

Award No. 1023

Docket No. 965

2-TM-MA-'44

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 14, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

THE TEXAS MEXICAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: 1—That the carrier violated the controlling agreement and Rule 3 (c) thereof, by the assignment of Engine Wiper A. Paredes to perform machinist helpers' work on and subsequent to October 1, 1943, instead of restoring to service Machinist Helper Estevan Rodriquez.

2—That in consideration of the aforesaid, the carrier be ordered to pay Machinist Helper Estevan Rodriquez for all work which he was rightfully entitled to perform under the provisions of the controlling agreement retro-active to October 1, 1943.

EMPLOYEES' STATEMENT OF FACTS: The carrier employed Estevan Rodriquez as a machinist helper at Laredo, Texas, on October 1, 1926, and he continued in the service until he was laid off in a reduction of force on December 7, 1941.

The claimant's address was supplied the local chairman and the master mechanic's office clerk as required by provisions of the agreement, and from the date laid off he has been available for return to the service.

On October 1, 1943, the carrier increased the force, but the claimant was not called or given preference of returning to service, and in lieu thereof another, Engine Wiper A. Paredes, was employed or assigned as a machinist helper on October 1, 1943, and who during that month worked 17 days of eight hours each, 1 day of twelve hours, 2 days of four hours each and 1 day of three hours.

The local committee demanded that the claimant be restored to service in accordance with his seniority and the provisions of Rule 3, and this the carrier has declined to do to date.

The controlling agreement is dated effective December 15, 1937.

POSITION OF EMPLOYEES: Rule 3 (c), provides that—

"In the restoration of forces, senior laid off men will be given preference of returning to service, if available within a reasonable time, and shall be returned to their former positions when these former positions are re-established. Fifteen days shall be considered a reasonable time in which to report for duty. Employees laid off under this rule must leave their addresses and changes in address with the local supervisor and committeemen."

Cortez' absence. However, as the facts developed, Rodriquez would have received only one day's employment, if his physical condition had been satisfactory, because Cortez was absent for only one day on leave of absence following the expiration of his vacation. Furthermore, it developed that during Cortez' entire absence, both on vacation and leave of absence, no other employe performed his work or was assigned any of his duties, and a machinist helper was in fact not needed during said period.

Rodriquez did not preserve his rights with carrier by leaving his address with his local supervisor as required by Section (c) of Rule 3. However, regardless of this, when the carrier was willing to re-employ him temporarily, his physical condition, upon examination, was found to disqualify him for employment. System Federation No. 14 has objected to the carrier's requiring Rodriquez to submit to a physical examination, but it has never contended that Rodriquez was not in fact unfit as found by the chief surgeon.

Even if we were to assume, contrary to the true facts as stated above, that an additional position of machinist helper was established on or about October 1, 1943, or at any time subsequent to that date, nevertheless Rodriquez would have no claim thereto because of his defective physical condition.

The carrier submits that there has been no violation of the agreement and that under the facts of this case, System Federation No. 14 has no basis for any claim. Carrier, therefore, respectfully requests that the claim be in all things 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 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.

Helper Estevan Rodriquez was furloughed December 7, 1941, in accordance with the terms of the agreement.

Estevan Rodriquez is the senior furloughed helper and when the number of helpers needed in service is increased Rodriquez is entitled, under the terms of the agreement, to be returned to service.

Rule 30 of the agreement does not permit laborers or others to be used as helpers when by so doing it creates an addition to the force.

AWARD

Estevan Rodriquez will be returned to service when the force of helpers is increased, in accordance with the terms of the agreement.

Compensation claimed in this case is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 7th day of August, 1944.