

Award No. 4508

Docket No. 4306

2-GN-CM-'64

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph M. McDonald when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 101, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. — C. I. O. (Carmen)**

GREAT NORTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Carrier violated the agreement when they arbitrarily changed the seniority date of J. J. Malek on the proposed 1961 seniority roster.

2. And that accordingly, the Carrier be ordered to comply with the agreement and place J. J. Malek in his original position with a seniority date of May 5, 1958.

EMPLOYEES' STATEMENT OF FACTS: On May 24, 1960 an agreement was entered into between the Great Northern Ry. Co., hereinafter referred to as the carrier, over the signature of Mr. C. A. Pearson, Vice President - Personnel and the Brotherhood Railway Carmen of America, over the signature of Charles P. Vickers, General Chairman.

This agreement revised the 1960 Havre Car Department seniority roster to show Mr. Malek as having a seniority date of May 5, 1958, and his position on the roster adjusted to show him immediately following Charles B. Hergeshimer, hereinafter referred to as the claimant.

On December 15, 1960 a protest was entered on behalf of the claimant by Local Chairman T. A. Danell, wherein he protested the fact that on the proposed carmen seniority roster for 1961 Carman Malek was placed on the seniority roster with a date of March 3, 1958, which was in violation of agreement signed on May 24, 1960.

Accordingly this protest was processed up to and including the highest designated officer, all of whom declined to adjust it.

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

POSITION OF EMPLOYEES: It is respectfully submitted that under that part of the agreement signed May 24, 1960, and reading in pertinent part:

However, even if the letter agreement dated May 24, 1960 would not be automatically invalid, it was cancelled and rescinded by the carrier's notice dated July 7, 1960. Section 6 of the railway labor Act reads as follows:

"Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The carrier's notice of July 7, 1960 cancelling and rescinding the May 24, 1960 letter agreement was never answered until August 26, 1960. The organization did not request a conference on the matter within 10 days of July 7, 1960 or request the services of the Mediation Board within 30 days of July 7, 1960 as provided in Section 6, quoted above. Therefore, the carrier was free to place its notice dated July 7, 1960 into effect after 30 days from that date, which it in fact did. The notice is still in effect to date, and the May 24, 1960 letter agreement has been considered cancelled.

**THE CLAIM OF THE ORGANIZATION, THEREFORE,
IS WITHOUT MERIT FOR THE FOLLOWING REASONS:**

1. The verbal protest of the 1959 seniority submitted by Carman Malek was fully sufficient under schedule rule 2(b), and was properly acted upon by the car foreman, local chairman and car department clerk.
2. The letter agreement dated May 24, 1960 was either automatically invalid because it rested upon a mutual mistake of essential and fundamental fact, or it was properly cancelled by the carrier in accordance with section 6 of the railway labor act, as amended.

For the foregoing reasons, the carrier respectfully requests that the claims of the employees 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 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.

Parties to said dispute waived right of appearance at hearing thereon.

This dispute had its inception under the so-called Williston Agreement on this Carrier's property. Said agreement was in short, a device to fairly apportion seniority of men transferred from Carrier's Williston Car Department to other points as the Williston Car Department was gradually shut down.

Carman Malek was transferred within the terms of the Williston Agreement to the Havre, Montana, Car Department, and assigned a seniority date of May 5, 1958 on the 1959 seniority roster. This was changed by an interlineation which showed Malek's seniority date as March 3, 1958, and the 1960 seniority roster showed Malek's seniority date as March 3, 1958.

The 1960 roster was protested by Carman Hergesheimer, which protest resulted in a letter agreement between Carrier and the General Chairman of the B.R.C. of A., dated May 24, 1960. This agreement recited, in effect, that since Malek had not protested his seniority date of May 5, 1958 within that 60 day time limit set up under Rule 2(b) of the controlling agreement, that it was improper to change his seniority date from May 5, 1958 to March 3, 1958 on the 1960 roster.

The instant dispute has been processed by the Organization, protesting the proposed 1961 seniority roster assigning Malek to a seniority date of March 3, 1958, in violation of the letter agreement of May 24, 1960.

Carrier maintains that Malek had made a verbal protest of the 1959 seniority roster at Havre, within 60 days of its posting and that such is proper under Rule 2(b), and further that the letter agreement of May 24, 1960 was invalid because of a mutual mistake of fact. Carrier further contends that the letter agreement was properly cancelled and rescinded by the Carrier.

Since the letter agreement of May 24, 1960 recites that Malek did not make a protest within the time limits of Rule 2(b), we first take up the question of the validity of that agreement.

Assuming, without deciding, that a verbal protest within the 60 day time limit of Rule 2(b) would be valid, what does this record reveal? Carrier submits a statement from Malek, one from its Car Foreman and one from a Clerk at Havre, that Malek did verbally protest the roster. The Organization submits a statement of the Local Chairman at Havre disputing these statements. This record is not sufficiently clear to permit us to find such a mutual mistake upon the part of the negotiators of the letter agreement of May 24, 1960 as to cause us to set such agreement aside. On the contrary, it would seem that during the six months of negotiation preceding that agreement there would have been ample opportunity for this matter to be explored. How else can we account for the specific finding in that agreement that: "Mr. Malek did not protest his seniority date (5-5-58) as shown on the 1959 seniority roster within the 60-day time limit as provided for in Rule 2(b) of the current Shop Crafts Schedule Rules Agreement."?

The Carrier further maintains that by notice dated July 7, 1960 (cf. Carrier's Ex. C-17) it invoked the provisions of Section 6 of the Railway Labor Act, and since the Organization did not comply with such notice under the Act, the notice went into effect, and therefore the letter agreement of May 24, 1960 is rescinded. A perusal of Carrier's Exhibit C-17 shows no reference whatsoever to the Railway Labor Act or Section 6 thereof. It is merely a part of the continuing correspondence concerning the instant dispute.

We conclude that the letter agreement of May 24, 1960 remains in full force and effect, placing Malek's seniority date at May 5, 1958, and we uphold the Organization's protest to the 1961 seniority roster at Havre, Montana.

AWARD

Claim 1: Sustained.

Claim 2: Sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of May 1964.