Award No. 7192
Docket No. MS-6747

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wycoff, Referee

PARTIES TO DISPUTE:

UNITED RAILROAD WORKERS OF AMERICA, C. I. O.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

STATEMENT OF CLAIM: (1). That the Carrier violated the effective agreement when on September 13, 14, 20, 21, 27, 28, 1951 it used employes without seniority in the Oiler classification to fill temporary vacancy in Oilers position.

(2). That the Carrier be required to pay Mr. L. E. McCall, hereinafter referred to as the Claimant, eight (8) hours at time and one half for September 13, 14, 20, 21, 27, and 28, 1951.

EMPLOYES' STATEMENT OF FACTS: There is an agreement in effect between the parties dated September 1, 1947, Amended September 1, 1949, known as the Ice Plants Agreement, Copy of which is on file with the Board, and is by reference made a part of Statement of Facts.

Claimant was regularly assigned to a position of Oiler with assigned working hours from 3:00 P. M. to 11:00 P. M. with rest days being Thursday and Friday of each week.

September 13, 14, 20, 21, 27, and 28, 1951 were the rest days of the claimant, the carrier on those dates assigned the work of Oiler to an employe then holding a regularly assigned position of Ice Handler, who held no seniority as Oiler.

Claimant was available and willing to perform Oilers work on his rest days, but was not called.

POSITION OF EMPLOYES: It is the position of the employes that the assigning of work of the Oilers classification to employes without seniority in such classification is a violation of the seniority provisions of Article 3, Section 1 and 2 and Article 4, Sections 1, 2, 3, and 4, which read as follows:

ARTICLE III, SECTION 1 and 2. SENIORITY

"Section 1. Seniority in each class of service and in lower related classes, if any, begins at the time employe last enters continuous service of the Company on a bulletined position in the department of the plant at which employed, and in addition employes

elimination of the Carrier's right to have any and all employes covered by the Ice Plants Agreement do any and all classes and kinds of work required.

Article II, Section 1 expressly recognizes that employes covered by the Ice Plants Agreement **do not** have exclusive rights to the performance of work in the classes in which they hold seniority. That understanding or agreement was not eliminated by the adoption of the 40-Hour Work Week Agreement rules which became effective September 1, 1949, as is evidenced by the following statement of the majority in Third Division Award 6042:

> "Certainly the forty-hour week agreement made no change in the duties performable by a job classification nor did it alter the Carrier's right, consistent with the agreement, to determine the number of employes required for its operations. Both of these matters remaining as they were under the prior Agreement, and the work assignments involved remaining as they existed for years under the prior agreement, the claim is without merit."

Without prejudice to its position, as previously expressed herein, that the Employes' claim is entirely without support under the Agreement rules and should be denied, the Carrier desires to direct the Board's attention to the fact that the Employes' claim for eight hours at time and one-half rates in behalf of the claimant, McCall, account not used on his rest days is contrary to the well established principle, to which the Third Division has consistently adhered, that the right to work is not the equivalent of work performed under the overtime and call rules of an Agreement. See Third Division Awards 5929, 5943, 6013, 6157 and many others.

In conclusion, the Carrier respectfully reasserts that the Employes' claim is entirely without merit or support under the Agreement rules and should be denied in its entirety.

The Carrier is uninformed as to the arguments the organization will advance in its ex parte submission and accordingly reserves the right to submit such additional facts, evidence and argument as it may conclude are necessary in reply to the Organization's ex parte submission or any subsequent oral arguments or briefs submitted by the Organization in this dispute.

All that is contained herein is either known or available to the Employes or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was regularly assigned to a position of Oiler with two rest days each week.

On the dates specified in the Claim the Carrier assigned the relief work to an employe then holding a regular position of Ice Handler who held no seniority as Oiler.

Claimant was available but was not called. There was no available qualified employe of the Oiler class actually working at the plant in a lower class or out of service in force reduction and holding rights to recall.

First. Since there were no available qualified employes in a lower class in or out of service (Article IV Section 4 (c)), Claimant as the incumbent of the position was entitled to the work (Award 5311) unless Article II Section 1 requires a contrary conclusion.

Second. Article II Section 1 (effective October 1, 1937 and continued without change in succeeding Agreements effective November 1, 1942, September 1, 1947 and November 1, 1952) reads:

"Due to the nature and requirements of the service; because of the set-up and organization necessary to accomplish the work, and in order to permit a uniform spread of employment to the greatest number of employes, it is understood and agreed that all employes subject to this Agreement will do any and all classes and kinds of work required."

It appears without contradiction in the record that ever since 1937 the employes covered by this Agreement "have been used in exactly the same manner as that complained of in the instant dispute." Moreover in 1953 in their formal notice requesting a revision of certain rules, the Organization proposed an amendment to Article II Section 1 by adding the following terminal qualifying clause:

"consistent with employes' seniority in such classification."

Article IV Section 4 (c) goes no further than to establish priorities within the Oiler classification when temporary vacancies occur; but it does not mention the incumbent. There is therefore no conflict between the express terms of Article IV Section 4 (c) and the express terms of Article II Section 1.

It follows that the action taken by the Carrier was authorized by Article II Section 1.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the 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

The Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 16th day of December, 1955.