

Award No. 256
Docket No. 275
2-Va-MA-'38

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 40, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. (Machinists)**

VIRGINIAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: Demoted Machinist Helper J. W. Arthur should be reclassified and restored to his former position of machinist helper with seniority unimpaired and be paid for all time lost between December 7, 1936, and December 21, 1936, and also the difference between the rate of a laborer and that of a helper for all time worked since December 21, 1936.

EMPLOYEES' STATEMENT OF FACTS: J. W. Arthur entered the employment of the Virginian Railway Company as a machinist helper at Elmore, W. Va., June 2, 1925, and continued to work as such until during the year of 1930, when he was requested to take charge of the labor gang for a couple of weeks. He was advised at that time that he would continue to carry the classification and pay of a helper. At the end of the two week period he called the attention of his superior official, Mr. G. T. Strong, master mechanic to the fact that the two weeks had passed and he (Arthur) desired to return to helping machinist. Mr. Strong advised him that he was giving satisfactory service and instructed him to continue on the job as labor foreman.

On several occasions during the following years, Mr. Arthur made the request that he be allowed to return to his former assignment of helping, but each time he was instructed to remain on the labor foreman's job as he was giving satisfactory service. On one occasion he was allowed to return to helping while another man was placed in charge of the labor gang.

No objections were raised by the management at that time to his returning to helping and no question was raised as to his right to do so. He did return to helping and so remained for a period of about six months, while Mr. Rodney Edwards had charge of the labor gang as foreman thereof. Subsequently, however, Mr. Edwards was given other work and Mr. J. W. Arthur was again re-assigned to the labor gang as foreman and continued as such until December 7, 1936, at which time he was discharged. Request was made by him at that time that he be allowed to return to helping as younger men in point of service were then and still are employed as helpers. This request was denied and the discharge made effective December 7, 1936. He was rehired as a laborer on December 21, 1936; has worked since that time as laborer except that on one occasion he was allowed to make a few days of extra helping.

From the time he first entered the service (June 2, 1925), until his discharge (December 7, 1936), he was classified as a machinist helper and paid helper's rate for all time made, regardless of whether he was assigned as

helper or elsewhere. The man who relieved Arthur for the six month period as labor foreman while Arthur returned to his former assignment at helping was on salary which Arthur never received.

POSITION OF EMPLOYEES: We contend that the fact that J. W. Arthur was classified and paid as a helper during the entire time of his employment, both while helping and while acting as labor foreman, establishes his claim that he was and is a helper and that the management so recognized when it relieved him from his first assignment as labor foreman and permitted him to return to helping. That it continued to so recognize when he was again assigned the second time as labor foreman, but continued in the classification and with the pay of a helper, regardless of the fact that he followed a salaried man on the job at this time. In relation to this claim, we submit Exhibit A, copy of letter written by Mr. L. A. Markham, assistant to the president, Virginian Railway Company, addressed to Mr. J. W. Munsey, general chairman of the machinists, dated November 24, 1937, in which admission is made that Mr. Arthur was carried on the pay roll as a machinist helper during the entire period he worked as labor foreman.

We further contend that by permitting Mr. Arthur to return to helping machinist for about the six month period, while Mr. Rodney Edwards was assigned as labor foreman, the management thereby recognized and granted Arthur's right and standing as a machinist helper to return to helping when he was not being used as labor gang foreman.

We further contend that J. W. Arthur was discharged because he became a member of the machinists' union and would not join the company union, and point out that the privilege of returning to his former assignment of helping machinist while Mr. Edwards was acting as labor gang foreman was granted to Mr. Arthur before he became a member of the machinists' union, but denied him after he became a member and at the first opportunity.

He was not discharged for cause which the management seeks to claim, and in connection therewith we submit Exhibit C, copy of letter dated October 1, 1937, written by Mr. J. W. Sasser, superintendent of motive power, Virginian Railway Company, and addressed to Mr. J. W. Munsey, and we call attention to the statement therein made (which we have underlined) which sets up the claim that:

Arthur was discharged for failure to follow instructions, said instructions were to unload two carloads of sand on the date of december 5, 1936.

We herewith offer as Exhibit D copy of order of the yard master which shows beyond question that the two cars of sand were not placed in the pit where the unloading was to be done until three o'clock on December 5, 1936, which was quitting time for Mr. Arthur and the men working in the labor gang. They were not instructed to work overtime, neither to report for duty the following day. Knowing this, the management could not have justly fired him for not unloading the sand which their own records show was not spotted in the unloading pit during the hours of duty of Mr. Arthur, or the men working under him.

We further contend that Mr. Arthur was rehired as a laborer in an attempt to forestall our right to appeal his case to the National Railroad Adjustment Board, since we are not authorized to speak for laborers on the Virginian. In connection therewith, we submit Exhibit E, copy of letter written by Mr. J. W. Sasser, superintendent of motive power, and addressed to Mr. J. W. Munsey as of November 11, 1937. We have underlined statements therein which we think reveal such an intent.

In proof of the fact that Mr. J. W. Arthur was shunted from helping to labor gang foreman, back to helping and then again re-assigned to supervise the labor gang, we herewith submit Exhibit B, original affidavits made in multiple and signed by three fellow shopmen.

