

Award No. 1319

Docket No. 1239

2-W&LE-BM-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee J. Glenn Donaldson when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 23, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Boilermakers)**

THE WHEELING AND LAKE ERIE RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That under the current agreement Boilermaker Helper Joseph Eberhardt was unjustly suspended from the service during the period of March 16 to April 12, 1948, inclusive, a total of 26 days, and that accordingly the carrier be ordered to compensate this employe for all time lost during the aforesaid period.

EMPLOYEES' STATEMENT OF FACTS: Joseph Eberhardt, hereinafter referred to as the claimant, was regularly employed by the carrier as a boilermaker helper in the roundhouse at Brewster, Ohio, on the 8 A.M. to 4 P.M. shift, with a seniority date on the boilermaker helpers' seniority roster of September 6, 1923, copy of which is submitted, dated June 1, 1947, identified as Exhibit A.

The claimant was used to fill out bulletined vacancy of five days for a boilermaker on the 4 P.M. to 12 Midnight shift, beginning with March 1 to March 5, inclusive, and thereupon resumed his own shift as a boilermaker helper on Saturday, March 6. The claimant remained on his regular assignment until removed from service on March 16, because he did not elect to again accept the assignment as a boilermaker on the 4 P.M. to 12 Midnight shift, and this is affirmed by copy of the letter submitted, dated March 26, 1948, addressed to Local Chairman Christman by Roundhouse Foreman Blackburn, identified as Exhibit B.

The carrier made no effort to fill this vacancy with an apprentice who had served more than three years on his time, including six months in the roundhouse, or with other qualified available boilermaker helpers—Glen F. Winkhart and Charles E. Speicher—senior to the claimant, or with qualified and available Boilermaker Helper Joseph Carter, junior to the claimant, during all the time the claimant was held out of service until about April 12 when Boilermaker Helper Charles E. Speicher was offered, and accepted, the position as boilermaker on the 4 P.M. to 12 Midnight shift, effective April 13, 1948, and who has since continuously held that position. See Exhibit A, as to the seniority of these helpers.

The carrier restored the claimant to his position and rights as a boilermaker helper without compensation for the time lost on April 13, 1948. However, the claim for compensation for time lost has been progressed in accord-

The carrier denies the employees' contention that Mr. Eberhardt was held out of service by the carrier, but claims that the committee's erroneous advice to Mr. Eberhardt that his seniority was in jeopardy was the real cause of Mr. Eberhardt's not reporting for work, and that he voluntarily absented himself from his assignment without obtaining permission from his foreman, which was in violation of Rule 10 (A) which reads in part as follows:

"When an employee wishes to be absent from duty he must obtain permission from his foreman. If detained from work on account of illness or for any other good cause he shall notify his foreman as promptly as possible. If he fails to do so, it will be considered sufficient cause to drop his name from the payrolls and seniority rosters . . ."

The carrier also states that Mr. Eberhardt's voluntary absence from work was in violation of Rule 13 (C) which reads in part as follows:

". . . While questions of grievances are pending, there will be neither a shut-down by the employer nor a suspension of work by the employees . . ."

and it is the carrier's contention that Mr. Eberhardt should have reported for work on the assignment as boilermaker on the second trick as he was instructed on March 15 and should have continued working as such while settlement of his grievance was pending. The carrier, rather than drop Mr. Eberhardt's name from the payrolls and seniority roster, considered it more advisable to overlook these rule violations for the reason that Mr. Eberhardt, an otherwise well-intentioned and faithful employee, was the victim of ill-considered advice of his general chairman.

The carrier also wishes to point out that in the first discussion of this case with the roundhouse foreman, the local committee made no request for payment for the time that Mr. Eberhardt had been absent from duty. The first request for payment for such time was made by Mr. McCool, general chairman, in his letter of March 29, 1948 to the superintendent motive power and cars.

In conclusion the carrier states:

- (a) The vacancy was bulletined under the provisions of Rule 8 (A) (1);
- (b) The vacancy was filled during the five-day bulletined period under the provisions of Rule 8 (A) (1);
- (c) The attention of the general chairman of the craft involved was called to the insufficient force of mechanics as provided in Paragraph (C) of memorandum appearing at Page 44 of pamphlet; and
- (d) The claimant was assigned to the position at his request under the provisions of the memorandum appearing at Page 71 of the currently effective agreement.

Wherefore, premises considered, the carrier respectfully requests the Honorable Board to deny the claim of the employee.

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.

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

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

The Memorandum of Agreement, executed January 23, 1943, effective March 1, 1943, appearing at pages 71 to 73, inclusive, of the bound agreements was effective upon the dates here in question, the record being devoid of any evidence of the giving of prior written notice of cancellation as expressly required thereby to terminate it. Such war-impelled emergency clause, however, being one of the two rules assigned as basis for carrier's action, does not support the carrier's position—i.e., that when no bids are received on bulletined boilermaker's position, the carrier as a matter of right can assign any qualified boilermaker helper to a **permanent** boilermaker assignment. The phrase "qualified helpers **may** be used to fill such vacancies" when read in connection with the entire agreement, was merely permissive, being a concession upon the part of the unions involved to the upgrading of employes, in the face of pressing shortage of manpower. Neither is there language appearing in the second ground urged in justification of carrier's action, Rule 44(c), to make acceptance of reclassification mandatory in the case at hand. Claimant's reasons for refusing the classification change are immaterial.

The carrier's expressed reason for holding claimant out of service during the period in question, March 16 to April 11, 1948, inclusive, was his refusal to accept the boilermaker position. Further, he in good faith reported for work on March 16, 1948, to the position we find herein that he was entitled to retain; and finally, the question of disciplining claimant for not reporting to the new assignment would seem waived by the following statement appearing in carrier's brief at page 10:

"The carrier, rather than drop Mr. Eberhardt's name from the payrolls and seniority roster, considered it more advisable to overlook these rule violations for the reason that Mr. Eberhardt, an otherwise well-intentioned and faithful employee, was the victim of ill-considered advice of his General Chairman."

hence Rule 10, **Absence from Work**, and Rule 13 (c), **Grievances**, are not involved.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 26th day of July, 1949.