Award No. 2495
Docket No. 2376
2-UP-SM-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee D. Emmett Ferguson when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Sheet Metal Workers)

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreements Sheet Metal Worker Raymond H. Scott at Los Angeles was improperly compensated for services performed as Foreman both on Christmas Day, December 25, 1954, and New Year's Day, January 1, 1955.

2. That accordingly the Carrier be ordered to additionally compensate him in the amount of an additional day's pay at the Foreman's rate of pay.

EMPLOYES' STATEMENT OF FACTS: Raymond H. Scott, hereinafter referred to as the claimant, is employed at Los Angeles Coach Shop and is assigned as lead man on a Saturday through Wednesday basis, hours 8:00 A. M. to 4:00 P. M.

On Christmas Day, December 25, 1954 and New Year's Day, January 1, 1955, the claimant was assigned to work as a foreman and compensated at the daily rate of $23.12 or the foreman's rate for working.

This dispute has been handled with the carrier up to and including the highest officer so designated by the company, with the result that he has declined to adjust it.

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

POSITION OF EMPLOYES: It is submitted that under Rule 34 reading in pertinent part as follows:

> "Should an employe be assigned temporarily to fill the position of a foreman, he will get the foreman's rate . . ."

the claimant is entitled to be paid for such holiday service performed at the same rate as the foreman would be entitled to receive if he worked the holi-

claim had been presented in the proper Division, it is apparent that it is totally without merit and should 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 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 this dispute were given due notice of hearing thereon.

Claimant Scott "was regularly assigned as Sheet Metal Worker-Leadman * * * and in addition had been designated and regularly utilized in the capacity of a regular relief foreman." He worked three (3) days a week as a sheet metal worker and two (2) days a week as a foreman. He holds seniority as a sheet metal worker.

On Christmas 1954 and New Year's 1955 he worked the foreman's job for which he was paid $23.12, the daily rate figured as a portion of a foreman's monthly wage. He received no special benefits for having worked on the holidays. He is represented before this Division by the organization as a sheet metal worker, making claim of a violation of Article II of the August 21, 1954 Agreement, and of Rule 34 of the schedule. The carrier resists the claim on three grounds. On the merits, the carrier urges that the claimant was not protected by the schedule covering sheet metal workers while working as a foreman. The other two grounds of defense are that the claim is not the same as was progressed on the property, and that this Division has no jurisdiction.

We first note that in the original claim letter of January 15, 1955 the organization based its demand on Rule 34 and on the August 21, 1954 Agreement, as well as the references to the rules of the foreman's agreement. Subsequently the organization did not argue the foreman's agreement. The present theory of the claim is one of two grounds on which it was progressed in conference. The abandonment of one line or theory takes nothing from the other, and does not catch the carrier by surprise, or present new matter which was not considered on the property. This is the same dispute, involving the same parties, covering the same occasion and testing one of the same rule violations as alleged originally. We find on this ground that the present claim is properly before the Division.

On the question of divisional jurisdiction we observe the language of the Railway Labor Act grants the Second Division "jurisdiction **over disputes** involving * * * sheet metal workers." It should be emphasized that the jurisdiction is **not over the agreements** with specified crafts. It follows that if claimant Scott is a sheet metal worker involved in a dispute, this Division has jurisdiction. To this point the problem appears to have a simple solution; but the fact that Scott works two (2) days as foreman and was working as foreman on claim dates is raised by the carrier as proof that he was a foreman and as foreman his dispute must be decided by the Fourth Division.

Rule 34 of the schedule, under which Scott holds seniority, anticipates service as a foreman, in other words a dual occupation. The Railway Labor Act makes no provision for such situations. We must now make a determination of Scott's present status as a claimant, to avoid a vacuum and to resolve a dilemma, such as was presented by the local chairman in his original claim letter wherein he stated that the assignment "does not in itself mean that Mr. Scott should receive less compensation on the holiday in either case than he would have received under either * * * agreement."

A strict application of Article II of the August 21, 1954 Agreement resolves the dilemma. The applicable pertinent provisions are paraphrased as follows:

> "Section 1. * * *, each regularly assigned hourly and daily rated employe receive eight hours' pay * * * for each * * * holiday (which) falls on a workday of the work week of the individual employe:
>
> New Year's Day * * *
>
> Christmas.
>
> Section 2 (a). Monthly rates. * * * Weekly rates * * *.
>
> Section 2 (b). All other monthly rates * * *.
>
> Section 3. An employe shall qualify * * * if compensation * * * is credited to * * * days preceding and following * * *."

