Award No. 12599
Docket No. MW-11858

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

(1) The Carrier violated the effective Agreement when, instead of calling and using furloughed Gate Maintainer Helper William F. Connor to perform Gate Maintainer Helper's work on October 8, 9, 20, 1958, November 13, 1958 and December 1, 5, 29 and 30, 1958, it assigned the work to an employe who holds no seniority as a Gate Maintainer Helper.

(2) The Carrier further violated the effective Agreement when it called and used furloughed Gate Maintainer Helper William F. Connor to perform service on various dates during the months of January, February, March, April, May and June of 1959 and failed and refused to allow Mr. Connor the full flat monthly salary for services rendered during each of said months.

(3) Gate Maintainer Helper William F. Connor now be allowed his full flat monthly salary for the months of October, November and December of 1958 because of the violation referred to in Part (1) of this claim.

(4) Gate Maintainer Helper William F. Connor be reimbursed for the actual monetary loss suffered when the Carrier failed and refused to allow him the full flat monthly salary for services rendered in each of the months referred to in Part (2) of this claim.

EMPLOYES' STATEMENT OF FACTS: Effective September 30, 1958, the claimant, who has established and holds seniority as a Gate Maintainer Helper and who was regularly assigned to that position on the Pennsylvania Division, was furloughed in force reduction.

On October 8, 9, 20, 1958, November 13, 1958 and December 1, 5, 29, 30, 1958, the Carrier called and used an employe who holds no seniority as a Gate Maintainer Helper to assist Gate Maintainer Skilton in repairing crossing gate facilities at various locations on the Pennsylvania Division.

Rule 20 of the applicable agreement is captioned "Basis of Pay for Monthly Rated Employes." Each provision of the rule has to do with the employment of monthly rated employes. In paragraph (d) thereof, the following appears:

> "(d) It is understood that seasonal employes or extra employes may be furloughed at any time during a month when their services are no longer required and compensation pro rated on the basis of the actual time worked. This will also apply to such seasonal positions and extra positions created at any time during a month."

It is the position of the Carrier that on September 30, 1958, when the position of claimant was abolished and he was placed on furlough, that the position ceased to exist. On October 8, 1958 and the other stipulated dates as listed on Page 4 herein, an extra position was created, in accord with the permissive provisions of Rule 20 (d). Carrier admits that claimant was not called for such work during the months of October, November and December, 1958, and has offered to compensate the claimant by payment pro rated on the basis of the actual time worked by persons holding no rights to such service. As stated previously, such offer has been refused.

On January 9, 1959, and the subsequent dates enumerated on Page 4, an extra position was created. Claimant was called to fill this extra position with the distinct understanding that such extra position was established on a day-to-day basis. He accepted these calls, performed service as required, and was compensated therefore as provided by Rule 20 (d).

The first sentence of Rule 20 (a) as hereinbefore quoted, provides as follows:

> **"Employes working on a monthly basis** will be paid a flat monthly salary * * *." (Emphasis ours.)

Effective October 1, 1958, claimant Connor was no longer "working on a monthly basis" — he was not working at all, on a monthly basis or otherwise — he was furloughed. Therefore, insofar as he was concerned, Rule 20 (a) ceased to exist. When an extra position was established as permitted by Rule 20 (d), claimant was entitled to such work under the provisions of Rule 4.

Claimant in this case was used, or should have been used, as provided by Rule 20 (d). Carrier has offered to make claimant whole for the admitted violations on eight specified days prior to January, 1959. This offer still stands. It is the position of the Carrier that the claim as presented is wholly without merit and should be denied.

OPINION OF BOARD: The Claimant was assigned to the monthly rated position of Gate Maintainer Helper. On, or about, September 30, 1958, the position was abolished and the Claimant placed in furloughed status.

Subsequently, on various dates during October, November and December, 1958, employes were assigned as Gate Maintainer Helpers who held no seniority to such position. When additional work as helper was required during January, February, March, April, May and June of 1959, the Claimant was called, performed service and was paid according to Rule 20(d), pro rated on the basis of actual time worked.

It was the contention of the complainant that he should have been compensated on a monthly basis, as the position of Gate Maintainer Helper was a monthly rated position and not on a pro rated basis for actual time worked.

The Carrier contended that the position of Gate Maintainer Helper was abolished and the claimant was no longer a monthly rated employe according to Rule 20(a).

"RULE 20

(a) Employes working on a monthly basis will be paid a flat monthly salary covering all services rendered * * *."

The Claimant in the submission has not denied the authority, under the Agreement, in the Carrier to abolish the position, when a decrease in the amount of work required to maintain the type of gates in operation was apparent.

Rule 20(d) was offered as the Rule upon which payment was made by the Carrier. This rule applied to employes in furloughed service. It reads as follows:

"(d) It is understood that seasonal employes or extra employes may be furloughed at any time during a month when their services are no longer required and compensation pro rated on the basis of actual time worked. This will also apply to such seasonal positions and extra positions created at any time during a month."

Thus, the complainant was in a furloughed status and paid on a pro rata basis for actual work performed. Further, the extra position was established as permitted by Rule 20 (d), and the Claimant was returned to service under Rule 4, when extra work was available.

"RULE 4

Employes displaced or out of service because of force reduction will be given an opportunity to return to service or to former positions in accordance with their seniority when forces are increased or vacancies occur."

This Board is of the opinion that the regular monthly rated position occupied by the Claimant was abolished on September 30, 1958. Rule 20(d) provides compensation for employes furloughed when their services are no longer required. The Carrier complied with the terms of this rule. Rule 4 granted the complainant the right to return to service when vacancies occur, and the Claimant so returned to service.

We are also of the opinion that under the facts and circumstances herein a new position was not created as intended by the provisions of Rule 36(b) when the Claimant was returned to service as a furloughed employe.

It has been raised in argument, but not in submission, that Rule 20(d), as it appears in the parent agreement, is no longer in existence but substituted by a Memorandum of Agreement between the parties dated May 5, 1950. In this agreement Rule 20, has been changed and Rule 20(d) omitted. It is thus contended 20(d) is no longer in existence.

This Board is of the opinion that this contention is invalid for two reasons: one, that issue was not raised by the parties in the submission; two, the Memorandum of Agreement does not specifically refer to the parent agreement or state that it supersedes all other agreements between the parties as to Rule 20(d). Thus, we must construe the Memorandum of Agreement as part and parcel of the parent agreement, and what the parties did not change in the Memorandum of Agreement must be presumed retained in the parent agreement. Rule 20(d) was not mentioned in the Memorandum of Agreement and remains intact in the parent Agreement so we must apply its apparent meaning as applied herein. Thus, the Carriers contentions are well taken.

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

1. That Claim No. 1 is sustained. Claimant should have been called for service during the specific days of the claim in October, November and December, 1958, when the work was assigned to employes holding no seniority as Gate Maintainer helper.

2. Claim No. 2 is denied in accordance with the opinion.

3. Claim No. 3 is sustained to the extent that the Claimant should be compensated according to Rule 20(d) at the pro rata rate for time worked, and denied on the basis of the monthly rate.

4. Claim No. 4 is denied in accordance with the Opinion.

AWARD

Claim sustained and denied according to the opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June 1964.