

Award No. 1002

Docket No. 931

2-Va-CM-'44

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee I. L. Sharfman when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (CARMEN)**

THE VIRGINIAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That under the then controlling agreement the carrier be ordered to:

(a) Change the seniority date of Car Repairer S. F. Mozingo from March 17, 1941, to June 18, 1929, to rank ahead of Car Repairer S. H. Baker on the Elmore, W. Va., seniority roster.

(b) Pay Car Repairer S. F. Mozingo at the then current carmen's rate for all time lost between June 17, 1929, to August 13, 1931.

(c) Pay Car Repairer S. F. Mozingo the difference between the compensation he received and what he was entitled to receive at current carmen's rate between August 12, 1931, and March 18, 1941.

EMPLOYEES' STATEMENT OF FACTS: The carrier promoted S. F. Mozingo to position as a car repairer at Page, West Virginia, on February 1, 1926. He was laid off in a reduction of force on July 7, 1928. Restored to service in August, 1928, and again laid off on June 8 or 9, 1929.

The carrier employed, as of the dates set opposite names, the following carmen at Elmore, West Virginia.

S. H. Baker,	June 18, 1929
W. H. Turnmire	November 28, 1930

The carrier put Carman S. F. Mozingo to work as a carman helper at Elmore, West Virginia, on August 13, 1931.

The carrier employed, as of the dates set opposite the names, the following carmen at Elmore, West Virginia:

G. W. Kirk,	February 3, 1936
J. V. Street,	December 1, 1936
C. H. French,	October 1, 1937
W. B. Dehart,	October 1, 1937

The carrier then as late as March 17, 1941, again promoted S. F. Mozingo, on this occasion at Elmore, from carman helper to a carman.

The agreement controlling is dated effective November 15, 1922.

and Mr. Munsey's letter, dated August 16, 1940, in which he states that Mr. Mozingo was furloughed July 7, 1928, which corresponds with the date shown in Mr. Mozingo's personal record file and undoubtedly was taken from it—these dates are unquestionably fictitious. Therefore, the Division should not consider either of them as establishing the definite date Mr. Mozingo was permanently furloughed at Page in the first half of June, 1929.

With respect to Item (3) the carrier contends that the purpose of Rule 26 is to provide continuity of employment simultaneously with a reduction in force at one point when employment at another point is open by giving preference to employees affected by such reduction. But it is not the intention of the rule to permit a furloughed employee to use his seniority rights which apply only at the place employed to claim employment at some other point at any time when work is open.

The carrier further directs the Division's attention to the statement (submitted as Exhibit D) covering the hours, rates of pay, and positions worked by Mr. Mozingo at Page from May 1, 1928, to December 31, 1928, which would indicate that the duration of Mr. Mozingo's furlough in June, 1929, was intended to be temporary. This conclusion is based upon the irregular number of hours Mr. Mozingo worked as a car repairer and the time engaged in other classes of service. Further, the other classes of service in which he worked while furloughed would indicate he preferred to remain at Page while on furlough rather than transfer temporarily to some other point. This is also indicated by the following letter, dated April 1, 1937, written by Mr. Mozingo to the master mechanic at Elmore:

"Calling your attention that I was cut off at Page, W. Va. as I was the youngest rated man there in the Car Dept., and as there is going to be a man take the pension there when it is ready, and as my seniority on the list at Page entitles me to the next vacancy there, and I wish you would consider this as my application for this vacancy or any other vacancy at this point in the future, and thanking you very much."

The carrier also calls attention of the Division to the fact that Mr. Baker was furloughed as a car repairer from June 1, 1932, to June 2, 1940, during which period Mr. Mozingo would have been furloughed had he been transferred to the car repair shop at Elmore and started to work on June 18, 1929.

