Award No. 10133
Docket No. DC-9920

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

Albert L. McDermott, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES, LOCAL 351

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Dining Car Employes Union, Local 351 on the property of the Erie Railroad Company for and on behalf of L. Hackshaw, John Hall, I. Ratcliff, Maceo Ward, Charles Robinson, J. B. Hayden and other employes similarly situated that they be paid the difference between what they were paid and what they should have been paid as regularly assigned employes during the months of August and September, 1955.

EMPLOYES' STATEMENT OF FACTS: Under date of October 5, 1955, Organization's General Chairman submitted the foregoing claim to Carrier's Superintendent Dining Car Department (Employes' Exhibit A). Under date of October 25, 1955, the instant claim was denied on the property by Superintendent Dining Car Department (Employes' Exhibit B).

On November 1, 1955, the denial of the claim was appealed to Carrier's Assistant Vice President, the highest officer on the property designated to consider such appeals (Employes' Exhibit C). Under date of November 10, 1955, Carrier's Assistant Vice President proposed that the claim be limited only to the named claimants (Employes' Exhibit D). However, the suggestion was not accepted by the Organization (Employes' Exhibit E), and appeal conference held on May 24, 1956, considered the claim as submitted by Organization. Under date of May 25, 1956, Carrier's Assistant Vice President denied the claim on appeal (Employes' Exhibit F).

The record in the instant claim indicates that on August 19, 1955, Carrier abolished position of Buffet Car Attendants, which positions were filled by claimants prior to that date, on Trains 27-7-8 Jersey City to Marion and return due to track washouts, etc., emergency (Employes' Exhibit G). However, the facts indicate that these trains continued to operate despite the alleged washouts and emergency as a result of the bulletin included herein as Employes' Exhibit G. Carrier compensated claimants and other employes similarly situated only for hours worked and not on the basis of the monthly guarantee established by the effective agreement for the months of August and September, 1955.

POSITION OF EMPLOYES: The effective agreement, copy of which is on file with this Board, is incorporated herein by reference. Rule 6 (a) which controls the instant claim, provides as follows:

"All time on duty in regular, extra or other service, and deadhead allowances, will be considered as service hourage.

"Extra employes shall be paid for the number of hours actually worked at 1/205 of the appropriate monthly rate."

The terms of Rule 6(a) are limited to regularly assigned employes. Certainly no one would argue that when positions are abolished the employes affected continue on as regularly assigned employes, when, as a matter of fact, an abolishment terminates an assignment as of the date specified by the Carrier. In this case, the claimants were given written notice that their positions were abolished as of August 19, 1955. In short, their assignments ended then and there. Following this, they were then subject to the terms of Rule 4, Sections (f), (g), and (h).

The contention that the terms of Rule 6(a) makes the month a unit of employment and that the claimants are entitled to be paid the full months of August and September has been put to rest by Awards 4849, 5052, 5522, 7172, 4152, 6792, the latter two cases decided without the assistance of a referee. But this is not all. The Carrier has never allowed the monthly guarantee to employes whose assignments were terminated as a result of force reductions or account abolishment of assignment for the purpose of rearranging the work.

The foregoing notwithstanding and by reference to Carrier's Exhibit "C", each claimant during the months of August and September, 1955, either made the guarantee, laid off on his own accord, lost time account being displaced by a senior employe or lost time displacing a junior employe.

When the facts and circumstances are viewed in the light of the Agreement itself, it is clear that there has been no violation thereof. The burden of proof rests upon Petitioner:

Award 7350 (Coffey):

"The Statement of Claim amounts to no more than the allegation that the contract has been or is being violated. It is not evidence. The charge, as laid, must be supported by fact. On the theory that the one affirmatively charging a violation is the moving party, and, therefore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called 'burden of proof' doctrine. See Awards 3469, 5345, 5962, 6829, 6839."

Award 7362 (Larkin):

"The burden of establishing facts sufficient to require the allowance of a claim **(and proper language in the agreement covering the situations)**, is upon those who seek the allowances." (Emphasis ours.)

The Carrier submits that the claim is without merit and it should be denied.

All data herein have been presented to or are known to Petitioner.

(Exhibits not reproduced.)

OPINION OF BOARD: The Carrier's contention that the claim is barred by the terms of Rule 8(b) of the Agreement is without merit. Rule 8(b) reads:

"The right of appeal through the regular channels to the Chief Operating Officer designated is conceded. However, appeals from decisions rendered must be made within thirty days."

The Railway Labor Act, as amended, contemplates that disputes arising under it will be handled expeditiously. It does not, however, place a time limit on the progressing of claims and hence, the time element must be construed to be on a basis of what is reasonable under all the circumstances involved. Awards 4941, 6650. We find this appeal under all the circumstances to be timely filed. The provisions of Rule 8(b) are not applicable. The time limitation on appeals therein applies to appeals through regular channels **to the Chief Operating Officer.** As was stated in Award 10087, this time limitation applies only to appeals handled on the property.

The Carrier abolished the jobs of the Claimants in August, 1955 as a result of damage to a track, roadbed and four bridges in the wake of Hurricane Diane. What is in dispute is whether or not the Claimants were entitled to the guaranteed number of hours of work under Rule 6(a) of the Agreement.

Rule 6(a) provides:

"(a) Two hundred five (205) hours shall constitute a basic month's work for regularly assigned employes who are ready for service and who do not lay-off of their own accord. For the purpose of making up the 205 hours, regularly assigned employes may be used to perform service between trips or on lay-over days.

"The 205 hour basic month for regularly assigned employes may be reduced when employe lays off or is suspended, by deducting the number of hours that would have been paid had he remained in service.

"All time on duty in regular, extra or other service, and deadhead allowances, will be considered as service hourage.

"Extra employes shall be paid for the number of hours actually worked at 1/205 of the appropriate monthly rate."

The Carrier in the instant case was not restricted in its management prerogative. It had authority to abolish the jobs in question. At that instance, the Claimants were no longer regularly assigned employes. Until such time as each returned to the status of a regularly assigned employe he was not within the provision that "two hundred five (205) hours shall constitute a basic month's work for regularly assigned employes."

Based upon the evidence submitted, we are of the Opinion that the claim in its entirety should 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of October, 1961.