Award No. 4080

Docket No. 3901

2-SP(PL)-MA-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Carroll R. Daugherty when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (MACHINISTS)

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE: CLAIM OF EMPLOYES:

1. That the Carrier violated Rule 37 of the current controlling agreement effective April 16, 1942, as subsequently amended, when Machinist A. E. Cooper (hereinafter referred to as claimant), was denied the Foreman's rate of pay, when used temporarily as Foreman to perform all the duties and responsibilities of a Foreman under provisions of said agreement Rule, on the 3:30 P. M.-11:30 P. M. shift at Carrier's Tracy, California Roundhouse each date December 17, 1959 to January 18, 1960, inclusive, for which service claimant received the Lead Workman's rate of pay instead of the Foreman's rate.

2. That accordingly, the Carrier be ordered to additionally compensate claimant the difference between the Lead Workman's rate received and Foreman's rate for each date of the period referred to hereinabove.

EMPLOYES' STATEMENT OF FACTS: The primary facts which give rise to this dispute are as follows:

Prior to June 25, 1958, supervision of the mechanics employed on the second shift (3:30 P. M.-11:30 P. M.) in the Roundhouse at Tracy, California, was performed solely by the position of roundhouse foreman. This position with its work duties and responsibilities was placed within the scope of an agreement between the carrier and The American Railway Supervisors Association, effective July 10, 1946. The position has, since said date, been within the scope of said agreement.

On June 18, 1958, carrier issued a bulletin abolishing said foreman's position effective June 25, 1958. At the time the position was abolished the roundhouse foreman on that shift exercised supervision over seven men. In addition

They replied they were not involved in this dispute."

It is noted that petitioner now relies heavily on those two awards of the Fourth Division after it had disclaimed to be involved herein.

Even though the Fourth Division rendered sustaining decisions in Awards 1435 and 1436, carrier asserts that said awards can only be construed as an interpretation of rules and working conditions covered by agreement applicable to supervisors on this property, to which petitioner is not a party, and which rules do not come under the jurisdiction of this Division to interpret. Therefore, said awards of the Fourth Division cannot, by reference or otherwise, be used as a proper basis for a sustaining decision in the instant case.

In this connection, as clearly shown in the carrier's submission, petitioner is bound by the provisions of the current controlling agreement applicable to employes represented in petitioner's craft, including Rule 34 hereinbefore quoted, which specifically recognizes and provides that lead mechanics of any craft, including lead machinists, may work with, lead and direct other employes as specified in that rule. As clearly shown in this submission, the claimant performed only work of his craft as specified in applicable rules, including the machinists' classification of work rule and Rule 34 previously quoted, except for a very minor portion of his shift devoted to incidental duties not reserved exclusively to any craft or class as also set forth in detail herein and in handling of the instant case on the property.

Since it is within the jurisdiction of lead machinists to perform work as specified in Rule 34, carrier asserts that the assignment of the lead machinist at Tracy roundhouse and the performance of such work during his assigned hours, with a preponderance of his tour of duty actually devoted to performing work of his craft, as shown in the submission, is in accordance with the provisions of the current agreement. It is again recalled that the performance of such incidental minimum duties have not been recognized solely as work coming under the agreement representing supervisors by specific agreement provisions or practice. It is, therefore, the carrier's position that claimant has been fully and properly compensated under the provisions of agreement applicable to his craft and class and suffered no injury or wage loss as a result of the use of such employe as indicated herein. See Award No. 1382, Fourth Division, denying claim on such basis.

In the absence of any factual evidence to support the petitioner's position, the burden of proof is on the organization. See Award 2810 of this Division and Awards 1151, 1273 and 1366 of the Fourth Division, as well as Third Division Awards 6725 and 6734. The petitioner has obviously not furnished such burden of proof and the carrier avers such proof to support the organization's general contentions cannot be found within the provisions of the controlling agreement or by practice.

CONCLUSION: Carrier submits it has shown hereinabove the within claim is improperly before the Division in that it was not initiated on the property within the time limit provisions of Rule 38 of the current agreement. This alone is sufficient reason to dismiss the claim without inquiring into the merit thereof. However, in the event the Division elects to assume jurisdiction, carrier asserts it is clearly shown above that the claim is entirely lacking in merit and if not dismissed, requests that it 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.

