Award No. 5309
Docket No. 5097
2-NONE-MA-'67

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 21, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Machinists)

NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That on January 15, 1965, the work contracted to the class and craft of Machinists at the Carrier's New Orleans, Louisiana Diesel Shop was turned over to Foremen, Carmen, Laborers and others not covered by the controlling agreement, and, that as consequence thereof, Machinist Louis G. Hebbler was wrongfully furloughed.

2. That accordingly, the Carrier be ordered to restore this work to the class and craft of Machinists, and that Machinist Hebbler be returned to his former position with pay for all time lost, and, in addition, be made whole for all fringe benefits lost, such as vacations, holidays and insurance premiums.

EMPLOYES' STATEMENT OF FACTS: Louis G. Hebbler, hereinafter referred to as the Claimant, was regularly employed by the New Orleans and Northeasern Railroad Company, hereinafter referred to as the Carrier, as a Machinist at the New Orleans, Louisiana, Diesel Shop, with a seniority date of August 31, 1937. The claimant was furloughed at the close of his shift effective January 15,1965.

While employed, the Claimant was assigned to the 7:00 A.M. to 3:30 P.M. shift, Monday through Friday, and prior to being furloughed performed all the duties required of a Machinist, including, but not limited to the following:

Locomotive inspection as required by the Interstate Commerce Commission, Bureau of Locomotive Inspection and by rules of the Carrier.

Changing out and testing air brake equipment.

Adjusting and testing brakes — renewing brake shoes.

Engine Truck work.

(c) All work at New Orleans is being performed in accordance with the agreement here controlling and there is not any basis for the demand made by the Association.

(d) The Board is without authority to do what is demanded in claim 2.

Claim 1 should be denied because it is without basis and unsupported by the controlling agreement. Claim 2 should be dismissed by the Board for want of jurisdiction to pass upon the issue presented.

All evidence here submitted by the Terminal Company in support of its position has heretofore been made known to employe representatives.

The Terminal Company not having seen the Association's submission reserves the right after doing so to make response thereto and present any other evidence necessary for the protection of its interests.

Oral hearing is requested.

(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 were given due notice of hearing thereon.

The present claim is based on Petitioner's contention that on January 15, 1965, at New Orleans Carrier turned over machinists work to ineligible employes and as a result of that action wrongfully furloughed a machinist.

Carrier denies that machinists' duties were assigned to non-machinists and maintains that Claimant, who had been employel at the New Orleans Diesel Shop, was merely laid off in a force reduction and that after January 15, 1965, diesel maintenance was not performed at New Orleans but only at Atlanta and Chattanooga.

Machinists plainly are entitled to perform any work belonging to their craft that remains to be performed at New Orleans. However, this Board is not in a valid position to find that ineligible employes have been discharging machinist responsibilities unless, at the very minimum, it is furnished with evidence showing in detail just what machinists work remained after January 15, 1965, and how much time was devoted to that work. Statements of conclusions, suspicious and assumptions are not the equivalent of the necessary proof. Thus, the mere fact that New Orleans is many miles away from Atlanta and Chattanooga does not prove that Carrier assigned machinists' work to others. Similarly, Carrier's refusal to accept Petitioner's offer of a joint check is not evidence of the essential facts and cannot be used to prejudice Carrier's position in the case, particularly where as here a joint check was not required

by the Agreement as of the time of the incident and the information in question was not peculiarly within Carrier's possession.

The only evidence set forth in the record consists of two letter, one of March 21, 1965 by L. A. Huff an dthe other dated February 28, 1965, by Local Chairman Muhrah. Nenther letter presents in any reasonable detail a description of the duties under consideration and the time devoted to their performance. Huff's letter merely alleges generally that "others (incduling myself) are doing the machinists work" but does not state just what that work consists of and therefore has no evidentiary value. Muhrah's letter is more specific but is not sufficiently detailed as the critical facts, in and of itself, to support the full weight of the claim.

Petitioner has failed to establish the essential elements of its case and since the burden of proof rests with Petitioner, the claim will be denied.

AWARD

Claim denied.

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.

LABOR MEMBERS' DISSENT TO AWARD NO. 5309

The majority are inconsistent and in serious error in their findings to Award No. 5309. They recognize the Machinists' right to perform any work belonging to their craft by agreement, when they state in pertinent part:

> "Machinists plainly are entitled to perform any work belonging to their craft that remains to be performed at New Orleans."

The majority then proceeds without authority to establish rules by dicta, which place the employes in an impossible position to proceed under the requisites of Burden of Proof, when they state:

> "Carrier's refusal to accept Petitioner's offer of joint check is not evidence of the essential facts and cannot be used to prejudice Carrier's position in the case, particularly where as here a joint check was not required by the Agreement as of the time of the incident and the information in question was not peculiarly within the Carrier's possession."

The majority, based on the record, was surely aware of the facts in this instant case, which show:

> 1. Layoff of the instant claimant was January 15, 1965. The Agreement, which included among other things joint check by the parties, was dated January 27, 1965, some 12 days after the layoff.

2. They were also aware of the fact that the claim and grievance was in its first step of procedure on the effective date of the aforementioned job protection rule.

However, they satisfy themselves with such unfair reasoning as:

"Petitioner has failed to establish the essential elements of its case; and since the burden of proof rests with the petitioner, the claim will be denied."

Under any basic rules of evidence and the record before us, it is clear to all reasonable and fair men that the nature of evidence needed to establish affirmative proof is unilateral in nature. The only party in possession of records and knowledge of practices and work is the Carrier and is could only be available to the claimant through Agreement — in this instant case, the January 27, 1965, Agreement.

To twist these basic, sound principles of due process in such a manner in order to achieve a denial award, is repugnant to the basic principle of due process as required by the Railway Labor Act, particularly when it is crystal clear that the agreement was in effect and controlling all during the handling of this instant claim and dispute on the property, as well as before this Division. This award gives endorsement and comfort to possible mischief by the Carrier when they were in full knowledge of negotiations dealing with the job protection rule for more than a year and were emphatically in control of their actions just prior to signing the joint check rule on January 27, 1965.

It is for these reasons that we are compelled to such a vigorous dissent.

R. E. Stenzinger

D. S. Anderson

C. E. Bagwell

O. L. Wertz

E. J. McDermott

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