

Award No. 422
Docket No. 454
2-N&W-MA-'40

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That G. M. Burge be paid for time lost between April 16, 1939, and May 17, 1939, inclusive.

EMPLOYEES' STATEMENT OF FACTS: G. M. Burge, machinist helper, electrification, Bluefield, West Virginia, seniority date 1/16/23, was furloughed, while W. M. Mahafey, seniority date 9/16/24, made bulletined hours.

POSITION OF EMPLOYEES: The claim of the employes that G. M. Burge was senior machinist helper to W. M. Mahafey was sustained by the National Railroad Adjustment Board, in accordance with Rule 30, September 29, 1939, Award No. 385, Docket No. 395. The management refused to make this change in seniority before this furlough, that it might be made in accordance with Rule 26.

Rule 26: First paragraph—

“When it becomes necessary to reduce expenses at points or in any department or subdivision thereof, the hours may be reduced to forty (40) per week before reducing forces. When force is reduced, seniority as per Rule 30 will govern, the men affected to take the rate of the job to which they are assigned.”

Rules 35 and 36 have been complied with in this case, and the management has refused to pay Burge for time lost (Exhibits 1 and 2), who was unjustly furloughed.

Rule 37: Last sentence—

“* * * If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal.”

CARRIER'S STATEMENT OF FACTS: (1) Effective December 1, 1922, the Norfolk and Western Railway Company entered into an agreement with the employes of its Mechanical Department represented by the Association of Machinists, Helpers, Apprentices, Association of Boilermakers, etc., Association of Blacksmiths, etc., Association of Sheet Metal Workers, etc., Association of Electrical Workers, etc., and Association of Carmen.

(Order of Railroad Telegraphers and the Southern Pacific Company): “* * a correction in a seniority date should not operate retroactively unless the parties making the correction expressly agree that it shall. Any other interpretation would be too productive of confusion, controversy, and expense.” Seniority rosters may be corrected to cover the future, but these awards hold that they will not be reopened in cases where the rosters have operated as the established *modus vivendi* over a long period of years without protest.

A further reason why this claim should not be sustained exists. Mr. Mahafey's position on the helper machinist seniority roster affected all the men junior to him on that roster, and it was in that group sense that employes requested, in Docket No. 395, that his seniority date should be changed. However, when Mr. Burge was furloughed on April 16, 1939, there accrued to him a separate and distinct personal grievance. Rule 35 of the agreement between the Norfolk and Western Railway Company and the machinists, etc., effective July 15, 1938, provides in pertinent part:

“* * * No grievance will be considered unless it has been brought to the attention of the foreman by the aggrieved employe within ten (10) days after originating.”

Mr. Burge did not complain to his foreman within the ten day period required by Rule 35. It is a matter of record in this case that a group protest had been made to the management on September 14, 1938, against Mahafey's seniority status, but neither within the ten day period subsequent to Mr. Burge's furlough, nor indeed in the prosecution of the group demand for change in that status to the Second Division in Docket No. 395, did Mr. Burge or his representatives conceive that he had been aggrieved. The present alleged grievance was not matured under the procedure of the collective bargaining agreement and the carrier submits that this claim for lost time is barred by cited Rule 35.

The claim on behalf of Mr. Burge was not presented to the carrier until after the seniority roster had been altered, (October 17, 1939). In Award 684 (Brotherhood of Railroad Signalmen of America and the Denver Union Terminal Railway Company) the Third Division said: “* claim for compensation * * had not been presented to the carrier until the conditions of which complaint is made had disappeared, thus causing it to be one not cognizable by this Division.” (Underscoring ours.) The reasoning of that award has particular application here. It is true that while Docket No. 395 was pending before the Second Division, the representative of the machinists informed the management for the first time that if the employes prevailed in their contention that Mr. Mahafey's seniority date should be changed, they would then make demand upon the carrier for penalty payment for having furloughed Mr. Burge. The distinction between the vague, indefinite expression of a possible intention of filing a claim and the actual presentation of a claim is of course obvious. However, there was a clear indication that the representatives of the machinists conceived that Mr. Burge's rights were dependent upon the decision of the Second Division and that without such an award no grievance existed. The carrier submits that the theory that Mr. Burge ever had a bona fide grievance is not substantiated by Award 395 because the order of the Division was expressly limited to a change on the seniority roster on September 29, 1939, and contained no retroactive application.

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.

The parties to said dispute waived right of appearance at hearing thereon.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 15th day of January, 1940.