CONCLUSION

It is the position of the carrier based upon its foregoing records that it strictly and correctly applied the then existing agreement of November 15, 1922, when Mr. Baker was given preference to transfer to Elmore on June 8, 1929, to work as a car repairer, and it respectfully requests, first, that the claim be denied or dismissed for lack of jurisdiction; and if considered on the merits, second, that it be denied in its entirety.

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

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

The parties to said dispute were given due notice of hearing thereon.

This claim is based on an alleged violation, on June 18, 1929, of the then-controlling agreement effective November 15, 1922, whereby the claimant was deprived of his established seniority rights as of June 18, 1929, with a

a resulting loss of employment from June 18, 1929 to August 12, 1931, and the receipt of inadequate compensation from August 13, 1931 to March 18, 1941.

Entirely apart from the merits of the dispute, concerning which the evidence is somewhat conflicting, the carrier challenges the jurisdiction of the National Railroad Adjustment Board to consider this proceeding, on the ground that the case is not one that was "pending and unadjusted" on June 21, 1934, the date of approval of the Railway Labor Act as amended.

This Division of the Adjustment Board has held on many occasions that under Section 3 (i) of the amended Railway Labor Act it does not have jurisdiction in cases that were not pending and unadjusted on the date of the approval of the Act.

The record shows that the claim was first asserted by System Federation No. 40 on behalf of Mazingo on August 16, 1940; and there is no evidence whatever, contemporary with the alleged violation or with the claimant's first knowledge of the alleged violation, that Mazingo himself protested the action of the carrier, that is, either in 1929, when Baker was assigned to the position of car repairer at Elmore, or in 1931, when Mazingo was put to work at Elmore as a carman helper.

The sole basis for the contention of the employees that this proceeding involves a case that was pending and unadjusted on June 21, 1934, is to be found in an affidavit executed by Mazingo September 8, 1943. In this affidavit Mazingo, after stating that he had asked for a job at Elmore from time to time after he was furloughed at Page in 1929, declares:

"* * * I came to Elmore on the 12th day of August, 1931, and went to work as Car Repairer Helper on the morning of August 13, 1931. And when I came to Elmore as Car Repairer Helper, I found that they had hired a Car Repairer on June 18, 1929, namely, S. H. Baker—Mr. Baker being a furloughed engine carpenter from Princeton roundhouse which was a separate seniority from the car repairers. And I also found that they had promoted Car Repairer Helper W. H. Turnmire, at Elmore to Car Repairer on November 28, 1930, disregarding the fact that I was a furloughed Car Repairer holding seniority as such at Page, W. Va.; and I called this fact to the attention of Mr. E. M. Forbes, Foreman in the Car Yards at Elmore. However, Mr. Forbes ignored this matter and continued to work these men as Car Repairers, also forcing me to continue as Car Repairer Helper."

The employees place reliance exclusively upon these declarations of September 8, 1943. It will be noted that even in these declarations the usual evidence of the existence of a dispute—by way of follow-up of the oral protest, through submission of time claims or communication by the claimant with the carrier, or by the claimant with the local committee, or by the local committee with the carrier—is altogether wanting. Assuming that the claimant asserted his rights when he called the matter to the attention of the foreman in 1931, the conclusion is unavoidable that he slept upon his rights for a period of some nine years thereafter. Nothing further was done about the matter until 1940. While there are no formal requirements for keeping a dispute alive, except as they may be specified and made mandatory in a controlling agreement, it is essential, under the provisions of the Railway Labor Act, that the evidence be sufficient to show that an unadjusted case was actually pending at the time of the approval of the Act. The showing in this proceeding is inadequate for this purpose. The conduct of the claimant and his representatives was entirely consistent with acceptance of the situation and abandonment of the claim.

In the opinion of the Division the dispute involved in this proceeding was not pending and unadjusted within the meaning of the amended Railway Labor Act on the date of its approval.

Since, in these circumstances, the Division has no jurisdiction of the dispute, it is unnecessary to consider it on the merits.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 16th day of March, 1944.