Award No. 4708
Docket No. 4544
2-SP(PL)-CM-'65

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Bernard J. Seff when award was rendered.

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE: CLAIM OF EMPLOYES: "1. That under the New York Agreement, dated June 4, 1953, the following employes, R. M. Davis, Carman Apprentice; M. Gonzales, Carman Apprentice; G. A. Souza, Carman Apprentice; R. Gonzalez, Carman Apprentice; and A. Payton, Carman Helper, hereinafter referred to as the Claimants, were upgraded in compliance with the provisions of Article III of the said agreement, of which agreement became effective on August 1, 1953 between the Brotherhood Railway Carmen of America and the Eastern, Western and Southern Carriers and to which the Southern Pacific Company (PL), hereinafter referred to as the Carrier, is a signatory participant and has violated provisions of Article III of the New York Agreement, when the Claimants were downgraded and Carman Helpers were upgraded in their place.

2. That accordingly the Carrier be ordered to compensate the Claimants the difference between the rate of pay they are now receiving and the Mechanics' rate of pay for twelve days, from July 14, 1962 to August 1, 1962, a total of twelve days each, excluding rest days."

EMPLOYES' STATEMENT OF FACTS: As of the date this dispute arose, R. M. Davis, M. Gonzales, G. A. Souza and R. Gonzalez hereinafter referred to as claimants, held seniority as carmen apprentices at West Oakland, Calif. on the Southern Pacific (Pacific Lines) hereinafter referred to as carrier.

Carman Helper A. Payton, also hereinafter referred to as a claimant, held seniority as a carman helper at West Oakland, Calif., with carrier and a copy of the carmen helpers' seniority roster for the Western Division dated July 1, 1962.

On June 5, 1962, carrier upgraded all 5 claimants to carmen in accordance with the provisions of Article III of the June 4, 1953 Agreement and they worked in said capacity until July 14, 1962, at which time carrier demoted them to their original classification as per notice dated July 13, 1962.

On July 11, 1962, carrier recalled furloughed Carman Helper Willie E. Lyles to service as an upgraded carman as per notice dated July 12, 1962.

All data heren have been presented to the duly authorized representative of the employes and are made a part of this particular question in dispute.

Carrier reserves the right, if and when it is furnished with the submission which has been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the carrier at this time and have not been answered in this, the carrier's initial submission.

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.

The Organization states that five Claimants were properly upgraded on June 5, 1962 in accordance with the terms of Article III of the New York Agreement of June 4, 1953. Thereafter it alleges that the Carrier violated the above named Article III when it demoted the Claimants to their Classification of Carmen Apprentices and Carmen Helper respectively and proceeded to recall five furloughed Carmen Helpers to the service as upgraded Carmen in place of the five demoted Claimants.

The Carrier describes the question in the case as follows: Whether furloughed employes with prior service as upgraded employes may be properly recalled in accordance with past practice and the agreed upon application of agreement provisions and used as upgraded carmen? Petitioner takes the position that under the current Agreement, particularly Article III of the June 4, 1953 Agreement, furloughed employes with prior upgraded service are not subject to be recalled to upgraded service, but are subject to be upgraded to Carmen in accordance with their seniority as regular or helper apprentices and helpers in that order.

Preliminarily the Carrier raises certain threshold questions of a procedural nature which challenge the jurisdiction of the Board. It contends that since no reservations with respect to practices and understandings were provided or requested during the negotiation of the Agreement of June 4, 1953 any claim now presented on account of the Carrier's applying said practices and understandings is automatically barred by the time limit rule known as Rule 38. In answer to this contention the Organization points to the last paragraph of Article III of the said Agreement which states:

> "* * * This rule shall become effective August 1, 1953, except on such carriers as may elect to preserve existing rules or practices and **so notify the authorized employe** representative on or before July 1, 1953." **(Emphasis ours.)**

The Carrier did not so notify the Organization on or before July 1, 1953. From this failure of the Carrier to comply with the notification set forth above, the Organization argues that the June 4, 1953 agreement went into effect on

August 1, 1953 superseding all prior agreements, rules and practices relative to the upgrading of employes in the Carmen's Craft. The Carrier replies that the fact it intended to preserve past practices is evidenced by the fact these very past practices and understandings were continued in effect without protest from the Petitioner. In order to avail itself of this procedural point the Carrier must comply with the express condition precedent required to invoke the point, vis:—it must have notified the authorized representative of the employes on or before July 1, 1953. This it failed to do. Even long continued past practices, postdating a written agreement, cannot cancel the express written terms of such an agreement. Past practices may help illuminate the intention of the parties as an aid in determining their intentions where the contract itself is ambiguous but they are not binding where the contract language itself is clear.

The Carrier further states that the instant claim is barred because it was not timely filed on the property. The Organization answers by calling attention to Carrier's Exhibits D, G, J and L none of which raise these objections. In this connection the Organization relies on Second Division Award 1834 wherein it is stated:

> "* * * The rule is that where a Carrier undertakes to dispose of a claim without objecting to the manner of handling on the property it will be deemed to have waived its right to object thereafter."

The Carrier having sought to meet the instant claim on the merits in the Exhibits referred to above has waived its procedural objection as to timely filing. The action of the Carrier which resulted in the filing of the instant claim occured on July 14, 1962 and the instant claim was filed on August 23, 1962 which is within the time limit.

As a final procedural contention the Carrier alleges that the case has been prematurely submitted to the Board because it is not a claim or grievance but is in effect "an instance designed to modify or change Article III of the June 4, 1953 agreement * * *". Petitioner counters this argument by stating that it is requesting that the agreement be applied as the Organization understands and believes it should be applied. The request for an interpretation of the proper application of the said Article III, under the facts and circumstances of the instant case, does not appear to be premature.

On the merits of the controversy it would seem that a reasonable interpretation of Article III would have entitled the Claimants to have been advanced in accordance with their seniority. In other words, furloughed employes with prior upgraded seniority are not subject to be recalled to upgraded service but are subject to be upgraded to Carmen in accordance with their seniority as regular or helper apprentices and helpers in that order.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.