Award No. 4254
Docket No. 4244
2-CMStP&P-MA-'63

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. 76, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Machinists)

CHICAGO, MILWAUKEE, St. PAUL & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement other than Machinists were improperly used to make repairs to Locomotives No. 500, 504 and 235, at Lewistown, Montana, on September 19th and 20th, 1960.

2. That accordingly the carrier be ordered to compensate Machinist G. Waldo, in the amount of sixteen (16) hours at the rate of $2.638.

EMPLOYES' STATEMENT OF FACTS: Chicago, Milwaukee, St. Paul and Pacific Railroad Company hereinafter referred to as the carrier, employes machinists at Harlowton, Montana, including Machinist G. Waldo, hereinafter referred to as the claimant, to perform, among other things, the work involved in this dispute.

On September 19 and 20, 1960, the carrier sent Foreman Mielke to Lewistown, Montana by auto, which is a distance of fifty-six (56) highway miles, to weld up flat spots on Locomotives 500, 504 and 235 and to grind them to form proper contour.

Foreman Mielke is the Roundhouse Foreman at Harlowton, Montana supervising all crafts at that point, including the claimant.

This dispute has been handled with all carrier officers authorized to handle grievances, including the highest designated officer, with the result that he declined to adjust it.

miles away from Lewistown. In accordance with the provisions of Rule 31(a) the pertinent portion of which reads as follows:

> "Seniority of employes in each craft and subdivision thereof covered by this agreement **shall be confined to the point employed * * ***" (Emphasis ours)

the seniority rights of Claimant Waldow are confined to Harlowton and the carrier does not agree that under any circumstances do his rights extend to Lewistown or that the rules can be construed so as to give to Claimant Waldow the right to perform mechanics work at Lewistown, particularly in view of Rule 32 (a) which clearly states that foremen may perform mechanic's work at that point where no mechanics are employed.

Further with respect to Claimant Waldow, the carrier wishes to point out that he performed 8 hours service on his regularly assigned position at Harlowton on each of the dates of the claim, i.e., September 19 and 20, 1960, for which he was compensated accordingly.

There occurred no violation in the instant case and the carrier respectfully requests that the claim 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 waived right of appearance at hearing thereon.

That part of the record properly before us discloses that on or about September 19, 1960, three of Carrier's locomotives enroute from Heath to Harlowton, Mont., developed excessive flat spots on their wheels, requiring them to be set out at Lewistown for emergency repairs. The nearest point at which machinists were employed was at Harlowton, which is 63 miles by rail and 56 by highway form Lewistown. The Carrier dispatched Roundhouse Foreman Mielke from Harlowton to Lewistown by automobile where Foreman Brinkman, stationed at Lewistown, instructed and assisted by Mielke made the necessary repairs. This was accomplished by welding and grinding the wheel spots.

On account of this incident the Employes have asserted a claim on behalf of G. Waldo, a machinist stationed at Harlowton under Foreman Mielke for 16 hours at the rate of $2.638.

The Carrier asserts that no machinists have been employed at Lewistown for more than 25 years and that its foreman at that point has performed machinists' work throughout that period. It also says that only 8½ hours' work was involved in making the repairs and that the claim is an improper effort to exact a penalty.

Both parties agree that disposition of the claim depends upon the proper interpretation and application of Rule (32a) which reads:

"None but mechanics or apprentices regularly employed as such shall do mechanics' work as per special rules of each craft, **except foreman at points where no mechanics are employed.**" (Emphasis supplied).

While the above Rule has long been in effect and it has been the subject of several awards, its meaning is still in controversy under factual situations substantially comparable to the pending dispute and diametrically opposite conclusions have been reached.

Thus, in Awards Nos. 1761 and 3927 the claims were sustained, the Board holding that to entitle a foreman to perform machinists' work there must be the coincidence of two factual situations, namely, no mechanic employed at the point where the work was done and that the foreman performing the work be employed at that point; while in Award No. 2919 the claim was denied on the ground that foremen may perform mechanics' work at any point where no mechanics are employed.

We have studied the three awards above mentioned, as well as the very able dissent of the Carrier Members to Award No. 3927, in an effort to reconcile them, but find ourselves unable to do so. Award No. 1761 appears to be principally based on the theory that the concluding clause of Rule 32(a), underscored above, is in the nature of an exception and that the well-recognized rule for the interpretation of contracts requires that exceptions be strictly construed and that their application not be extended farther than is necessary. Award No. 3927 approved Award No. 1761, and made the further point that to hold otherwise would permit a carrier to use a foreman wherever no mechanic was regularly employed and that this would do violence to the classification and assignment provisions of the Agreement (Rules 33 and 51).

Award No. 2919 reached the opposite conclusion, although it made no reference to Award No. 1761, in its findings, nor did it fortify its disposition of the claim with any comprehensive analysis of the issue.

The Board, as presently constituted, aligns itself with Award Nos. 1761 and 3927, with the additional observation that if the exception contained in Rule 32(a) is not to be given a strict construction the effect will tend to make "roving machinists" out of foremen in those instances where machinists positions have been or may be abolished in the prevailing trend for the reduction of forces. When this is done, due regard must be given to the Carriers' other contractual obligations with respect to the assignment of work and the classification of positions.

The Employes have not, however, shown that the Claimant, Waldo, suffered any monetary loss or that there is any contractual liability for an arbitrary penalty. See Award No. 3967.

AWARD

Claim 1 sustained.

Claim 2 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June, 1963.

OPINION OF LABOR MEMBERS CONCURRING IN PART AND DISSENTING IN PART TO AWARD NO. 4254

We concur in the finding of the majority to part of the dispute and claim, but we dissent from the finding that "The employes have not, however, shown that the Claimant, Waldo, suffered any monetary loss or that there is any contractual liability for an arbitrary penalty. * * *."

It is impossible to reconcile the holding of the majority that the agreement was violated with the holding that the claimant suffered no monetary loss or that there is any contractual liability for an arbitrary penalty.

The hard cold facts are that the machinists' craft was deprived of contractual right to perform work belonging to their craft and a claim on behalf of any individual or individuals is only incidental thereto.

Second Division Award No. 3405, as well as others of this Division, have determined that for violation of contract provisions the claimants (on duty) be compensated at pro rata rate of the craft or class to which the work is assigned by agreement. The same remedial treatment should have applied in the instant case.

C. B. Bagwell

R. E. Stenzinger

T. E. Losey

E. J. McDermott

James B. Zink