Award No. 316
Docket No. 317
2-MP-MA-'39

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John A. Lapp when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 2, RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (MACHINISTS)

MISSOURI PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: That Machinists B. J. Sanders and C. E. Tipton and Machinist Helpers W. P. Smith and Isaac Casteel, Bush, Illinois, be compensated for all time lost, due to being furloughed April 27, 1938, to October 2, 1938, inclusive.

EMPLOYES' STATEMENT OF FACTS: At Bush, Illinois, effective date of April 27, 1938, force reduction of two machinists and two machinist helpers was made. Immediately after this reduction became effective, duties of roundhouse foreman were extended to include machinist and helpers' duties, usually performed by employes who were furloughed. Reduction remained in effect until October 3, 1938, at which time all employes involved in machinist craft were reassigned to their former positions.

POSITION OF EMPLOYES: Under date of April 22, 1938, following bulletin was posted at Bush, Illinois:

"Bush, Illinois, April 22, 1938.

ALL CONCERNED, MECHANICAL DEPT.

Bush, Illinois.

Effective with close of shift on Tuesday, April 26, 1938 force will be reduced:

2 machinists—B. J. Sanders, C. E. Tipton
2 mach. helpers—W. P. Smith, Isaac Casteel
1 boilermaker—Walter Adams.

/s/ J. H. Hawkins,
Div. Foreman."

Immediately this force reduction became effective, duties of foreman were extended to include that of duties ordinarily performed by machinist and helper, as provided in Rules 52 (a) and 53 of wage agreement.

"Rule 52. (a) Machinists' work, including regular and helper apprentices, shall consist of laying out, fitting, adjusting, shaping, boring, slotting, milling, and grinding of metals used in building, assembling, maintaining, and installing locomotives and engines (operated by

assigning Boland as working foreman at Yorktown Heights **where no mechanics were employed.**" (Emphasis ours.)

Award No. 227 was cited and vigorously supported as a precedent here. In that case claim was made "for all time lost as a result of being displaced by working foreman." The issue was involved in a complexity of other claims and the claim of displacement by working foreman was not pressed nor was any evidence given on it. The Board held that the claim was invalid for lack of evidence and considered the issue solely as one of seniority.

Award No. 247 was cited but has no bearing upon the present case.

The present case is closely in line with the one involved in United States Railroad Labor Board Decision No. 409 and in this Division's Decision No. 132. Mechanics were employed at Bush, Illinois. They were furloughed during the slack season and their work was done by foremen. How much work was involved is not clearly disclosed by the docket. That the work had decreased substantially from the rush season there can be no doubt and the carrier would have been within its rights in reducing the force at Bush.

It might be different if the work of the mechanics at Bush had been permanently discontinued, but the present case is not one of permanent discontinuance. Bush is a year round terminal with a heavy rush season and an extremely slack season. Three mechanics and two helpers were employed in the rush season in the winter of 1937 and 1938, and a similar number were employed when the rush season started in the fall of 1938. During the summer the work did not require the services of all of these mechanics and the carrier would be justified in reducing the force even to the point of having one mechanic on part time. The carrier was not justified, however, under the facts disclosed in the docket in eliminating all mechanics and permitting their work to be done through the slack season by a foreman.

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.

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

AWARD

Claim sustained to the extent that any of the claimants would have been employed if their work had not been taken over by a foreman.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 6th day of March, 1939.

DISSENT ON AWARD NO. 316, DOCKET NO. 317

We dissent from the referee's opinion and award for the reasons advanced in the following:

The referee correctly states that this case involves the interpretation of

Rule 26 of the current agreement between the carrier and the employes, which reads as follows:

"Assignment of Work

"Rule 26. (a) None but mechanics or apprentices regularly employed as such shall do mechanic's work as per special rules of each craft, except foremen at points where no mechanics are employed.

This rule does not prohibit foremen in the exercise of their duties to perform work.

(b) At outlying points where there is not sufficient work to justify employing a mechanic of each craft, the mechanic or mechanics employed at such points will, so far as capable, perform the work of any craft that may be necessary."

The circumstances which brought about the dispute and the contention of the carrier that their action was justified by the language of Rule 26, is set forth.

Following this is shown the answer of the employes—stating that the carrier could not create a condition whereby no mechanics were employed and then take advantage of the situation by permitting the work to be done by the foreman.

Proceeding further, the referee states:

"The facts indicate that Bush, Illinois, was a seasonal terminal with heavy operations during the coal shipping season. **Business dropped off considerably during the slack season which began in the Spring.** The force of mechanics was, therefore, eliminated, as indicated, and the work of the mechanics was done by a foreman during the slack season." (Emphasis ours.)

