Award No. 3645

Docket No. 3530

2-CofG-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard Johnson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION No. 26, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

CENTRAL OF GEORGIA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the carrier violated the controlling agreement on March 7, 1958 when it assigned Car Foreman G. Gilleland to temporarily relieve Car Foreman H. P. Sandefur, who was absent on jury duty, on this date.

2. That accordingly the carrier be ordered to additionally compensate Carman C. L. McNeal for the difference between what he was paid and what he would have been paid had he been used to fill Car Foreman Sandefur's position.

EMPLOYES' STATEMENT OF FACTS: The Central of Georgia Railway Company, hereinafter referred to as the carrier, assigned Car Foreman Gilleland to assume the duties of Car Foreman Sandefur, who was absent from work this date on jury duty, in addition to his own duties.

Carman C. L. McNeal, hereinafter referred to as the claimant, was certainly available that date because he worked his own job, and further, he certainly must be considered qualified because he has been used on occasions in the past to temporarily relieve foremen who were absent.

This dispute has been handled with all officers of the carrier designated to handle such disputes, including the highest designated officer of the carrier, all of whom have failed to make satisfactory adjustment.

The agreement effective September 1, 1949, as subsequently amended, is controlling.

POSITION OF EMPLOYES: It is the position of the employes that the carrier violated Rule 32 of the controlling agreement when it assigned

work, within the limitations of the Collective Agreement in the interests of efficiency and economy. * * *"

It is the further position of the carrier that the burden of proof rests squarely upon the shoulders of the petitioners. See **Second Division** Awards Nos. 2938, 2580, 2569, 2545, 2544, 2042, 1996, and others. Also see **Third Division** Awards Nos. 8172, 7964, 7908, 7861, 7584, 7226, 7200, 7199, 6964, 6885, 6844, 6824, 6748, 6402, 6379, 6378, 6225, 5941, 2676, and others — all of which clearly state that **the burden is on the claimant party to prove an alleged violation of the agreement.**

Had this ancient interpretation and practice of blanking foremen's positions, as in this case, been in violation of Rule 32 or any other rule in the shop crafts agreement, we believe without doubt that claims would have been progressed to your Board **many years ago,** and not some 10 years after the current September 1, 1949 agreement was negotiated.

The claim is obviously for a new all-exclusive rule requiring all vacancies of foremen's positions to be filled. Carrier urges that the Board does not possess the authority to write rules, and the Board has consistently so held. The Board's holdings are, of course, based on the Railway Labor Act which clearly restricts the Board's authority to deciding

> ". . . disputes between an employee or groups of employes and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ."

See Section 3 First (i) of the Act.

It is well settled that the freedom of action of a carrier is restricted only by statutory enactment or by the terms of an effective agreement. There is no statutory enactment involved here. Certainly the effective agreement does not prohibit the act which is the subject of this claim nor does it require payment of the penalty demanded. There is no justification whatsoever for this carrier to be saddled with this unnecessary expense. The instant claim is without any semblance of merit, and it should 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 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 claim is that the Carrier violated the Agreement at the Macon Shop on March 7, 1958 when it assigned Car Foreman Gilleland to relieve Car Foreman Sandefur who was absent that day, and that Carman McNeal should be paid the additional amount which he would have earned that day if called to fill the position.

The claim is based on Rule 32, which reads as follows:

"Should an employe be assigned temporarily to fill the place of a foreman, he will be paid his own rate — straight time for straight time hours and overtime rate for overtime hours — if greater than the foreman's rate; if it is not, he will get the foreman's rate. Said positions shall be filled only by mechanics of the respective craft in their departments up to and including 45 calendar days."

The record shows that four Car Foremen are regularly employed at the Macon Shop, one of whom, Car Foreman Sandefur, was absent on that day because of a death in the family. Apparently his duties were principally the supervising of running repairs on Track 16. The Carrier's Submission states:

"March 7, 1958, was a very rainy day, in fact it rained practically the entire shop working hours that day. Thus, little or no work was performed outside of the Car Shop Building, and therefore less supervision was required."

"There was absolutely no need to fill the place of Foreman Sandefur on March 7, 1958, thus his position was blanked that day. Carrier had three (3) foremen on duty, and they performed their normal duties that day just as they do on any other day of the year."

In other words, Carrier contends that since only three foremen were needed that day, and performed their normal duties, the fourth foreman's position was blanked, or left unfilled; that Rule 32 means only that if a man had been expressly called to fill the position for the day, he should under Award 1628 (with which Carrier does not agree) have been a mechanic; but that since no one was expressly called for the purpose Rule 32 does not apply.

