Award No. 12286
Docket No. CL-11993

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 5-C-1, and Group 2 Extra List Agreement No. 1, at the Freight Station, Williamsport, Pennsylvania, Northern Region, when it used more than the agreed-upon number of employes assigned to the Extra List on July 28, 1956.

(b) The Claimant, L. F. Anderscavage, an Extra Trucker assigned to the Group 2 Extra List, should be allowed eight hours pay for Saturday, July 28, 1956. (Docket 522)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

The Claimant in this case, L. F. Anderscavage, was the incumbent of a bulletined Group 2 position of Extra Trucker on the Group 2 Extra List at Williamsport Freight Station, Williamsport, Pennsylvania, Northern Region. He has a seniority date on the seniority roster of the Northern Region in Group 2.

is no rule in the Clerks' Agreement providing for such a payment under the circumstances here existing. In Award 7309, Referee Leroy A. Rader, this Board held that "The assessing of the penalty claimed would be an extremely drastic measure to be invoked and one of doubtful legality under the rules of the Agreement, as no specific rule can be used as a basis for such an award."

Therefore, under the principle established in Award 5186 and preserved in Award 7309, there is no basis for recovery of a penalty in this case.

For the foregoing reasons, the Carrier submits that the Claimant is not entitled to the compensation claimed.

III. **Under The Railway Labor Act, The National Railroad Adjustment Board Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out "of grievances or out of the interpretations or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties thereto. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has established that there has been no violation of the applicable Agreement in the instant case and that the Claimant is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board should deny the claim of the Employes in this matter.

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a proper record of all of the same.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim resulted from a dispute between the Carrier and the Organization, involving an interpretation of an Extra List Agreement, entered into on the 15th day of July 1954, at Williamsport, Pennsylvania. The purpose of the list was stated in paragraph one (1). "In order to establish a basis for handling extra work an extra list of employes will be maintained at the Freight Station, Williamsport, Pennsylvania, to protect work accruing to Group 2 classification at the following locations: Williamsport Freight Station, Williamsport Enginehouse, Williamsport Car Shop." Although the agreement is silent on the number of employes that were to be used on the extra list the parties in their argument agreed on the number 40.

On Saturday, July 28, 1956 Carrier utilized seven (7) available, furloughed and unassigned employes on this date in making up platform gangs at Williamsport Freight Station. It appears from the record that four gangs were used, two regular gangs scheduled to work that day and two gangs made up of the extra list, furloughed and unassigned men. The composition of the four gangs required the use of fourteen employes who were not regularly scheduled or assigned to work on Saturday. Of the fourteen men used, seven came from the extra list. Five of the employes were unassigned off work, awaiting the exercise of their seniority, which must be done within 29 days. Two of the employes used were furloughed, having been unable to exercise seniority and obtain either a regular position or a position on the Extra List. The use of furloughed and unassigned employes by the Carrier to perform this work at the regular rate rather than, use regularly assigned or extra list men at the overtime rate is the basis of this claim.

It was the contention of the Claimants that Rule 5-C-1 was violated when the Extra List Agreement was not complied with in filling extra gangs on July 28, 1956. Furthemore, this Agreement shall determine the number of extra employes to be used and the manner in which they shall work. The rule contains no exceptions of any kind and places no limit on the number of days an extra employe shall be permitted to work. Any such exceptions or restrictions must be incorporated in each individual Extra List Agreement if so desired by the parties. Thus the use of unassigned and furloughed men rather than Extra List men violated the Extra List Agreement. We quote Rule 5-C-1:

> "Where extra employes are used extra boards will be established by agreement between the Management and the Division Chairman. The number of extra employes to be used and the manner in which they will work will be determined by written agreement between the Management and the Division Chairman."

The Carrier contended that it was necessary to use the unassigned and furloughed men to make up two extra gangs because the extra list employes had already worked their forty hours in the workweek, while the unassigned and furloughed men had not worked forty hours that week. In support of the above the Carrier offers the following Rules 2-A-1 (e), 3-C-3 (b), 4-A-1 (i) and Article IV of the August 21, 1954 Agreement. We quote the above rules:

"RULE 2-A-1

(e) Positions or vacancies of thirty days or less duration may be filled without bulletining. The senior qualified available employe requesting such position or vacancy or requesting a bulletined position or vacancy, pending assignment of a successful applicant, will be assigned, except where agreement under Rule 5-C-1 requires the use of extra employe, provided this will not entail additional expenses to the Company."

