Award No. 5299
Docket No. 5005
2-SLSF-CM-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Harold W. Weston when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 22, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That carmen J. L. Nobles and M. A. Mills, Memphis, Tennessee were not compensated by the provisions of Section 5(a) of the Memorandum of Agreement made to current Rule 136. The Memorandum was effective the 1st day of May 1952.

2. That accordingly, the carrier be ordered to compensate the said carmen in the amount of 8 hours each, at time and one half their respective pro rata rate.

EMPLOYES' STATEMENT OF FACTS: The St. Louis-San Francisco Railway, is hereafter referred to as the carrier and carmen J. L. Nobles and M. A. Mills are hereafter referred to as the claimants.

On August 7, 1964, in the Tennessee Trainyard at Memphis, Tennessee, a vacancy occured in the carmen's class, of less than 15 days, due to Carman J. W. Martin being used as a relief foreman, which the carrier's supervision deemed necessary to fill. Instead of the carrier filling this vacancy, by the provisions of Section 5 (a) of the Memorandum of Agreement, from the Overtime Board, furloughed carman helper L. O. Sanderson was called in, upgraded and used to fill the vacancy. Claimant, J. L. Nobles, was first out off the Overtime Board on August 7, 1964 and was available to fill the vacancy on that date.

Claimant, M. A. Mills, was first out off the Overtime Board on August 8, 1964 and was available to fill the vacancy on that date.

The vacancy was in the carmen's class and carmen should have been assigned, under our current agreement, to fill the first two days of the vacancy, August 7, and 8, 1964.

This dispute has been handled with all officers of the Carrier designated

duration created by Carman J. W. Martin temporarily relieving a regularly assigned supervisor.

Not only is the claim invalid on its merits, but also the claim as appealed to this Division is defective in that it fails to specify the calendar dates for which compensation is claimed, and this reason, if none other, is sufficient cause to justify its dismissal. Neither this Division nor the Carrier should be required to supply an element so essential to a time claim as the date or dates of the occurrence.

With respect to Item 2 of the Employes' Statement of Claim, which is the reparations portion, the record clearly establishes that neither claimant is entitled to assert a contractual right to the work under claim by virtue of his standing on the overtime board. In the circumstances, neither claimant can show that he has been damaged or sustained a financial loss as a result of the Carrier's action, and since the Agreement contains no provision for liquidated damages or imposition of penalties, neither is entitled to recover the monetary sum claimed. See Third Division awards such as 13326, 13334 and 13390.

Finally, the Organization requests that the two claimants be allowed eight hours at one and one-half times their respective pro rata rates of pay. On familiar principles, claim for time lost is not the equivalent of time worked, and in such circumstances, the proper rate is the pro rata rate.

The Board is respectfully requested to deny the claim in its entirety.

All data used in support of the Carrier's position have been made available to the employe or his authorized representative and made a part of the particular question in dispute.

Oral hearing is waived.

(Exhibits Not Reproduced)

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 issue is whether or not Carrier violated Section 5(a) of the Memorandum of Agreement of May 1, 1952, regarding Rule 136 by using L. O. Sanderson, whose status, as Carrier points out in its Submission, was that of a furloughed carman helper, instead of two carmen, Claimants Noble and Mills, to fill the first two days of a Carman vacancy of less than fifteen days.

Section 5(a) provides that the first two shifts of temporary vacancies of less than fifteen days (not including vacation vacancies) must be worked from

the overtime board before upgradng a carman helper. The record developed on the property indicates, and we find, that Claimants were the carmen eligible to be used on the days in question, Noble on the first day and Mills on the second day of the vacancy; no issue as to their eligibility was raised until after discussions on the property had been concluded and the claim had been processed to this Board.

The critical question concerns Sanderson's status. Carrier points out that Sanderson had been upgraded from carman helper on October 15, 1961, and that Section 5(a) therein is inapplicable. Petitioner maintains that upgrading was only temporary and that, when furloughed, Sanderson had returned to a Carman helper status.

The terms the parties use during their discussions, to describe an employe's status may have some significance but, in final analysis, the provisions of their agreement s are controlling. Section 1(a) o fthe Memorandu mof Agreement of April 18, 1952, concerning Rule 136 is clear in its requirement that a Carman helper must have had one or more years' experience as such before he may be upgraded to Carman. (That requirement had formerly been four years but was reduced to one year by the Agreement of April 18, 1952, possibly to help meet the shortage problem among qualified Carmen). Section 1(b) and other provisions of the 1952 Agreement are not inconsistent with Section 1(a) and are subject to its terms.

From our examination of the record, we are not satisfied that Sanderson had the necessary one year experience on October 15, 1961 that would qualify him for upgrading within the meaning of the Agreement of April 18, 1952.

Claimants accordingly were entitled to the disputed assignments and nothing in the record establishes the contrary. We find this claim reasonably definite and the date involved readily ascertainable. We will sustain the claim at the pro rata, but not overtime, rate.

AWARD

Claim sustained at the pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 24th day of October, 1967.

CARRIER MEMBERS' DISSENT TO AWARD NO. 5299

The question that was submitted to this Division for arbitration was whether the Carrier violated the collective bargaining agreement by using an upgraded carman helper, who had been furloughed as long as October 15, 1961, to fill a vacancy of less than fifteen days.

At no time during the handling of this dispute on the property were upgraded Carman Sanderson's qualifications under the Agreement of April 18, 1952 ever challenged. Cf. page 4 of the Petitioner's ex parte submission, pages 2 and 3 of the Carrier's ex parte submission, pages 3 and 6 of the Petitioner's rebuttal submission and page 3 of the Carrier's rebuttal submission. Indeed, the Petitioner would hardly have been in a position to dispute the length of Carman Helper Sanderson's established seniority, (which, incidentally, goes back to 1950), since it is a matter of common knowledge that a union shop has existed on this property since Section 2 Eleventh was enacted into the Railway Labor Act in 1951 and from which time forward the Petitioner has been collecting dues from Sanderson as a member of the Carman's Organization. Yet, the Award rests on the finding that Sanderson did not have the necessary one year's experience to qualify for his upgrading.

The Award of the majority illustrates the pitfalls, which are inherent when an arbitration board proceeds to decide a question that was not submitted for arbitration.

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