Award No. 11406
Docket No. MW-10901

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective Agreement when, during the period from June 10, 1957 through June 14, 1957, it suspended Garage Service Man W. Loving from his regularly assigned position and required him to work another position.

(2) Mr. Loving be allowed eight hours' straight time pay for each day he was withheld from his regularly assigned position.

(3) Mr. Loving be allowed the difference between what he received on the other position at the straight time rate and what he should have received at the time and one-half rate for June 11, 12, 13 and 14, 1957.

EMPLOYES' STATEMENT OF FACTS: The claimant, Mr. W. Loving, was regularly assigned to the position of Garage Service Man on the day shift from 8:00 A. M. to 4:30 P. M., whereas Garage Service Man Guzman was regularly assigned as such on the second shift from 3:30 P. M. to 12:00 midnight at Gary, Indiana.

During the period from June 10, 1957 through June 14, 1957 Garage Service Man Guzman was accorded his annual paid vacation.

Commencing on June 10, 1957 and continuing through June 4, 1957 claimant Loving was suspended from his regularly assigned position and was required to fill Mr. Guzman's position while he was on vacation. The claimant was paid at the applicable time and one-half rate of Mr. Guzman's position for June 10, 1957 and at the straight time rate of that position for June 11, 12, 13 and 14, 1957.

Consequently, the claim as set forth herein was presented and handled in the usual manner on the property and was declined at all stages of the appeals procedure.

All material data included herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF BOARD: The Claimant, W. Loving, was regularly assigned to the position of Garage Service Man on the day shift from 8:00 A. M. to 4:30 P. M.; Garage Service Man Guzman was regularly assigned as such on the second shift from 3:30 P. M. to 12:00 Midnight at Gary, Indiana.

During the period from June 10, 1957, through June 14, 1957, Garage Service Man Guzman was accorded his annual paid vacation; commencing on June 10, 1957, and continuing through June 14, 1957, Claimant Loving was suspended from his regularly assigned position and required to fill Guzman's position while he was on vacation and was paid at time and one-half rate of his (Guzman's) position for June 10, 1957, and at the straight time rate of that position for June 11, 12, 13 and 14, 1957.

Employes contend that when a Garage Service Man is assigned to a regular bulletined position he is entitled to and must occupy that position until such time as one of the following events occur — the position is abolished, the assignee is displaced therefrom, or the assignee makes application for and is assigned to another bulletined position; it is their contention that none of these eventualities occurred here.

It is the contention of the Claimant that he was required to suspend work during his regularly assigned work period on the dates in question for the purpose of absorbing overtime in violation of Rule 25(c) and Rule 31 of the Agreement.

Rule 25(c) has no application to the immediate matter as there was no change in the regular assigned hours of the employe.

Rule 31 of the Agreement is, as follows:

"ABSORBING OVERTIME

"Rule 31. Employes will not be required to suspend work during any assigned work period for the purpose of absorbing overtime."

It is the position of the Carrier that Rule 31 sets up two requirements that must be met before a violation can be established — (1) that an employe must be required to suspend work during an assigned work period and (2) Carrier must have required the employe to take this action for the purpose of absorbing overtime.

Claimant, on the other hand, contends that if the effect of suspending work during any assigned work period is to absorb overtime that is sufficient to establish an intent or purpose on the part of the Carrier to absorb overtime and establishes that there has been a violation of Rule 31 and cites a number of awards in support of Claimant's position.

In denial of Claimant's contention, Carrier asserts that the burden is upon the Claimant to establish by a fair preponderance of the evidence that the Carrier has violated the Agreement and specifically, has failed to establish that Carrier by its action suspended Claimant Loving from his assigned working period for the purpose of absorbing overtime; that we have a right to presume as well that the Carrier acted for a proper purpose such as avoiding the hiring of a new employe or avoiding taking other permissible action such as making a short layoff of a junior man not required on the first shift thus making such

employe available for work on the second shift; it further asserts that the Claimant has admitted that Carrier might have properly employed a relief employe for this position at the straight time rate of pay. The Carrier further maintains that what was done here was in compliance with the Rules of the Agreement including the Vacation Agreement and cites the following Rules in support of its position:

"Rule 12. (c)

"New positions or vacancies of thirty (30) calendar days or less duration shall be considered temporary and may be filled without bulletining except that senior unassigned employes in the seniority rank will be given preference in assignments, if available. Such assignment not subject to displacement."

"Rue 32.

"The management shall have the right to reduce the number of gangs but gangs will not be laid off for short periods when proper reduction of employes can be accomplished by first laying off junior employes."

12 (a) and (b) of the Vacation Agreement provide as follows:

"12. (a) Except as otherwise provided in this agreement a carrier shall not be required to assume greater expense because of granting a vacation than would be incurred if an employe were not granted a vacation and was paid in lieu therefor under the provision hereof. . . ."

"(b) As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief employe is not utilized, effort will be made to observe the principle of seniority."

In Award 10957 (Dolnick) this Board made the following pronouncement: "The National Vacation Agreement permits the Carrier to use regular employes to relieve employes on vacation when no qualified extra employes are available. This is true even though the Carrier shifts regular employes around to take care of the vacation absence."

That Rule 31 has not been abrogated by the Vacation Agreement has been held in prior Awards of this Board; every effort should be made to reconcile it with the Vacation Agreement. Claimant does have the burden of establishing that the work period of the employe was suspended for the purpose of absorbing overtime. Though suspension of the work period is an essential element of the Rule and a presumption that the Agreement has been violated may be drawn from the fact of suspension if the result is the absorbing of some overtime, it is not a conclusive presumption and may be overcome by the facts and circumstances involved in a particular case. The Rule is not violated and is not involved where an employe, as in this case, is temporarily transferred from his regular assignment to another assignment in accordance with all the rules of the Agreement and merely works the assigned hours of the position to which he is transferred. That is the situation here so consequently this presumption has been overcome.

Under all the facts and circumstances herein, we cannot find that Claimant has sustained the burden of proof required to establish that suspending the work period of the employe, Loving, was for the purpose of absorbing overtime.

Having reached this conclusion, there is no necessity for us to consider in this Opinion the application of Rule 62 of the Agreement which has to do with confining time claims to actual pecuniary loss.

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 has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1963.