Award No. 2586
Docket No. 2470
2-CStPM&O-MA-'57

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 75, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Machinists)

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement the Carrier unjustly dealt with and improperly abolished Machinists Rudolfo, Cavanaugh and Smith's positions on January 4, 1955 at its Omaha, Nebraska roundhouse.

2. That the Carrier be ordered to:

a. Re-establish these Machinist Positions

b. Compensate the aforesaid employes for all time lost at the applicable rate of pay.

EMPLOYES' STATEMENT OF FACTS: On January 4, 1955, the Chicago, St. Paul, Minneapolis and Omaha Railway Company, hereafter referred to as the carrier, posted a bulletin in the roundhouse at Omaha abolishing all mechanics and helpers positions effective at the close of work day January 7, 1955. This affected three Machinists and two Machinist Helpers.

The carrier then established a foreman and assistant foreman's position and assigned them to perform the same duties formerly performed by the laid off machinists. The carrier changed its mind about abolishing the two machinist helpers positions and retained them in service to assist the foreman in performing machinists' work.

On January 5, 1955, a personal notice over the signature of Acting Roundhouse Foreman J. J. Nolan was given each individual employe affected reaffirming the contents of the January 4, 1955 bulletin.

In conclusion the carrier submits that this claim should be denied in its entirety.

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 the dispute were given due notice of hearing thereon.

As of January 7, 1955 the Carrier abolished three machinists positions at its Omaha roundhouse. The work formerly performed by these machinists was taken over by employees which the Carrier calls "working foremen." The claim is a demand that the three machinists positions be re-established and that the employes affected be compensated for all time lost at the applicable rate of pay.

Both parties have raised procedural issues which it is not necessary that we resolve in view of the conclusion reached.

Both parties rely upon Rule 30-T of the Agreement which reads:

> "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.
>
> The rule does not prohibit foremen in the exercise of their duties to perform work.
>
> All outlying points (to be mutually agreed upon) 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 Carrier undertakes to defend its action on the grounds that a reduction in force was justified; that Rule 30-T expressly permits foremen to perform work, and that there were no mechanics employed in Omaha after the three machinists were furloughed, which authorized the carrier to transfer the work involved to the foremen.

We cannot construe the Rule as broadly as the Carrier would have us do. It does permit foremen to perform mechanics work at points where no mechanics are employed and it does permit one craft of mechanics to perform the work of another, at outlying points to be mutually agreed upon, when there is not sufficient work to justify employing a mechanic of each craft. However, neither of said situations prevailed at Omaha, and we find no authority in the agreement for the action of the carrier in dispensing with the services of the machinists and transferring their work to foremen, so long as there remained sufficient work to justify the employment of the machinists.

In other words, a Carrier may not dispense with a machinist, who has a full complement of work, merely to make a place for a "Working foreman".

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 31st day of July, 1957.

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 2586
DOCKET NO. 2470

NAME OF ORGANIZATION: System Federation No. 75, Railway Employes' Department, AFL-CIO (Machinists).

NAME OF CARRIER: Chicago, St. Paul, Minneapolis and Omaha Railway.

QUESTION FOR INTERPRETATION: On October 24, 1956, the Organization filed a claim with this Board, (Docket 2470), alleging that on January 4, 1955, the Carrier "unjustly dealt with and improperly abolished" three machinists' positions at its Omaha roundhouse. The demand was that the positions be re-established and that the displaced occupants be reinstated and compensated "for all time lost at the applicable rate of pay." On July 31, 1957, this Board found, after a proper hearing, that the Carrier's action constituted a violation of Rule 30-T of the effective Agreement and entered an award: "Claim sustained." (Award 2586).

A controversy has since arisen between the parties with respect to whether, in satisfying the Award, the carrier is entitled to take credit for the earnings of the three employes in other employment while they were held out of their positions. The Carrier has tendered this issue by its request for an interpretation of Award 2586.

The Carrier contends that it is entitled to make such deductions by reason of Rule 35-T of the Agreement which reads:

> "If it is found that an employee has been unjustly dismissed, such employee will be reinstated and compensation will be allowed on basis of regular assigned hours, pro rata rate for time lost, less any amount he may have earned at other employment during such dismissal."