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

Carrier here alleges a procedural defect that must first be dealt with, namely, lack of timeliness in the filing of the claim. Carrier argues that the date of the occurrence of Carrier's alleged violation of Rule 37 was June 25, 1958; and, since the instant claim based thereon was not presented until February 12, 1960, the claim is barred because the period between said dates of occurrence and presentation was far in excess of the 60-day requirement of Rule 38(b). Petitioner contends that the alleged violation of Rule 37 was a continuing one within the meaning and contemplation of Rule 38(f), because carrier did not discontinue said alleged violation until January 18, 1960, and the date when claim was presented was less than 60 days after all dates preceding said January 18 back to almost the middle of December, 1959.

Carrier's contention raises two questions: (1) Was the instant alleged violation a continuing one? (2) If so, what was the last date on which a claim based thereon could properly be filed?

As to the first question above, the record shows that there was one explicit, initiating occurrence, namely, carrier's action on June 25, 1958, whereunder the foreman job was abolished, the lead workman job was created, claimant was assigned to the latter, and claimant was paid at the lead workman rate. If this action constituted a violation, said violation certainly existed on the effective date of carrier's action. But claimant worked under the four above-stated conditions until January 18, 1960; and if there was a violation on June 25, 1958, there must have been a violation on every date he worked thereafter until carrier rescinded its action. In effect, carrier's initiating action recurred every day claimant worked from June 25, 1958, to January 18, 1960. This conclusion becomes especially clear when it is remembered that any employe working under a labor agreement has a day-to-day individual employment contract with his employer.

Accordingly, the Division must find that the alleged violation here complained of was a continuing one. This finding then leads to a consideration of the second question posed above, namely, what was the last date on which a claim based on said alleged continuing violation could properly have been filed?

Rule 38(b) says that a claim (of alleged violation) must be filed within 60 days of the occurrence giving rise to the claim. This provision is entirely clear when applied to an alleged violation lasting only one day and resulting from an occurrence, i.e., an action by a carrier, such as a one-day temporary assignment of an employe. Said provision in Rule 38(b) becomes less clear when the initiating occurrence has less temporary results. Recognizing that a single initiating occurrence can have an enduring effect, i.e., can result in an alleged continuing violation, the instant parties wrote Rule 38(f) in an effort to specify their respective rights and duties under such circumstances.

Rule 38(f) says that, although retroactivity in respect to an allowed claim involving proved continuing violation is to be limited to a period of 60 days

prior to filing of the claim, the claim alleging the continuing violation may be filed at any time; and one such filing protects the rights of claimant so long as the alleged violation continues. From this it must be clear that, where an alleged continuing violation exists, as it did in this case from June 25, 1958, to January 18, 1960, the parties intended two main things: (1) the claimant should be relieved of the necessity for filing a separate claim for each day of alleged violation. (2) It would not be necessary for the claimant to file his one claim within 60 days of the initiating occurrence. But it seems equally clear that the parties did not intend the words "anytime" to mean "any old time" no matter when the alleged violation ceased to exist. The whole general purpose of Rule 38 was to establish a statute of limitations binding on both parties in respect to making and declining claims. Said general purpose is visible in the provisions of Rule 38(f). The first sentence thereof, paraphrased above, uses the present participle "continuing" in respect to alleged violations and uses the present tense "continues" in respect to the protection of a claimant's rights during the period in which the alleged violation exists day after day. The reasonable interpretation of said present tense is that a claimant can properly file his claim at any time while the alleged violation is going on but cannot properly do so after a carrier has rescinded its action.

Given all of the above and given the fact that the instant claim was filed on February 12, 1960, about three weeks after carrier rescinded its action, it must follow that the claim was not timely filed, and it must be held barred.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1962.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4080

The majority admits that carrier's unilateral action, subject of this dispute — "claim or grievance" — existed from June 25, 1959 to June 18, 1960.

This claim was presented within the provisions of Rule 38, paragraph (f):

> "A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than sixty (60) days prior to the filing thereof. * * *."

Therefore, an affirmative award should have been rendered and claimants retroactively compensated to the extent of the provisions of Rule 38, paragraph (f).

C. E. Bagwell
T. E. Losey
E. J. McDermott
R. E. Stenzinger
James B. Zink