



Award No. 5684

Docket No. 5489

2-NOPB-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee A. Langley Coffey when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. - C. I. O.
(CARMEN)**

NEW ORLEANS PUBLIC BELT RAILROAD

DISPUTE: CLAIM OF EMPLOYEES: That the Agreement was violated when Painter M. G. LeBlanc was assigned to repair front draw heads on Engines Nos. 61 and 47 at New Orleans, La. on April 18, 1966.

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

The Carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The fundamental issue contained in this case is identical to the issue presented in Award 5683. Therefore, our findings in Award 5683 have the same meaning, application, effect and are controlling in this case.

A W A R D

Claim remanded to the property for the parties to meet, confer and agree, within 90 days, from this date, on a definition of the word "points" within the meaning of Article IV, supra, so as to implement and apply that Rule to a terminal and switching operation as distinguished from the operation of a line-haul carrier.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division**

**ATTEST: Charles C. McCarthy
Executive Secretary**

Dated at Chicago, Illinois, this 30th day of April, 1969.

**CARRIER MEMBERS DISSENT TO AWARDS
5683, 5684, 5685, 5686 AND 5687.**

The action taken by the Division in adopting remanded awards 5683, 5684, 5685, 5686 and 5687 for the purpose of setting up conferences between the parties goes beyond the jurisdiction of this Board and these awards are without legal force. No matter how desirous it is to help the parties resolve their differences we cannot extend our authority beyond our jurisdiction as set forth by law.

These cases are clearly barred due to the parties failure to hold a conference on the property.

The pertinent provisions of the Railway Labor Act pertaining to the necessity of holding a conference between the parties to a dispute are contained in Section 2, Second and Sixth and Section 3, First (i) which are, as follows:

"Second, All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rate of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held. xxx.

"Section 3, First (i). The disputes between an employee or group of employees and a carrier or carriers growing out of grievance xxx shall be handled in the usual manner xxx." (emphasis ours)

Furthermore, the Rules of Procedure of the Board contained in Circular No. 1 provide that:

"No petition shall be considered by any Division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act."

Furthermore, Rule 26 of the controlling agreement requires the Organization to seek a conference and the carrier to grant the conference within (10) days of application.

The burden is upon the Organization to seek out a conference (see our Award 2642) but the facts of record reveal the carrier on May 1, 1966, and on May 22, 1966 wrote to the General Chairman offering a conference but not until August 29, 1966, did he respond then in the last letter from the General Chairman he was agreeable to a conference, if the carrier desired one. A conference was not held prior to receipt of the June 30, 1967 notice of intent to file a claim before this Division as required by law.

This claim is defective for it has not been given the required handling on the property as required by the Railway Labor Act by the procedure rule of this Board and by Rule 26 of the controlling agreement.

We have no authority to kiss away the requirements of law and other rules by remanding these claims for any reason. Neither the parties nor this Board can waive the requirement of law, thus these cases are barred by law and we have no jurisdiction to do other than dismiss the cases. See our Awards 514, 1275, 1433, 1675, 1680, 1718, 1720, 1721, 1725, 1733, 1746, 1748, 1820, 1840, 1852, 2110, 2642, 2864 and 4852 among many.

The crux of this claim is identical with that in previous claims. The Engine Terminal under the jurisdiction of the Master Mechanic and the Freight Car Repair Yard under the jurisdiction of the Master Car Builder are in fact and in custom two separate points and it falls to the Organization to show by evidence otherwise. This was not done.

While it is irrelevant and superficial to respond to the findings we reiterate that the fundamental facts involved in these claims are substantially similar to those found in our recent better reasoned Awards 5168, 5199 and 5200 and their findings should be persuasive precedents. This Division has held many times that prior awards involving the same parties, agreement rules and comparable facts will be followed unless shown to have been glaringly erroneous.

For the reasons offered, we dissent.