The Organization asserts that: (1) the present controversy was put at rest, adverse to the Carrier, by Award 2586; (2) Carrier made no contention in its original submission or at the hearing that Rule 35-T had any application to this controversy and it is now too late for it to do so; and (3) the three employes concerned were merely furloughed and not dismissed when they were wrongfully deprived of their positions and, in any event, Rule 35-T is a discipline rule and is not relevant to this case.

Both parties have cited numerous awards of this and the other Divisions bearing upon the subject of when it is proper to take outside earnings into account in compensating an employe who has been wrongfully deprived of his position. If, however, it is concluded that the Carrier's request for an interpretation is properly before us and that Rule 35-T is applicable it will not be necessary for us to look beyond the Agreement and the awards of this Division.

It is true, as has been pointed out by the Organization, that the original claim out of which the present dispute developed asked that the Carrier be required to "Compensate the . . . employes for all time lost at the applicable rate of pay," and that this Board sustained the claim without specifically saying whether or not outside earnings are deductible. But this state of the record does not, in our judgment, require the conclusion that the Award implies that no such deductions can be considered. As this Board pointed out in Award 1638, "whatever the method of calculating the compensation may be, a deduction of outside earnings is required **unless there is a clear and definite intention that the adjustment is on some other basis."** Certainly, there is nothing in Award 2586, or in the record on which it was predicated, to force the conclusion that outside earnings are not to be taken into account in calculating the financial redress to which the employes are entitled. The Organization's contention that the present controversy was resolved against the Carrier by the Award must, therefore, be rejected.

If what has just been said is correct, it must also follow that the fact that the Carrier did not urge the application of Rule 35-T in its original submission or at the hearing is immaterial, since an award that is silent on the subject of the deductibility of outside earnings carries that implication. In other words, the Award must be interpreted as though it provides for deducting outside earnings, even though it contains no express provision therefor. It is only where the rules preclude such deductions that they are prohibited. See Award 1638, supra.

Enough has been said to provide the basis for the interpretation requested but we will, nevertheless, take notice of the Organization's third and last proposition, namely, that Rule 35-T pertains only to disciplinary cases and that the dispute resolved by Award 2586 did not belong to that category. Frankly, we are unable to perceive any rational basis for distinguishing the compensatory rights of an employe who "has been unjustly dealt with," (Rule 32-T), and one who "has been unjustly dismissed;" and we think it is indulging in too much refinement to say that Rule 35-T is applicable to an employe who is wrongfully discharged for an alleged breach of discipline, but not to one who is furloughed by reason of his position having been wrongfully abolished.

In view of the conclusions reached it is unnecessary for us to undertake to harmonize the numerous awards of the Divisions that have been called to our attention or to determine on which side of the questions considered by them the weight of authority lies.

The Board interprets its Award 2586 as contemplating that the three employes concerned are entitled to be compensated on the basis of their regular assigned hours, pro rata for time lost, from the time their positions were abolished until such positions were re-established and the Carrier restored or offered to restore said employes to said positions, less any amounts said employes may have earned at other employment during said periods.

Referee Curtis G. Shake who sat with the Division as a member, when Award No. 2586 was adopted also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 18th day of September, 1958.

LABOR MEMBERS DISSENT TO INTERPRETATION NO. 38 OF AWARD NO. 2586

The claim in Docket No. 2470, which resulted in Award No. 2586, reads in part "compensate the aforesaid employes for all time lost at the applicable rate of pay" and the Award reads "Claim Sustained."

In the submissions presented in Docket No. 2470, no facts were stated or supporting data given as to outside earnings and no issue was raised as to deductions to be made in case of a sustaining award.

The petition submitted here as one for interpretation is, in fact, one for determination of a new dispute not argued or presented in the docket nor acted upon in the award. Its determination would not be an interpretation of the present award, but a new award based on a new dispute not properly before us.

Therefore the majority interpretation of September 18, 1958 is erroneous.

/s/ James B. Zink

/s/ R. W. Blake

/s/ Charles E. Goodlin

/s/ T. E. Losey

/s/ Edward W. Wiesner