

Award No. 3865

Docket No. 3578

2-C&O-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 41, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Carmen)**

**THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Southern Region and Hocking Division)**

DISPUTE: CLAIM OF EMPLOYEES: That the current agreement was violated, particularly Rule 27 (c) when the Carrier failed to recall Ronald C. Cordell, oiler and packer (carman helper) for service March 16, 1957, and John E. Kiger whose seniority was terminated by the Carrier was permitted to work beginning March 16, 1957, C&O Railway Co., Russell Terminal, Russell, Kentucky.

2. That the Carrier be ordered to compensate Ronald C. Cordell, oiler and packer (carman helper) eight (8) hours, five (5) days each week from March 16, to September 28, 1957, account John E. Kiger, with no seniority date, being permitted to work March 16, to September 28, 1957.

EMPLOYEES STATEMENT OF FACTS: Mr. Ronald C. Cordell, oiler and packer (carmen helper) with seniority date of 1-1-51 at Russell Terminal, Russell, Kentucky, was on furlough due to force reduction on March 16, 1957 and the carrier failed to recall Mr. Cordell for service on that date. Mr. John E. Kiger, a returned veteran whose seniority date of October 30, 1950 had been terminated by the carrier, was called and worked from March 16, 1957, to September 28, 1957.

The agreement effective July 21, 1921 as subsequently amended is controlling.

POSITION OF EMPLOYEES: That John E. Kiger, a returned veteran with seniority date of October 30, 1950, Russell, Kentucky, and the seniority date was terminated by the carrier. Ronald C. Cordell, with seniority date of January 1, 1951 was not called for service on March 16, 1957, as oiler and packer and Kiger with no seniority date was permitted to work beginning March 16, 1957 and worked until September 28, 1957. By permitting John E. Kiger to work on said dates, the carrier violated the controlling shop crafts agreement, Rule 27 which for your ready reference reads in pertinent part as follows:

he done so, he could have worked most, if not all, of the days during the period covered by this claim. Cordell did not elect to protect such work which is a further indication of the fact that he did not desire to work for the Railway Company.

Cordell's record shows that he relinquished his rights as carman helper at the car shop, thereby indicating that he gave up his seniority in this one classification at this one point. However, his record reveals that when giving up his seniority as yard brakeman, he resigned, which is a strong indication that he resigned from all service of the Railway Company. If this had been the case, he would have no rights as an oiler and packer at Russell Terminal. Unfortunately, Cordell's letter of resignation of January 4, 1957, cannot be located so its exact wording and Cordell's intent cannot be definitely established at this late date. Had Cordell not resigned on January 4, 1957, he could have continued in service as a yard brakeman. Thus, it will be seen that Cordell's failure to work for the Railway Company was of his own choosing.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Parties to said dispute were given due notice of hearing thereon.

Rule 35 (d) (1) provides that all claims or grievances must be presented in writing "within 60 days from the date of the occurrence on which the claim or grievance is based."

It is clear from the record that the claim was not presented within that period after the occurrence. However it is contended that the presentation was within that period after the discovery of the facts concerning the occurrence, and reliance is placed upon Award 2480 in which this Division said:

"* * * , we do not see how a grievant can file a grievance until he knows or thinks he has been aggrieved. * * * We think the time limitation started to run at that point."

Rules or statutes of limitations can be so written that the limitation period will start from discovery of facts rather than time of occurrence.

But in adopting this rule the parties did not so provide, and we must observe the rule as adopted.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of November, 1961.

DISSENT OF LABOR MEMBERS TO AWARD No. 3865

The majority is incorrect in stating that "It is clear from the record that the claim was not presented 'within 60 days from the date of the occurrence on which the claim or grievance is based'"—as Rule 35 (d) (1) requires. The instant claim, filed by the local chairman on July 23, 1958, is based on letter addressed to John E. Kiger by the Master Mechanic under date of May 29, 1958, which letter revealed that Cordell had superior seniority to Kiger. This letter revealed that the claimant was deprived of employment because of an error on the part of the carrier and the claimant should have been compensated as claimed.

Edward W. Wiesner

C. E. Bagwell

T. E. Losey

E. J. McDermott

James B. Zink