Claimant Scott "**was regularly assigned**" on claim dates. The assignment was by virtue of his seniority held under the sheet metal workers' schedule and his seniority status was not extinguished by the fact that he was doing work other than sheet metal work. This finding gives effect to the obvious intention of the parties as expressed in their agreement establishing paid holidays.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 11th day of June, 1957.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 2495

This award requires a dissent. The Second Division has erroneously assumed jurisdiction over this dispute and, additionally, it has applied an agreement provision which is plainly inapplicable to the Claimant in this situation.

This Division had no jurisdiction because on the dates of claim Scott was working as a Mechanical Department Foreman, and additional compensation was sought under the Shop Crafts Agreement while working in the capacity of a foreman. Foremen are a class or craft of employes and/or subordinate official separate and distinct from sheet metal worker employes and are represented on this property by the American Railway Supervisors Association, whose agreement with the Carrier provides for the compensation of employes working in the foreman class. Foremen are a class or craft of employes over which the Fourth Division has jurisdiction under clearly defined provisions of the Railway Labor Act. This appears to have been recognized by the majority in the last sentence of paragraph 8 of the Findings, where it is stated:

> "As a foreman his dispute should be decided by the Fourth Division."

The Division, however, purports to find that Claimant was not a foreman but was a sheet metal worker. This finding is not in accord with the facts and is in error.

The Board apparently predicated this finding on the fallacious assumption that Claimant Scott worked as a foreman by virtue of Rule 34 of the Shop Crafts Agreement, i. e.:

> "Should an employe be assigned temporarily to fill the position of a foreman, he will get the foreman's rate. Said position shall be filled only by mechanics of their respective craft in their department."

whereas, the fact is he worked as a foreman by virtue of the Carrier's Agreement with the Railway Supervisors of America. This is so because it is fundamental in collective bargaining concepts that the determinant in deciding which agreement to apply in a dispute is the type of work involved and not the craft or organization to which the claimant may belong, or in which he may hold seniority. The only labor organization with jurisdiction over the work of a particular craft is the organization holding the contract as a representative which encompasses work of that craft. Only that organization speaking for the craft may legislate as to who may perform the work of its craft, under what circumstances, and for what compensation. It is clear that Scott could not possibly have worked as a foreman in this case unless the Supervisors' Agreement so permitted, or if the organization interpreting that Agreement did not so permit.

Rule 34 of the Shop Crafts Agreement could only permit sheet metal men to work as supervisors if the Supervisors' Organization either allowed or permitted such service. That the Sheet Metal Workers' Organization recognized this is obvious from the language of Rule 34, which provides:

> "**Should** an employe be assigned temporarily . . ." (Emphasis supplied)

The word "should" in this context clearly and only means "if." Therefore, Rule 34 was not the primary source of authority for Scott to work in the higher or upgraded craft of foreman.

The majority says that Rule 34 "anticipates" service as a foreman. This, too, is immaterial and furnishes no basis for the assumption of jurisdiction. The majority intimates its disturbance over this "anticipation" which, it says, creates a "dual occupation"—a situation not provided for in the Railway Labor Act. Scott did not have a "dual occupation." That is impossible. An employe cannot and does not occupy two positions or jobs at one and the same time.

The majority concludes that this creates an anomalous situation beyond the contemplation of the Railway Labor Act. It describes this situation as a "vacum" and then, in order to escape from this illusory "dilemma," finds jurisdiction in the Second Division. It is submitted there was no "vacuum", or "dilemma," since the Act provided that the Fourth Division should hear and determine disputes involving foremen, and on those days when Claimant Scott performed foreman's work, he was a foreman.

In any event, and without regard to whether or not the Claimant's service as a foreman was performed by virtue of Rule 34, that provision only prescribes pay at foreman's rate. It is obvious and fundamental that to determine the foreman's rate of pay, resort must be had to the Foremen's Agreement. There was no showing here, and the majority does not even purport to find, that Claimant did not receive the "Foreman's Rate." What the majority did here was to find the Claimant to be a sheet metal worker employe on those days he worked as a foreman, and then proceeded to apply the holiday pay provisions of the August 21, 1954 Agreement to his service as a foreman in the face of the fact that such Agreement is not applicable to foremen.