The last quoted paragraph contains an admission that the point involved was a "seasonal terminal with heavy operations during the coal shipping season," and that "Business dropped off considerably during the slack season which began in the Spring." The referee's statement that "Business dropped off considerably" and "The force of mechanics was, therefore, eliminated," implies that the reduction of force was the obvious and reasonable thing to do in view of the considerable reduction in business This being the admitted situation, it cannot be reasonably said that the carrier was at fault for the severe drop in business, and how may the carrier be charged with taking any advantage under such circumstances? As a matter of fact, the employes do not anywhere charge that the carrier took advantage of the suitation; that is the language of the referee.

The referee then proceeds to place an interpretation on Rule 26, stating:

"Rule 26 must be considered as one of limited application, * * *. It was a permission that under certain circumstances, foremen could do mechanic's work. It was not a permission to substitute foremen for mechanics, except in a very limited way. It is apparent that this interpretation is the correct one, for if the rule is not narrowly limited, it might result in the substitution widely of working foremen for skilled mechanics by the mere device of laying off all of the mechanics a part or all of the time and letting foremen do the work."

Rule 26 very definitely permits the use of foremen to perform mechanic's work "at points where no mechanics are employed." Nowhere in the language of the rule is there contained anything to indicate any limitation whatsoever where no mechanics are employed. He then attempts to justify the statement quoted immediately above by referring to "the issue, itself, has been before tribunals including the United States Railroad Labor Board and this Division of the National Railroad Adjustment Board."

He refers to Decision 409 of the United States Railroad Labor Board and states that that decision "reviewed a similar set of circumstances." As a matter of fact, the circumstances were about as dissimilar as could be found, as in that case, a boilermaker, the only mechanic employed at the point involved, was furloughed and another boilermaker brought in from another point to take the position. Decision 409 was based upon the fact that "there must be shown good and sufficient reason in order to permit the carrier to displace employes." The last quotation contains the language of the United States Railroad Labor Board in Decision 409. There was no good reason shown for the displacement of one mechanic and the only mechanic employed at the point, and the appointment of another mechanic from another point in his place; in fact, there was no reason whatever given for this action.

Reference is then made by the referee to the Second Division's Award 132. We agree that the circumstances and conditions surrounding the dispute which developed Award 132 are very similar to those in Decision 409. However, Referee Lapp goes on to say that in Award 132 it is shown that "a machinist was transferred from an outlying point and a foreman thereafter did his work." Again the referee indicates that he did not have a full understanding of the circumstances even in the latter case. What actually happened was that a machinist holding the title of "lead machinist," with a differential rate, not only performed all the mechanical work necessary, but, in addition, was regarded as a supervisor, being held responsible for all supervisory work. This machinist held seniority at the point involved from August 3, 1922. It was admitted by the carrier that this machinist's work was satisfactory for a period of seven years. What the carrier did in that instance was to transfer from a distant point a foreman who held foreman's rights, making the change "without good and sufficient reason."

Reference is made to the Second Division's Award 188 with the aid of a referee. Dr. Lapp states:

> "This case did not involve the displacement of mechanics and the transfer of work to working foremen. The only mechanic at the point was given the job of foreman. The decision of the Division was, apparently, based upon the fact that no mechanics were being displaced at the particular point by a foreman, thus taking the case out of the direct line of the previous cases where the condition was created through the furloughing or transfer of men and the assignment of their work to foremen. * * * "

A correct statement of the conditions and circumstances surrounding that case is that, initially, an electrician named Boland was appointed at Yorktown Heights to perform the necessary mechanic's work and the carrier, some time subsequent to Boland's assignment as a mechanic, classified him as a foreman. It was the positive declaration of the employes in that case and definitely the basis on which the dispute was submitted to this Board, that the carrier was not within its rights under the rules of agreement to take the work away from a mechanic and give it to a foreman.

Referee Devaney, in reaching his conclusions as a basis for the award, said:

> "The rule, however, as stated, is general and we have no way of determining what was in the minds of the negotiators when the rule was written. We must accept and apply the rule as we find it. It may well be that the fears of the employes that the carrier will apply this rule to the employes' detriment is fully justified. **If so, that can only be corrected by negotiations, clarifying the intent of the parties and changing the wording of the rule as to result in fair dealing.**" (Emphasis ours.)

Referee Lapp states in connection with Award 188 that "the decision of the Division was, apparently, based upon the fact that no mechanics were

being displaced at the particular point by a foreman, thus taking the case out of the direct line of the previous cases where the condition was created through the furloughing or transfer of men and the assignment of their work to foremen." On the contrary, the particular circumstances involved in Award 188, absolutely did involve the displacement of a mechanic and the transfer of work to a working foreman. Even though the only mechanic employed was promoted to the position of foreman, it did displace the mechanic and transfer the work to the working foreman, and that was the main objection of the employes to the change. Obviously, when the mechanic was promoted and classified as foreman, then thereafter, there was no mechanic employed at the point.

