NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number24756

THIRD DIVISION Docket Number MW-23860

Josef P. Sirefman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it laid off Section Laborers D. A. Poncelow and D. D. Rote on June 4, 1979 without benefit of five (5) days' advance notice (System File C#69/D-2358).

(2) Each of the above-named claimants be allowed forty (40) hours of pay at their respective straight-time rates because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: Section Laborers D. A. Poncelow and D. D. Rote, the Claimants herein, were furloughed employes called back to work. Their positions were not bulletined, and on June 4, 1979 their foreman notified them that they would be laid off at the close of work that day. The Organization contends that as regularly assigned employes, Claimants were entitled to "Not less than five (5) working days' advance notice" of the layoff under Rule 9(d). The Carrier contends that their employes were taken back to work on a temporary basis for less than 30 days, working from day to day; and there was no need to bulletin their positions. Therefore, these Claimants were unassigned rather than regularly assigned employes and were not entitled to the five day notice.

Third Division Awards 15894, 12180, 14325, and 14828 are germane. In Award 15894, involving the same Carrier as in this claim, Referee Heskett held:

> "Claimant Heater after years of service, was laid off as the result of force reduction. However, he was assigned to fill a newly established unbulletined position on 20 November, 1961, and he received compensation credited by Carrier to the work days immediately preceding and following the Thanksgiving Holiday, 23 November 1961.
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> Organization contends that Carrier violated the terms of the Agreement when it refused to allow Claimant eight hours' straight time pay for the aforementioned holiday. Carrier contends that Claimant was not a 'regularly assigned employe' but was a furloughed employe occupying a temporary position who was not due holiday pay.
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> The record discloses that Claimant did not fill the position of any other regularly assigned employe, that he was assigned to and identified with a specific position, that the position was newly created to increase the force and that he held said position until the Fall of 1962, approximately one year. The fact that the position was not properly bulletined under Rule 8(c) is conjectural and immaterial. Claimant was not a furloughed employe temporarily filling a position owned by another--he was a 'regularly assigned employe' within the meaning of the Agreement. Awards 14325 (Dorsey), 12180 (Kane)."

This Award relies upon 12180 whose pertinent part reads:

"The Claimants were employed as regularly assigned section laborers and laid off April 30, 1958 due to a reduction in force. on May 1, 1958, they made application for and were assigned to jobs with a tamping gang and worked there until October 31, 1958. This claim is for holiday pay on Decoration Day, May 30, 1958. The Claimants worked on the day prior to and subsequent to the holiday. The Carrier contended that according to Article II Section 1 of the Agreement they were not regularly assigned employes on May 30, 1958 and not entitled to holiday pay although complying with Section 3, in that they worked before and after the holiday.

An examination of the pertinent facts in this dispute reveals that the Claimants complied with all the requirements for holiday pay. The basic issue being: Were the Claimants regularly assigned to this job? Our answer is yes. They did not fill vacation vacancies, sick leave, or any of the innumerable types of temporary positions that are illustrated in the awards."

and upon Award 14325 where Referee Dorsey dealt with a job's "duration":

"Then Carrier goes on to say that:

> 'A 'regularly assigned' employe is universally understood to refer to an individual who is identified with a specific job for indefinite duration, subject only to displacement by a senior employe or as a result of the job being abolished in accordance with the agreement. Such employes are in an entirely different category from extra or furloughed employes who are assigned to fill the places of regularly assigned employes or to work for brief periods as additions to the force.'

For the purposes of this case we will accept Carrier's definition of 'regularly assigned'; but, we disagree that employes assigned 'to work for brief periods as additions to the force' cannot be held to be 'regularly assigned' to a position.

The record reveals that Claimant was not filling the place of any regularly assigned employe. He was assigned to and identified with a specific position for indefinite duration, subject only to displacement by a senior employe or as a result of the job being abolished in accordance with the agreement. That the position was newly created to increase the force for an indefinite period does not detract from Claimant's ownership of the position subject to the contingencies spelled out in Carrier's definition of 'regularly assigned.'. With the Carrier having the right to reduce forces and abolish positions, all positions can be said to be of 'indefinite duration.' Even bulletined positions designated as permanent may turn out to be 'for brief periods as additions to the force.'

Carrier would have us equate Claimant's status to that of an extra employe; or, a furloughed employe temporarily filling a position owned by an absent employe. The record does not support the argument."

In Award 14828, Referee Engelstein emphasized that the intermittent nature of the available work did not mean the Claimant was not a regularly assigned employe:

"Carrier maintains that Mr. Creel retained his seniority rights in Gang No. 7, but that he had no seniority as a section laborer with Gang No. 346. It argues that he performed temporary work with this gang and was not a substitute for a regular employe. As a casual employe he was not subject to the 96 hours' notice required by the Mediation Agreement of October 7, 1959.

Although the work at the Centralia Welding Plant is sporadic and the size of welding gang No. 346 is increased or decreased depending upon economic needs, the work was not unplanned or of an emergency nature. The fact that Mr. Creel was assigned for brief and uncertain periods to assist the rail welding gang in unloading rail when it was received from the steel mills did not make him a casual laborer. He still maintained his status as a regularly employed and assigned laborer and therefore he was entitled to 96 hours' furlough notice. In fact, Carrier recognized him as a regular employe, for it gave Mr. Creel 36 hours' notice based upon what it regarded as the existing rule for furlough notice to regular assigned employes. The 36 hour rule had however been changed to 96 hours' advance notice.

We find that Carrier violated Article IV of the Mediation Agreement and section laborer Frank Creel is allowed two days' pay at straight time rate."

A review of this record by the Board establishes that the Claimants were clearly identified with newly created positions, and were not filling in for other employes out on vacation, on sick or other types of leaves. Therefore, the conclusion is that the Claimants were regularly assigned employes for the purpose of receiving Rule 9(d) notice and therefore are entitled to five days pay.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.