"RULE 3-C-3

(b) Furloughed employes who have notified the employing office that they desire consideration for temporary work, will when available, be given preference on a seniority basis to all extra work, short vacancies or vacancies occasioned by the filling of positions pending the assignment by bulletin, **which are not filled by senior employes, or as provided by agreement under Rule 5-C-1 . . .**" (Emphasis ours.)

"RULE 4-A-1

(i) (Effective September 1, 1949) Where work is required by the Management to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

Article IV of the August 21, 1954 Agreement reads:

"1. The Carrier shall have the right to use furloughed employes to perform extra work, and relief work on regular positions during absence of regular occupants, provided such employes have signified in the manner provided in paragraph 2 hereof their desire to be so used. This provision is not intended to supersede rules or practices which permit employes to place themselves on vacancies on preferred positions in their seniority districts, it being understood, under these circumstances, that the furloughed employe will be used, if the vacancy is filled, on the last position that is to be filled. This does not supersede rules that require the filling of temporary vacancies. It is also understood that management retains the right to use the regular employe, under pertinent rules of the agreement, rather than call a furloughed employe.

2. Furloughed employes desiring to be considered available to perform such extra and relief work will notify the proper officer of the Carrier in writing, with a copy to the local chairman, that they will be available and desire to be used for such work. A furloughed employe may withdraw his written notice of willingness to perform such work at any time before being called for such service by giving written notice to that effect to the proper Carrier officer, with copy to the local chairman. If such employe should again desire to be considered available for such service notice to that effect — as outlined hereinabove — must again be given in writing. Furloughed employes who would not at all times be available for such service will not be considered available for extra and relief work under the provisions of this rule. Furloughed employes so used will not be subject to rules of the applicable collective agreements which require advance notice before reduction of force.

3. Furloughed employes who have indicated their desire to participate in such extra and relief work will be called in seniority order for this service. **Where extra lists are maintained under the rules of the applicable agreement such employes will be placed on the extra list in seniority order and used in accordance with the rules of the agreement."** (Emphasis ours.)

Two questions are presented in this claim:

1. Did the Carrier violate the Extra List Agreement when it used unassigned and furloughed men for extra work in excess of 40 extra men required by the Agreement?

2. Is the Claimant entitled to eight hours pay for Saturday, July 28, 1956, for said violation?

It appears from the record that the Claimant was working on the day in dispute, having been called, and thus suffered no monetary loss but submits the claim exclusively for violation of the agreement.

In order to determine the issues, we must look to the Extra List Agreement and the General Agreement between the parties. The submissions are long and in the interest of brevity, we have extracted parts and stated conclusions to be drawn from the record and the agreements. The purpose of this Extra List Agreement, which was a special agreement, was to establish a pool of labor for this casual type of work that was present at this location. The Agreement according to Rule 5-C-1 clearly stated its purpose, number of employes, manner in which they will work, and method of amending. For all intents and purposes it was drawn up to regulate the use of extra employes at this location. The agreement appears to contain its object or purpose, and measures the scope or extent of its application and is presumed to be an agreement to regulate extra work at this location. It was further provided in the rules. (5-C-1). This is a special agreement concerning this special subject matter and takes precedence over the general agreement on this special subject. This principle, regarding special agreements, has been adopted by this Board. Moreover, if another result is desired by the parties it may be accomplished by providing for the same in the agreement.

An examination of Rule 2-A-1 (e) reveals and provides that it is applicable ". . . except where agreement under Rule 5-C-1 requires the use of extra employe . . ." In Award 8568 it was also held that this rule doesn't apply to, "extra work, non-repetitious and of short duration". The work entailed in this dispute was of this nature.