The referee treats very lightly the Second Division's Award 227, which was cited and argued in support as a precedent. The referee admits that the claim was made "for all time lost as a result of being displaced by working foreman." That was the principal claim in that dispute. It is true that the issue did involve other claims, but to say that "the claim of displacement by working foreman was not pressed, nor was any evidence given on it" is to say very clearly, in other words, that the employes themselves admitted that there was no evidence of violation of the rule which is, in fact, the same rule that is involved in the instant case. The Board did hold that the claim was invalid for lack of evidence. This lack of evidence was the failure to prove that the rule was violated. We repeat that the rule in question is the same rule as is involved in this case, Docket 317, Award 316. The last paragraph of the findings in Award 227 reads:

> "A full review of the case indicates that the only violation of the rules was when a junior machinist was temporarily used at Brownsville, Texas, for a period of fourteen (14) days while Machinist H. E. Carson was furloughed."

Carson was the claimant and his sole claim before this Division was that he was displaced by a foreman. As previously stated, it was admitted by both sides that Carson was displaced by a foreman. Award 227, rendered by the Second Division without the aid of a referee, is proof of the fact that the employes themselves did not claim that there was any violation of the rule in Carson's case, and the rule we refer to is the very same as is involved in Docket 317, Award 316.

The present case is not at all in line with the one involved in the United States Railroad Labor Board Decision 409, and in this Division's Award 132. There is no similarity. We have shown this evidence of dissimilarity in the foregoing.

It is acknowledged by Referee Lapp that "how much work was involved after the mechanics were furloughed is not clearly disclosed by the docket." However, he adds "that the work had decreased substantially from the rush season there can be no doubt and the carrier would have been within its rights in reducing the force at Bush." And so, in the one breath the referee positively states that the record does not show how much work remained after the heavy work was transferred to another point and the mechanics were furloughed, admits that the work had decreased substantially and that the carrier was within its rights in reducing the force, yet in the face of all this he decides that some mechanical force should have been retained.

The referee's concluding paragraph of his opinion indicates that he based his conclusions principally upon the fact that the point involved "is a year round terminal with a heavy rush and an extremely slack season" as he states that "it might be different if the work of the mechanics at Bush had been permanently discontinued, but the present case is not one of permanent discontinuance. * * * During the Summer the work did not require the services of all of these mechanics and the carrier would be justified in reducing the force even to the point of having one mechanic on part time. The carrier was not justified, however, under the facts disclosed in the docket in eliminat-

ing all mechanics and permitting their work to be done through the slack season by foremen."

We repeat it is admitted by the referee that the record does not show how much mechanics' work remained or was involved after the mechanics were furloughed. He admits that in the circumstances the carrier would be justified in reducing the force "even to the point of having one mechanic on part time," further stating: "The carrier was not justified, however, under the facts disclosed in the docket in eliminating all mechanics and permitting their work to be done through the slack season by foremen." In stating that the carrier would be justified in reducing the force even to the point of having one mechanic on part time, **the referee plainly admits that foremen could perform the necessary work when the one mechanic was not on duty or on part time.** He does not indicate what facts were disclosed in the docket that did not justify the elimination of all the mechanics. We can only surmise that the basis for this statement is that the services of the mechanics were not permanently discontinued. It is clear that the referee ignored entirely the language of Rule 26 which provides that foremen may do the work at points where no mechanics are employed.

How may a referee or anyone else not in a position to judge as to the amount of work remaining, at the point involved, decide that there was sufficient work for the retention of even one mechanic?

Again we refer to the Second Division's Docket 171, Award 188. All documents submitted by both sides in that case were available to Referee Lapp, and were actually submitted in evidence in the instant case. Among the documents submitted in connection with Award 188 is a brief submitted by one of the labor members of the Second Division, which it may be reasonably assumed contained definitely the position of all labor members of the Second Division. In that document, under the caption: "PURPOSE OF THE RULE," there are given pointed illustrations covering conditions under which a foreman may perform mechanic's work. The illustrations read as follows:

> "Point A on a certain railroad might at one time have been a flourishing terminal point, but because of a number of reasons the facilities and the activities had been moved to points outside, and a gradual reduction in the forces had taken place at point A until there was no one but the foreman and a few laborers left. The carrier urged upon the men the necessity of having this foreman make light, temporary repairs to locomotives or cars which would enable the equipment to complete its journey to a more substantial repair point on the railroad.
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> Another illustration would be the stub-end of a branch line where a few locomotives might turn around in the course of a day, or where perhaps a switch engine would tie up at night. Such a point could possibly use the services of an engine watchman, a fire cleaner, a hostler, a boiler washer, and possibly a call boy, but there is not sufficient mechanics' work to keep one mechanic regularly employed, so it is permissible at that point to have the foreman make a few unimportant repairs."

