Award No. 8680
Docket No. MW-7916

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Carrier violated the effective Agreement when it failed and refused to allow the full flat monthly rate of pay to certain employes whose monthly-rated positions were abolished on or about December 11, 1953.

(2) That Welder George R. Lawton, Cook John T. Tamsett, Painter Foreman Patsy Delello, Painter Foreman Harry C. Congdon, Master Carpenter R. A. Pearce and all other monthly-rated employes who suffered a monetary loss because of the violation referred to in part (1) of this claim be reimbursed for the exact amount of monetary loss suffered.

(3) A joint check be made of the Carrier's records in order that monetary losses resulting to George R. Lawton, et al, may be properly and accurately ascertained.

EMPLOYES' STATEMENT OF FACTS: On or about December 11, 1953, the Carrier abolished certain monthly rated positions, thereby causing the occupants thereof to become furloughed employes and only being paid for the days on which they had actually performed service during that month. At the same time, positions of other monthly rated employes were abolished and the employes holding these latter positions were required to exercise their seniority rights in displacing junior hourly rated employes. These latter monthly rated employes were paid on the basis of their monthly rate only for the days on which they had actually performed service while occupying such positions. The basis of pay for the aforementioned monthly-rated employes contemplate that they be paid a flat monthly salary without deduction from the monthly salary account of curtailment in hours or days worked.

Claim was filed in behalf of the above referred to monthly rated employes for the differences in pay between what they did receive and what they should have received for service performed during the month of December, 1953.

in the Carrier's service. Even though a monthly rate of pay should be held to indicate a hiring for the month, the right given the Carrier by Rule 3 of the subject agreement to reduce forces for legitimate reasons, subject to seniority rights, dispels any idea of permanency, or the hiring of a term, in any given position."

Certain monthly-rated positions were abolished in a force reduction and the employes affected exercised their seniority in accordance with agreement rules. Claim in this case is not supported by agreement rules and carrier respectfully requests that it be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made a part of the particular question in dispute.

OPINION OF BOARD: This case must turn on Organization's version of paragraph (a), Rule 20, which reads:

"(a) **Basis of Pay for Monthly Rated Employes:** Employes working on a monthly basis will be paid a flat monthly salary without deduction from the monthly salary account curtailment in hours or days worked. This flat monthly salary shall be the basic monthly rate for a month of 169⅓ hours. * * *"

Argument offered in behalf of the Organization states that "under the rules these employes are entitled to a flat monthly salary **without deduction** because of curtailment of days or hours, and under the rules the claim must be allowed because Carrier failed to comply with the Agreement in disallowing the claim."

Organization is referring to this portion of the Agreement of August 21, 1954:

"* * * With respect to claim or grievances filed prior to the effective date of this rule the claims or grievances must be ruled on or appealed, as the case may be, within 60 days after the effective date of this rule and if not thereafter handled pursuant to paragraphs (b) and (c) of Section 1 of this rule the claims or grievances shall be barred or allowed as presented, * * *"

Argument offered in behalf of the Organization states:

"It will be immediately apparent to the Referee that Carrier is required to render its decision within 60 days after the effective date of this rule and that it must be handled **in accordance with paragraphs (b) and (c) of Section 1** of the rule **or** the **claim shall be allowed** as presented."

Organization's position on this point is not correct. All that paragraph 2 requires is that (and this is a claim filed prior to the effective date of the Agreement referred to)—

"* * * the claims or grievances must be ruled on or appealed * * * within 60 days after the effective date (January 1, 1955) of this rule, * * *."

Carrier did all that was required by the rule. It ruled on the claim on January 24, 1955.

The remainder of the sentence relied on by the Organization has no application here because it simply says—

"and if not thereafter handled * * *."

Conceivably, such handling "thereafter" (i.e., "after" denial by the Carrier, as here) would, in this case, refer to the Organization for the Carrier had denied the claim within 60 days after January 1, 1955. The handling "thereafter" in this case was Organization's notice to this Division of its intention to file with the Division the dispute and its ex parte submission in support of such dispute. Carrier met the requirements of the rule.

The facts in this case are not in dispute.

A number of awards have been cited by or in behalf of the Organization in support of its position.

The three sustaining awards most heavily relied on by the Organization are 759 (Swacker), 2975 (Douglas) and 3756 (Swaim).

In Award 759, the claimants there involved were "laid off for a few days of the month." The award does say, however, that "a hiring at a stipulated rate of pay for a term, will, in the absence of contrary evidence, be deemed to be a hiring for the term."

The claimants in Award 2975 likewise were laid off.

In Award 3756, the Carrier did abolish claimant's position. The award held that "If the employe under this Rule was given a contract of employment for a month the Carrier could not shorten the term of the employment by its own action."

Organization argues that Rule 20(a) is not ambiguous. "It very plainly provides," the Organization argues, "that monthly rated employes will be paid a **flat monthly salary without deduction from such monthly salary account curtailment in hours or days worked.** Rules 20 and 36 definitely comprehend and provide that the month is to be considered as a unit; that such employes are to be compensated for service rendered during this period, and that such service is to be paid for at the agreed-to monthly rate of pay. * * *" "Each of the claimant monthly-rated employes were available to perform the work which they had contracted to perform and for which the Carrier had contracted to compensate them."

We can agree with much of Organization's argument. We must point out, however, that there was no "curtailment in hours or days worked" in the instant case. Claimants were not laid off, as in Awards 759 and 2975.

Their positions were abolished, and when so abolished, everything pertaining to the positions was abolished with them. They just ceased to exist. One cannot curtail that which does not exist.

Organization offers the argument that the—

> "* * * **only exception** to the requirement to pay the flat monthly rate without any deductions therefrom account of curtailment in hours or days worked applies to seasonal or extra employes. Not a single one of the claimant employes was or is either a seasonal employe or an

extra employe. **Where one or more exceptions to a rule are expressed no other or further exceptions will be permitted to be implied."** (Emphasis theirs.)

We are not concerned with that point in the case before us. We are making no exceptions to the rule.

There being no question about Carrier's right to abolish the jobs in question, there should be no question that when they are abolished they cease to exist.

We must and will agree with what was said in Award 4849 (Carter):

"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 rule here in question does provide, as Organization asserts, the guarantees therein spelled out so long as the position exists. It does not, as we held in Award 4849, provide a contract of employment as to time. The claim will be denied.

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. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January, 1959.