Paragraph (b) of Rule 3-C-3 provides that furloughed employes may be used to perform extra work or fill vacancies provided such work is not performed by senior employes, or as provided ". . . by agreement under Rule 5-C-1 . . ." Thus the available regular employes who were observing one of their rest days were senior to the furloughed employes, as were the extra list employes who had worked forty hours. Rule 3-C-3 in its title specifically provides for similar situations as are present herein, "Increase in Force".

The pertinent parts of 4-A-1 (i) ". . . it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week, in all other cases by the regular employe". Can any available extra be used who has not worked 40 hours? Can any available unassigned employe be used who has not worked 40 hours? We answer both of these questions in the negative. A strict interpretation of Rule 4-A-1 (i), as presented by the Carrier would give a right to the extra available or unassigned employes equal to the extra list employes if neither group had not worked 40 hours. We base this conclusion on, (1) If the general agreement takes precedence over the Extra List Agreement the Rule 4-A-1 (i) applies irrespective of the agreement. The only limitation would be if such work would put them working in excess of 40 hours; and (2) A local agreement which purports to establish or assign rights to employes in conflict with the general agreement is, to that extent, a nullity. We ask now: What was the purpose of Rule 5-C-1, and the Extra List Agreement? To give a preference to those employes whose names appeared on such list. This agreement gives those members a regular assignment to the extra work. If any available or unassigned extra employe, who hadn't worked 40 hours, could perform the extra work, what purpose was achieved by the Extra List Agreement. Rule 4-A-1 (i) doesn't restrict the unassigned and furloughed employes to work after the extra list employes work 40 hours. The rule just restricts them to 40 hours

per week. The unassigned and furloughed could seek extra work on equal terms with the extra list employes. This we say was not the purpose of the Extra List Agreement. The agreement was by its circumstances established to provide for special situations not provided for in the general agreement. Furthermore, no limitation in the agreement has been placed on overtime work. A limitation had been placed on a monthly basis and this had not been exceeded. Thus we are of the opinion that if the extra list men had the right to the positions under the agreement they had the rights to the benefits accruing, overtime. Hence Rule 4-A-1 (i) in our opinion does not apply to this location in light of the Extra List Agreement.

Article IV of the August 21, 1954 Agreement reads in its pertinent sections in paragraph 3. ". . . Where extra lists are maintained under the rules of the applicable agreement such employes will be placed on the extra list in seniority order and used in accordance with the rules of the agreement." Thus we observe that the use of the extra list is recognized in providing for a labor pool and its provisions must be complied with.

The Carrier has forcefully argued the rational policy of spreading employment by eliminating overtime and giving job opportunities to employes who have not worked forty hours in a week. However, we must state that in light of the Extra List Agreement which does not deny overtime such a policy must be achieved by agreement. If the unassigned and furloughed employes are to be used at this location as extra employes they must be provided for by agreement. The use of supplemental labor pools are usual in this type of casual work which are of short duration and non-continuous. We are required to hold that the intentions of the Carrier, as stated, cannot be found from the provisions of the Extra List Agreement. An affirmative award is therefore required in claim 1.

In resolving claim No. 2, the Carrier has presented to us current Awards No. 3967, 4083 and 4112 of the Second Division and numerous awards on this Division wherein time claims were limited to the pecuniary loss sustained by the Claimant. In the dispute herein no pecuniary loss was sustained as the Claimant worked on the day in question. Penalties or punitive damages are not customarily allowed for simple breach of an agreement, except when authorized by contract, statute or malicious intent is shown. None of these elements is found in this record. In view of the facts, circumstances of the record and awards of this Division we hold that punitive damages are not proper in this case. Thus claim No. 2, will be denied.

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

Claim No. 1: That the Agreement was violated.

Claim No. 2: That the claim for damages was not sustained.

AWARD

Claim No. 1 sustained.

Claim No. 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12286 DOCKET CL-11993 (Referee Kane)

The Majority, consisting of the Referee and Labor Members, committed grave error in finding a violation of the Extra List Agreement under the facts of this dispute. They committed a factual error as well as an error of interpretation. They said:

> "* * * The use of furloughed and unassigned employes by the Carrier to perform this work at the regular rate rather than, use regularly assigned or extra list men at the overtime rate is the basis of this claim."