The above quoted statement concludes thus:

> "Many other similar or related illustrations could be given, but the two already recited are sufficient to explain the meaning of the language, 'except foremen at points where no mechanics are employed.' "

The first illustration above quoted covers exactly the situation that existed at Bush, Illinois (Docket 317). In former years, a considerably larger force was employed at Bush, Illinois, until the machinist force had been reduced to two mechanics and two helpers. The work further decreased until management decided, for economic reasons, that the heavier work could be trans-

ferred to another point leaving "light, temporary repairs to locomotives which would enable the equipment to complete its journey to a more substantial repair point."

The foremen who took over the performance of such light, temporary repairs as were necessary did not, in the true sense, displace any mechanics. These foremen were the foremen in charge, one days, the other nights, for a long period, so that, again using the illustration presented by the employes, "there was no one but the foreman and a few laborers left."

We have clearly pointed out Referee Lapp's misunderstanding of the circumstances and conditions surrounding the cases covered by Decisions 409, 132, 188 and 227. We have indicated the many inconsistencies in the referee's statements throughout and have shown that the labor members of the Second Division previously agreed and argued that the "purpose of the rule" (meaning Rule 26) is that where there is not sufficient mechanics' work to keep one mechanic regularly employed, it is permissible at that point to have the foreman perform the necessary work. This reasoning definitely applies to the situation in the instant case. Formerly, there was a larger force of mechanics employed at Bush, Illinois. There had been reductions in force from time to time, and finally the last two mechanics and their helpers were furloughed, all because of the reduction in business. Positively no showing has been made that there was a sufficient amount of mechanics' work remaining to keep even one mechanic employed. The record does not show any such claim.

The claim in the instant case is that the two mechanics and the two helpers be compensated for time lost due to being furloughed. The position of the employes is that Rules 52 (a) and 53 of the agreement were violated because foremen were used to do mechanics' work, ignoring entirely the fact that when the foremen were permitted to do mechanics' work there were no mechanics in service at the point. The employes additionally took the position that Rule 26 was violated, giving as their opinion that Rule 26 provides that foremen at points where no mechanics are employed, and where no mechanics' work is performed or anticipated, may perform emergency mechanical work. We again call attention to the fact that even the labor members of the Second Division have taken the position, as indicated in the foregoing, that at points where the work has been reduced to the extent that there is not sufficient work to keep one mechanic regularly employed, it is permissible to have the foreman do the work. Obviously, if there was no "mechanical work ordinarily performed or anticipated," there would be no need even of a foreman with mechanical ability where no mechanical work is performed or anticipated.

We hold that Referee Lapp totally disregarded the actual facts and circumstances in this case, ignored the reasons advanced for the rendition of previous decisions involving Rule 26, and, particularly, did he fail to understand the situation surrounding the appointment of a foreman in the case of Docket 171, Award 188. The foreman appointed had previously been employed as a mechanic at the same point.

Referee Devaney in the language of his decision in Award 188, also shown in the foregoing, declared that:

> "The rule is general and we have no way of determining what was in the minds of the negotiators when the rule was written. We must accept and apply the rule as we find it."

Referee Devaney further declared in substance that if there now be any misunderstanding as to the clear intent of the rule, "that can only be corrected by negotiations, clarifying the intent of the paries and changing the wording of the rule * * * ."

There has been no violation of the rules of agreement mentioned in this case. Referee Devaney declares the language of Rule 26 to be general in its

terms; Referee Lapp concludes that the same rule "must be considered as one of limited application * * *," and further states that "* * * if not narrowly limited, it might result in the substitution widely of working foremen for skilled mechanics without limitations as to hours and wages."

One referee renders his decision on the language of the rule in that its terms are general; Referee Lapp bases his conclusions on what he envisages may some time happen, overlooking the fact that for the past twenty years the practice of using foremen where no mechanics are employed has been general on all railroads throughout the country; he also overlooked the important fact that in recent years there have been more instances of this kind due to lack of business, resulting in the "drying up" of activities at the smaller points.

The carrier has never been denied the right to reduce forces to whatever extent necessary, even to the furloughing of the last mechanic, and this we repeat is definitely admitted by the labor members of this Division in their position on the "Purpose of the Rule," (same rule herein involved), as shown in Docket 171, Award 188, and made a part of their presentation in the instant case.

Referee Lapp has gone beyond all authority in declaring the action of the carrier in the instant case to be a violation of the rules of agreement.

(Signed) M. W. Hassett
C. E. Peck
J. A. Anderson
A. G. Walther
W. C. Hudson