15, inclusive, he was paid as an Extra Gang Foreman.

During the period of November 17 through November 30, 1947, he was paid at the rate of a Section Foreman.

Extra Gang Foreman's rate is higher than that of a Section Foreman.

The Employes have contended that in accordance with the effective Agreement, Claimant Frank Gush should have been compensated the entire month of November at the Extra Gang Foreman's rate. The Carrier has denied our claim and has contended that it was proper to pay this employe the first half of the month at the higher rate of Extra Gang Foreman while he was so employed, and at the lower rate of Section Foreman the last half of the month while he was employed in such a capacity.

The Agreement in effect between the two parties to this dispute, dated July 14, 1941, and subsequent amendments and interpretations, in particular the Supplementary Agreement effective December 16, 1944, are by reference made a part of this Statement of Facts.

From the foregoing it is seen that Award 3756 predicated as it was on facts diametrically opposed to those of the instant case, not only does not govern the instant claim but, on the contrary, requires its denial.

> "Precedents must be weighed in the light of the facts upon which they are predicated."

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Here, the very reverse of the facts obtaining in the Lehigh Valley case appears.

The abolition of the Extra Gang Foreman's position was the result of a general force reduction not a "curtailment of hours or days worked" on such position.

Rule 3 provides that

> "(c) Track Foremen * * * laid off on account of force reduction will be permitted to displace junior employes in lower classes on their own seniority district in track sub-department."

Mr. Gush was permitted to displace a junior employe in accordance with the rule and paid the rate of the foreman he displaced after the abolition of the Extra Gang Foreman's position on November 15, 1947.

It is clear, therefore, that he was paid everything he was entitled to under the agreement in effect on this property, the interpretation of which is well evidenced by the Local Chairman's concurrence with Roadmaster Elston that the claim should be disallowed.

OPINION OF BOARD: Claimant was employed and paid as an extra Gang Foreman for the period November 1 to November 15, 1947. The position was abolished on November 15, 1947, and claimant displaced and worked as a Section Foreman the balance of the month. He was paid at the Section Foreman's rate for the last half of the month. He contends that he should have been paid at the Extra Gang Foreman's rate for the whole of the month of November.

The applicable rule is that part of Rule 15 (a), current Agreement, providing:

> "(a) Track Foremen, Gardener Foremen, Repairmen, Assistant Repairmen, Crane Operators, Rock Inspectors, Treating Plant Foremen and Scalemen who are now paid on a monthly basis will be paid a flat monthly salary with additional payment for overtime, Sundays and Holidays in accordance with Rule 18 a, b, and c, and without deduction in the flat monthly salary account of of curtailment of hours or days worked.
>
> For overtime purposes only, the hourly rate of the above-mentioned monthly rated employes will be determined by deducting Fifteen ($15.00) from the monthly salary and divide the difference by 204 hours. All overtime will be added to the present monthly salary."

The foregoing rule provides for paying the employes within it on a monthly basis. It is not a monthly guarantee rule. The collective Agreements with which we here deal are not contracts of employment as to time. The Carrier merely agrees to give all the work of a class to that class and fixes the rate of payment therefor. When there is no work of a position to be performed, the position may be abolished. This is what happened in the present case and claimant was required to exercise his seniority and displacement rights. When he displaces because of force reduction, he takes the rate of the position he assumes. The rate of a position is paid only so long as there is work of the position to be performed. When the work of the position disappears, the Carrier can abolish the position without penalty. Specific guarantee rules may provide for a rate of pay based on other considerations, but we have no guarantee rule in the present case, nor a contract of employment for a definite period. There is no merit in the claim.

The Organization relies upon Award 3756. In that dispute, the Board relied upon certain facts that were deemed controlling that are not present here. In that case, the practice was contrary to that which existed here. The Carrier had sought unsuccessfully to change it by negotiating a new rule, thereby recognizing the existence of the practice for which the Organization contended. The issues upon which the result hinged were so different from those in the present case that Award 3756 cannot be deemed a controlling precedent.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 28th day of April, 1950.