/s/ P. R. HUMPHREYS

P. R. Humphreys

/s/ H. F. M. BRAIDWOOD

H. F. M. Braidwood

/s/ F. P. BUTLER

F. P. Butler

/s/ H. K. HAGERMAN

H. K. Hagerman

/s/ W. H. HARRIS

W. H. Harris

MAJORITY OPINION TO AWARDS

5683, 5684, 5685, 5686 AND 5687.

Dissent by Carrier members to the above Awards, on the grounds that the awards are "without legal force," usurps the powers, duties, authority and functions of the full Board. We respect the right of respectable and respectful dissent, but the dissident forces, as they are presently constituted, go beyond the bounds of propriety when they declare the awards of this Board are "without legal force." We except.

The Carrier members were in the minority when the awards were adopted. They still are. They do not speak for this Board. They are still welcome to state their views, as they have, but "without legal force."

The tormentors of this Board and the parties, have spoken with reckless abandon outside and beyond the law, the contract, and the facts, in the respectful opinion of this Board.

Amended Rule 26, Time Claims and Grievances, effective August 4, 1948, was deleted from the Agreement in its entirety and a new Rule 26 substituted March 10, 1964. In addition to the express terms of the new Rule, provision is made therein that "the August 21, 1954 National Agreement shall apply to all claims and grievances." Rule 26 on the property and Article V of the National Agreement provide for the filing of grievances in writing, and for presenting the written grievances in an orderly manner through successive steps to the highest officer designated by Carrier to handle claims and grievances, and for appeal of all unsettled claims and grievances, that have been timely filed and handled on the property, to this Board. The Employees complied.

Carrier did not contend in its submission that the above Rule has not been complied with. The Carriers' members undertake to fill the void by their dissent, when they charge that the Employees have not complied with Rule 26, an obvious reference to the old Rule that is no longer in effect.

The Employees affirmatively stated in their ex parte submission that:

"All matters herein referred to in support of the Employees' Position have been the subject of correspondence or discussion with the management."

The Employees further say in their submission that:

"A grievance was filed and was handled in accordance with the agreement and Railway Labor Act with all carrier officers authorized to handle grievances with the result and all of them declined to adjust it."

The handling on the property is further in evidence on the basis of what we find in the Employees' submission wherein they state the reasons given by the Carrier's officers for opposing the grievance. For example, the Employees say on page 2 of their submission that, "the top officer of the Carrier continued to rely on a Rule (Article VII of the September 12, 1955 Agreement) which he knew was not controlling."

Carrier's rejoinder at page 4 of its answering submission is that, "all data contained herein has been furnished the Organization."

The submissions were referred by the Division to a Committee of Messrs. Wertz for the Organizations' members and Humphrey for the Carriers' members.

The Organizations' member on the Committee proposed the Board find:

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein."

And, thereupon, proposed that the Board's award read, "claim of Employees sustained."

Carriers' member on the Committee proposed the same jurisdictional findings and that the Board's award read, "claim denied."

Accordingly, the dispute was deadlocked on the merits and the submissions were docketed with others on a list of deadlocked cases to be

handled on the merits by a Referee. The Referee reviewed the dockets in question with the members of the Committee and listened to their arguments. The question of jurisdiction was not even raised, much less argued.

The dissident forces are guilty of grievous error, according to what this Board sees in the dissent. They apparently overlook the fact that Rule 26 from the "controlling Agreement" provides only that, "all conferences between local officials and local committees to be held during regular working hours without loss of pay to committeeman."

Section Sixth of the Railway Labor Act, pertaining to holding a conference in case of a dispute between Carrier and its Employees, arising out of grievances, etc., does not make it the duty of the Organization to seek out a conference, in the opinion of this Board.

Award 2642 is not a valid precedent in this case, (if it ever was) for imposing conditions on the current Agreement of these parties, or for enlarging upon the provisions of the Railway Labor Act.

According to the Railway Labor Act, as we view and understand it, either party to the dispute may give notice one to the other of a desire to confer in respect to such dispute. The law does not say that it is the duty, obligation, or a requirement made of the "Organization to seek out a conference."