Regularly assigned employes were not involved in this dispute. The Statement of Claim is clear evidence of this fact. Furthermore, their rights would be subordinate to those of unassigned employes under Rule 4-A-1 (i). Unassigned employes may be used up to forty hours per week under the provisions of Rule 4-A-1 (i) before regular employes are even considered.

The Majority erroneously decided that only Rule 5-C-1 would apply to our facts, rejecting Carrier's argument that both Rule 4-A-1 (i) and Article IV of the August 21, 1954 Agreement — granting the Carrier the right to use furloughed employes — applied. This gives a preferred status to Rule 5-C-1, as against Rule 4-A-1 (i) and Article IV. The Majority rejected Rule 4-A-1 (i), saying:

> "* * * A strict interpretation of Rule 4-A-1 (i), as presented by the Carrier would give a right to the extra available or unassigned employes equal to the extra list employes if neither group had not worked 40 hours. * * *"

This statement is utterly ridiculous. It is a non sequitur. The Carrier made it abundantly clear that it was **not** contending for the use of unassigned or extra employes **in preference to extra list employes at the straight time rate.** All the extra employes had either completed their forty hours work or were working on the last eight of their forty hours — and this included the Claimant. The Carrier's position was that it had the right to use unassigned or furloughed employes — AFTER THE EXTRA EMPLOYES HAD COMPLETED OR WERE IN THE PROCESS OF COMPLETING THEIR FORTY HOURS. The Referee was advised of this fact over and over. There was no problem,

no issue, and no argument on the rights of unassigned or furloughed employes vis-a-vis extra employes at the straight time rate.

The Extra List Agreement does not grant extra employes the demand right to work in excess of forty hours. Moreover, the provisions of the Master Agreement, (Rule 4-A-1 (i)), while recognizing their right to be used up to forty hours to the extent there is extra work for them to perform — limits their right at that point. It was not a question of either the Extra List Agreement applying or Rule 4-A-1 (i). They each apply in their own sphere. We had an obligation to construe the rules together and give each some meaning when applied to the facts. Award 6856.

The bare facts of the case show that the extra list had been exhausted with respect to the use of employes at the straight time rate. When that occurred, the Carrier used other available employes — unassigned and furloughed — at the straight time rate. The effect of this decision is to prohibit the Carrier from spreading employment by using available employes — yet, one of the avowed purposes of the Organization in requesting negotiation of the Forty-Hour Week Agreement, was to "spread employment". The Organization's position here is exactly contrary to the position they espoused before Emergency Board No. 66 [Forty-Hour Week Board] which, we might add, the Board accepted. The irony of it is the Board then recommended the adoption of the so-called "Unassigned Day" rule — present Rule 4-A-1 (i) — in response to these pleas for spreading employment. Now, the Majority says Rule 4-A-1 (i) does not apply, and the work must be concentrated by compelling Carrier to assign it to a favored few at the premium rate.

This decision is erroneous, and we dissent. We concur in that portion of the Opinion which holds that Claim No. 2 should be denied.

W. F. Euker
R. E. Black
R. A. DeRossett
G. L. Naylor
W. M. Roberts

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 12286, DOCKET CL-11993

If there is anything about Award 12286 that can properly be termed "utterly ridiculous" it is the Dissentor's "Bleeding Heart" approach "account Carrier being unable to spread employment". Such feigned compassion is as hollow in the dissent as it was in the arguments presented to the Referee. The Award quite properly found that Carrier violated the controlling Agreement it had made under Rule 5-C-1.

That Agreement clearly set forth, as required by Rule 5-C-1, (1) the number of extra employes to be used and (2) the manner in which they would work. Furthermore, it set forth exactly when and under what circumstances employes would be added to and taken from the extra list.

The Carrier ignored the Agreement — not because it wished to "spread employment" — but because it wanted to avoid payment of overtime; the action of Carrier was merely a subterfuge to evade payment of overtime and

the Award should have required the Carrier to pay the claim account violation of the Agreement.

It is unfortunate that, in correctly finding a violation, the Carrier was still allowed to escape any payment. However, had the available regularly assigned employes been named as Claimants, the result, as to payment, would no doubt have been different.

The Award is correct in all respects excepting that it allowed Carrier to violate the Agreement with impunity.

D. E. Watkins