To substantiate our entire case, we herewith submit Exhibit F, original affidavits also made in multiple, signed and sworn to by Mr. J. W. Arthur and acknowledged by a notary public, all of which is furnished for the information of the Board.

CARRIER'S STATEMENT OF FACTS: Arthur was employed at Elmore as a laborer by the railway company on June 2, 1925, and worked as such until August 8, 1925, when he was furloughed on account of force reduction. On September 15, 1925, he was called back as a laborer and in January, 1926, placed in charge of his gang, in which position he remained until he was dismissed December 7, 1936, except for approximately three weeks in the summer of 1929, when he worked as a member of the gang. On December 7, 1936, Arthur was dismissed for a dereliction of duty. Shortly after being dismissed, he was re-employed as a laborer in the gang he supervised, on his urgent plea of poverty and illness in his family, and paid the laborer's rate of pay.

At the time Arthur was originally employed, he was classified on his employment slip as a machinist helper, and rated as a machinist helper. The reason for having been classified as such and paid the rate of pay while performing laborer's work was because of the scarcity of labor at the time he was employed and the necessity of paying higher wages than the prevailing labor wage in order to hold labor. Having been placed on the pay roll of the company improperly classified as a machinist helper, it was continued, without notice of its having been brought to the attention of responsible officials of the railway company. When it was located, same was corrected.

Claimant while carried on the pay rolls of the Virginian Railway Company as a machinist helper and paid the machinist helper's rate, performed no service except as a laborer and/or as foreman of his labor gang, although on a few occasions, as is the recognized practice, while working as a laborer, he was used in the place of a machinist helper in the roundhouse, who may have been off duty, but on such occasions it did not change his classification as a laborer, nor was it understood that such occasional temporary work as machinist helper in the roundhouse changed his classification as a laborer. It has long been the continued custom on this property to use laborers temporarily as machinist helpers when for any reason machinist helpers are off duty, but the temporary substitution has never been construed as changing the classification of a laborer to that of machinist helper.

Neither at the time of claimant's dismissal on December 7, 1936, after the usual investigation had been made, nor upon his re-employment, nor at any time prior thereto, was any claim made by claimant that he was entitled to be classified as a machinist helper or entitled to seniority rights as such. Not until September 27, 1937, was the subject brought to the attention of the railway company's superintendent of motive power, Mr. J. W. Sasser, by Mr. J. W. Munsey, chairman of machinists and Virginian System Federation No. 40.

The laborer's rate of pay at the time Arthur was employed was 31c per hour, and the machinist helper's rate of pay was 52c per hour.

At the time Arthur was dismissed the laborer's rate of pay was 33½c per hour, and the machinist helper's rate of pay was 57c per hour.

POSITION OF CARRIER: Question of Jurisdiction: It is the position of the carrier that this claim should be dismissed for the reason that the occupational classification of the Interstate Commerce Commission classifies gang foremen in shops under Reporting Division 68, which is not a class of employees subject to the jurisdiction of this Board under Section 3 (h) of the amended Railway Labor Act; therefore, the Board has no jurisdiction to hear or determine this case.

Dismissal of Arthur: Arthur was dismissed December 7, 1936, for neglect of duty while working as foreman of labor gang at Elmore, W. Va.

This dispute involves whether Arthur was unjustly dismissed; if so, should the railway company be required to restore him to service as foreman of the labor gang at a rate of pay applicable to a classification of work in which his class of work was not a part.

We contend that because Arthur, for the reason hereinbefore set forth, was classified and rated contrary to the classification of work he performed, it did not establish his classification of work as machinist helper's work, but on the contrary, his classification of work as laborer establishes his rate of pay. Therefore, if Arthur was unjustly dismissed, his only claim could be for return to service as foreman of the labor gang, and as previously stated, this Board is without jurisdiction in this respect.

Should the railway company be required to classify the claimant as a machinist helper and place him in service as such, it will result in the cutting off of a machinist helper now in service.

For the foregoing reasons, the Virginian Railway Company respectfully requests that claimant's petition be dismissed.

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 Act, as approved June 21, 1934.

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

The parties to said dispute waived right of appearance at hearing thereon. The record of Mr. Arthur's employment is very obscure and statements as to the facts highly contradictory as to his actual occupation and duties when he first entered the service of the railroad.

It is clearly developed that Mr. Arthur worked as a machinist helper several months in the latter part of 1925 and in the first part of 1926, which service would establish him seniority as a machinist helper. It is also clearly developed that in January, 1926, while working as machinist helper, he was transferred to foreman of the labor gang. A rule of the agreement in effect on this property provides:

"Men transferred by the company to other service will retain their home point seniority unimpaired so long as continuity of service is unbroken and may be returned to that point for similar service."

Mr. Arthur was dismissed from the service while acting in the capacity of labor gang foreman for alleged dereliction of duty, and while there is not much in the record as to actual facts of his dismissal, they appear to be trivial, and as the management has seen fit to restore Mr. Arthur to service, the Division is of the opinion that his seniority as a machinist helper should not be broken.

AWARD

J. W. Arthur will be restored to his former position as machinist helper with seniority unimpaired, but without pay for time lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 11th day of August, 1938.