The fundamental issue in this case concerns the question of what agreement is properly applicable to Claimant Scott when and during the time he

performed work as a foreman. While Scott's only permanent status was that of a sheet metal worker, and it was as such that he held his seniority, the majority resolves the entire question on this undisputed, but irrelevant, point.

They state:

> ". . . if claimant Scott is a sheet metal worker involved in a dispute, this Division has jurisdiction."

Such a solution ignores the simple fact that on the dates of claim Scott worked as a foreman and not as a sheet metal worker. As we stated in Award No. 1287:

> "The controlling criterion is the nature of the work performed . . . Jurisdiction is conferred so long as the actual work performed is the type of work which the Act expressly delegates to the Second Division;" also, in Award No. 1527: . . . "when it is recalled jurisdiction depends upon the status of the employes involved, not upon the organization representing them, we are impelled to conclude the instant dispute must be held to involve a maintenance of way man and is therefore not within the prescribed jurisdiction of this Division of the Board."

and in Award No. 1740:

> . . . "It is true, as carrier contends, that solely because these claimants are represented by the Sheet Metal Workers' organization, a class of employes of which the Act gives this Division jurisdiction, would not give this Division jurisdiction of their disputes. Jurisdiction of the several Divisions is not based on representation. We must therefore look to the agreement to ascertain just what are the duties of a sheet metal worker and whether or not these claimants come within that class."

The basic inquiry must be what agreement applies to Scott in his temporary status as a foreman.

It can hardly be denied that when Scott worked as a foreman, he was in an entirely different status or class or craft from that of a sheet metal worker. Similarly, if any dispute arose while working as a foreman which involved his foreman's work, the Railway Supervisors' Organization, as custodian of the contract covering foremen's work and the representative of that craft on this property, would properly insist upon an application of their contract, and would consider Scott's "status as a claimant," as that of a foreman. The result must be the same when the dispute involves appropriate compensation to be paid an employe working as a foreman for those days he worked upgraded as a foreman, regardless of what craft he belonged to on a permanent basis.

In considering which agreement should be applied, the N.R.A.B. has applied the agreeemnt of the craft in which the employe was working at the time the dispute arose, and not the agreement of the craft of which he might have been a permanent member prior to upgrading.

First Division Award No. 16317, without referee, held as follows on this point:

> "Here, in Docket 25864, the Division finds itself confronted with two (2) separate and distinct schedules of contract, both of which are alleged to be involved and controlling.
>
> "The Dispute involves the complaint of a switchman who, while working as an extra or relief yardmaster was, as result of formal investigation, disqualified for future services as a yardmaster in any category. The petitioner alleges the current agreement between the accredited representatives of 'Yardmen and Switchtenders' is

> involved and controlling; while the respondent carrier alleges the current agreement between the accredited representatives of 'Yardmasters and Assistant Yardmasters' is involved and controlling. The Division finds that under the evidence of record in this particular docket the complaint should be dismissed without prejudice . . ."

This award is representative of others reaching the same conclusion.

The courts and the National Railroad Adjustment Board have not considered the craft membership of the individual claimant as necessarily conclusive of the jurisdictional question. Merely because an employe claimant happens to be a member of an organization holding the contract for representative purposes for a class of employes under cognizance of a particular Division is not a valid basis for that Division assuming jurisdiction. This is demonstrated by the numerous Yardmaster cases before the First Division. The First Division would not assume jurisdiction simply because an operating employe brought the claim. Those cases properly followed **Order of Railway Conductors** vs. **Swan,** 152 F. 2d 325, 328 (1945), affirmed 329 U. S. 520 (1946), and dismissed numerous cases for want of jurisdiction, despite the fact that in most of the cases the "present status as a claimant" of the moving parties justified First Division jurisdiction.

Award No. 2495 is erroneous and can have no value as a precedent, absent a clear showing that on December 25, 1954 and January 1, 1955, the claimant worked in the Sheet Metal Workers' class or craft. No such showing has been made.

M. E. Somerlott
J. A. Anderson
E. H. Fitcher
D. H. Hicks
R. P. Johnson