The dissident forces mistake and misstate the record in paragraph 2, page 2 of their dissent. On May 1, 1966 the General Chairman wrote the Master Car Builder offering a conference, and on May 22, 1966 the General Chairman wrote the Master Mechanic offering a conference, and on August 29, 1966 the General Chairman wrote the Chief Clerk to General Manager that he was agreeable to a conference if the Carrier desired one. Carrier did not desire one from all that appears in the record. Therefore, we take no heed of what Carrier says on page 2 of its rebuttal to the Employees' rebuttal, to-wit:

"As can be readily seen, no conferences were held on this property to discuss this claim."

The dissent on file herein "is no authority to kiss away" the record.

In connection with the record, this Board has not overlooked Carrier's contentions that:

1. The Employees did not raise or discuss the proposition that Article IV of the September 25, 1964 National Agreement replaced and superseded Article VII of the August 21, 1954 National Agreement, at any time while progressing the dispute on the property.

2. Reliance upon Rule 86 was raised for the first time in the Employees' submission to the Board.

It is true that, as Carrier says, neither Rule is the subject of correspondence between the parties. However, Article IV of the September 25, 1964 Agreement and its adoption by these parties on November 4, 1964 is in the record before this Board by an exhibit attached to the Employees' ex parte submission. Rule 86 was also cited in the same submission.

Carrier's objection was first raised in its rebuttal to the Employees' rebuttal. Therefore, the Employees were not privileged to answer and give their position as surrebuttal. This Board thinks it would have been better if Carrier's objection had been raised in the answering submission, but the objection was not ignored. The awards remanding the claims allow some recognition for Carrier's position without depriving the Employees of an opportunity to answer.

This Board is not impressed, at this late date, with the suggestion that a dismissal award would have been a proper disposition of these cases.

Carriers' member on the committee had proposed an outright denial, not a dismissal. A time claim was not at issue before this Board. The dispute involved a continuing disagreement over the effect of changes that had been made in the Agreements on the property. A dismissal would have left the dispute unresolved and as an open invitation for the parties to return again to get a decision.

The parties by this time must have been weary of the effort. Three prior Board awards had not served to settle the dispute and five separate submissions were still pending. As to those pending, this Board was of the opinion and still is that the dispute should be settled on the property. Accordingly, we outlined the basis for a settlement and remanded the dockets.

A remand is proper, in the opinion of this Board, at any time the submissions are incomplete and need to be handled again on the property before a final decision, or if it appears likely that the parties can resolve their own dispute without the Board's further intervention after setting up guidelines for their consideration. We do not thereby relinquish jurisdiction. If the parties do not adjust and settle their dispute, this Board can and will decide said dispute without a needless requirement that they start over with a new submission.

Moreover, this Board's action in referring the dispute back to the disputants upholds the spirit and intent of the law, in our opinion. Accusations that this Board has violated the law, if taken seriously by the parties, could defeat the ends and purposes we had in mind and will, therefore, defeat the spirit and the manifest intent, purposes and objects of the Railway Labor Act, in our further opinion.

Finally, the dissent refers to "better reasoned Awards 5168, 5199 and 5200 as persuasive precedents." They no doubt are persuasive, in the purview of the Carriers' members, on the basis that they are denial awards.

(The Referee has no desire nor does he wish to make history or undertake to establish precedents for the handling of disputes on an ad

hoc basis. It has been his experience that the members who represent the railroads never point to sustaining awards and the members who represent labor never point to denial awards when a Referee's assistance is needed.)

CONCURRING:

/s/ A. LANGLEY COFFEY
A. Langley Coffey, Referee

/s/ OREN WERTZ
Oren Wertz

/s/ D. S. ANDERSON
D. S. Anderson

/s/ EDWARD H. WOLFE
Edward H. Wolfe

/s/ R. E. STENZINGER
R. E. Stenzinger