The Employes' position is that Car Foreman Sandefur's work of supervising his crew was performed by another foreman; that because the work of the position was performed it was not blanked; and that under Rule 32 it should have been performed by a mechanic.

It is of course true that the Carrier may in its discretion employ as many or as few crews and foremen or crews without foremen, as it finds advisable, and may blank unnecessary positions. Obviously it considers four crews and four foremen ordinarily necessary and on March 10, 11 and 12, during Sandefur's absence, used a Carman to fill his position. But according to Carrier's statement above quoted little or no work was performed outside so that less supervision was needed. The statement was not that supervision of Sandefur's crew was not needed, but that the overall supervision of all four crews was less than usual because Sandefur's crew usually employed outside on Track 16, was used inside the Shop Building, where it could apparently be supervised by remaining foremen along with their own crews. If Sandefur's crew had worked outside without supervision the foremen's work would not have been done; but the Carrier's statement indicated that all four crews were supervised.

This is indicated also by Superintendent Mims' statement to General Chairman Moon that "your allegation that Foreman Gilleland took over Sandefur's duties has no bearing in the matter, as quite frequently one foreman's men are borrowed by another foreman, depending upon the importance of the work, and a carman in the course of an 8-hour day may work for one, two, three of more foremen". He not only failed to deny the General Chairman's

allegation, but overlooked the difference between borrowing some of a foreman's men and taking over the supervision of his entire force. However, it is not actually an admission that the statement was correct.

Carrier's contention is apparently sincere that Rule 32 at most relates only to circumstances in which it sees fit to make a definite temporary assignment of an employe to the position, and not where the work can be absorbed by other foremen.

The argument is based upon the general principles that the amount, or even existence, of supervision is for the Carrier to prescribe and that traditionally any foreman can ordinarily do another foreman's work; and upon the contention that the opening words of Rule 32: "Should an employe be assigned" means "If an employe be assigned;" that the Rule is merely a pay rule specifying the proper pay in that event; and that the final sentence merely provides how the position shall be filled in that event without forbidding the absorption of its work by other foremen.

There is respectable support for the contention, although much of it consists of statements amounting to dicta because not actually in point in those awards.

However in this instance the pay provision seems already to have been covered by Rule 16, providing for pay at the higher rate; and as suggested in Award 1628, the last sentence of Rule 32 is separate and distinct from the first sentence, does not relate to pay, uses the word "shall", and mandatorily limits the filling of the position to "mechanics of the respective craft", to the exclusion of others.

Furthermore the record indicates that in 1954 the claim of Carmen Gilleland and Horton, and in 1957 the claim of Carman DeLoach, were allowed by the carrier where other foremen had absorbed the work of absent foremen, thus indicating an accepted construction of an ambiguous provision.

Consequently we believe that on this record the claim should be sustained.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January 1961.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 3645.

The claim of the petitioner is that the Carrier violated the Agreement at the Macon Shop on March 7, 1958, when it assigned Car Foreman Gilleland to temporarily relieve Car Foreman Sandefur, who was absent "on jury duty, on this date."

It is axiomatic that the burden of establishing facts sufficient to require the allowance of a claim is upon the party who seeks its allowance, and when

that burden is not met, a denial award is required for failure of proof. On the date involved in the dispute herein Car Foreman Sandefur was **not** absent on jury duty; he was absent for other reasons. No evidence of probative value was presented by the petitioner to show that the absent car foreman's duties were performed by anyone on the date in question. The petitioner failed to meet the burden of proof that rested on it, and on that basis alone the claim should have been denied.

The majority correctly recognizes that the Carrier may in its discretion employ as many or as few crews and foremen, or crews without foremen, as it finds advisable, and may blank unnecessary positions. On March 7, 1958, the date involved herein, Car Foreman Sandefur's position was blanked. No provision of Rule 32, relied upon by the petitioner, requires that all temporary vacancies as foreman must be filled. Neither does this rule restrict the supervision that may be required of or performed by other foremen on duty. The allowance of the claims referred to in the penultimate paragraph of the award, one in 1954 and one in 1957, in no manner changed the Agreement.

The majority refers to Award No. 1628 and correctly states parenthetically "with which Carrier does not agree." The dissent filed to Award No. 1628 clearly sets forth the errors of that award. However, even under that award it was recognized that foreman positions could be blanked and not filled at all.

Award No. 3645 is clearly erroneous, and we dissent.

P. R. Humphreys

H. K. Hagerman

D. H. Hicks

T. F. Strunck