

Award No. 3449

Docket No. 3342

2-MP-EW-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis B. Murphy when the award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYEES'
DEPARTMENT, A.F. of L. - C.I.O. (Electrical Workers)**

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Electricians W. R. Kelly, M. E. Hamann and H. B. Holmes were unjustly deprived of their service and seniority rights effective August 1, 1958, which date they were removed from service of the Carrier.
2. That the Missouri Pacific Railroad Company be ordered to compensate Electricians Kelly, Hamann and Holmes in the amount they have lost in wages from August 1, 1958, until such time as the Carrier reinstated them with service rights unimpaired on January 29, 1959.

EMPLOYEES' STATEMENT OF FACTS: Prior to August 1, 1958, Electricians W. R. Kelly, seniority date September 21, 1948, M. E. Hamann, seniority date September 22, 1948, and H. B. Holmes, seniority date September 3, 1949, hereinafter referred to as claimants, were assigned as electricians at Dupo, Illinois, working the night shift, hours 8:00 p.m. to 5:00 a.m.

Under date of July 18, 1958, claimants and Machinists J. A. Craig, D. L. Bound and W. H. Logan were instructed by letter from Master Mechanic Bechel to appear for formal investigation in office of general foreman at Dupo, Illinois, at 9:00 A.M. Tuesday, July 22, 1958, to answer charges of "violation of instructions of your foreman in refusing duty" on July 18, 1958. (Copy of Master Mechanic Bechel's letter is submitted and identified as our Exhibit A).

The claimants requested that the hearings be postponed until July 24, 1958, to enable them to have representation desired; request was granted and hearing to develop the facts in connection with the charges commenced in the superintendent's office, St. Louis, Missouri, at 9:00 A.M. July 24, 1958. (Copy of transcript of the hearing is submitted herewith and identified as our Exhibit B).

On August 1, 1958, three of those charged, here the claimants, were each furnished identical letters, signed by L. M. Elledge, assistant general manager,

or dismissal from carrier's service, and this has been the practice on this property. Ample precedent is also to be found in awards of all Divisions of the National Railroad Adjustment Board. See Second Division Awards Nos. 1638 and 2068; Third Division Awards Nos. 4867 and 5191; First Division Awards Nos. 5862, 15765, 16408, 16558, 16576, 16854 and 16855.

In addition to the foregoing, Award No. 5754 of the Third Division held that a carrier is not required to plead deduction of earnings; that such deductions are permitted as a matter of law.

For the reasons fully set forth in this submission, there is no basis for claim for compensation as requested in paragraph 2 of employees' statement of claim and said claim must therefore be denied.

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 employees 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 were given due notice of hearing thereon.

The carrier contends that claimants Kelly, Hamann and Holmes were ordered to work overtime on July 18, 1958, to make electrical repairs on a locomotive that was coming in dead on train No. 370 so that it might be used on train No. 379. Following a complete investigation held on July 24, 1958, the claimants were discharged for violation of instructions in refusing duty resulting in delay to train No. 369.

The organization contends that the Foreman, Mr. Lively, was advised by the claimants that they did not want to work and that he (Lively) did not actually demand that the claimants had to work. The organization further contends that the machinists working the same shift were not disciplined and they did not work. It is the organization's further contention that Rule 4 (d) provides a proper method for calling day shift men to perform this work and the carrier did not take advantage of this provision.

The transcript of the testimony taken at the investigation is a part of the evidence presented in the instant case. The testimony of the carrier's representative contained in this transcript was not only completely denied by the claimants at the hearing but it is in part conflicting. For example, the Mechanical Foreman, Mr. Lively, in narrating his recollection of the facts stated that Mr. Kelly and Mr. Hamann refused to work but then on cross-examination Mr. Lively stated in reply to questions: "I asked them 'would they work?' They knew what time 369 went out. I didn't demand nobody to work. I didn't come out and say 'you have to work — I demand you work.'" Mr. Lively also testified that the electricians never refused to work before. Mr. Keith, the acting General Foreman's testimony contained practically the same contradictions. He first stated that he made demands that the electricians work overtime then upon cross-examination he admitted that he did not demand that they work but stated that, "I only asked them to work overtime and get the engines out." When asked in his position of General Foreman did he advise them that he was directing them to work he said that he didn't demand that they work.

The testimony of the machinists who were cited for investigation for the same violations as the electricians, all stated that they were only asked if they

wanted to work overtime and they said that they did not. They also testified that they could hear the requests made upon the electricians and it was not any different from the ones made upon them, in fact no demand was ever made on any of them.

The record shows that because of economic conditions the carrier reduced its forces on July 28, 1958 this being four (4) days prior to the claimants being dismissed and that men were being laid off at the time the overtime work was requested. The organization contends that these claimants could have availed themselves of new jobs, account of their seniority, but because of their dismissal notice they were denied their right of exercising this seniority. In fact claimant Kelly before receiving his dismissal notice was making arrangements to report for work in Kansas City, Missouri but he was not considered and his rights under Rule 23 were denied because of the dismissal notice on August 1, 1958.

As a general rule we agree that employes must perform work as directed by their supervisors but in the instant case there is considerable doubt as to the sincerity of the supervisor's request. The three witnesses who were cited for investigation in this case for the same alleged violations, but were not penalized, all agreed with the testimony of the claimants that no actual demand was made upon the claimants and themselves. This was substantiated under cross-examination by the two supervisors.

The record also agrees that these employes had always worked overtime when requested prior to this dispute. For these reasons and in the light of all the evidence presented we are unable to agree that the employes refused to comply with instructions to work overtime and by such failure caused the delay of train No. 369 as charged.

After a careful consideration of the evidence presented in this case in our opinion the carrier (1) unjustly deprived the claimants of their service and seniority rights effective August 1, 1958 and that the carrier should compensate Electricians Kelly, Hamann and Holmes, the amount that they have lost in wages until such time as they were reinstated (January 29, 1959), less any amount earned in other employment during this period.

AWARD

Claims (1) and (2) sustained in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois this 21st day of April, 1960.