Award No. 5333
Docket No. 5105
2-SOU-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, AFL-CIO (Machinists)

SOUTHERN RAILWAY 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 Ludlow, Kentucky Diesel Shop was turned over to Foreman, Carmen, Laborers and others not covered by the controlling agreement, and, that as a consequence thereof Machinists Harry C. Lindle, J. M. Rohan, P. R. James, W. J. Spada, C. J. O'Brien and J. L. Nie were wrongfully furloughed.

2. That accordingly, the Carrier be ordered to restore this work to the class and craft of Machinists and that Machinists Lindle, Rohan, James, O'Brien and Nie, be returned to their 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 and that Machinist W. J. Spada be returned to his former position with pay for time lost from January 18 through February 22, 1965, and in addition, be made whole for all fringe benefits lost, such as vacations, holidays and insurance premiums.

EMPLOYES' STATEMENT OF FACTS: Harry C. Lindle (seniority date April 6, 1943), J. M. Rohan (seniority date November 6, 1946), P. R. James (seniority date May 1, 1962), W. J. Spada (seniority date November 19, 1963), C. J. O'Brien (seniority date July 19, 1942), and J. L. Nie (seniority date September 16, 1945), hereinafter referred to as the Claimants, were regularly employed by the Southern Railway System, hereinafter referred to as the Carrier, as Machinists at the Ludlow, Ky. Diesel Shop, with seniority dates as shown above. Claimants Harry C. Lindle, J. M. Rohan, W. J. Spada, P. R. James and C. J. O'Brien at the close of their shifts on January 15, 1965. Machinist J. L. Nie was on leave of absence until March 26, 1965, upon which date he attempted to report back to work and upon finding that the work he had formerly performed had been turned over to other than machinists filed claim as hereinbefore referred to.

Furthermore all the claimants have been allowed all vacation and holiday pay to which contractually entitled.

As to insurance premiums, the Second Division of the Board in Award 4866, Referee McMahon, held that:

> "* * * We make no finding in reference to insurance premiums for hospitalization and life insurance. We can find no requirement in the agreement between parties which makes any reference to payment of premiums by carrier. Such claim for insurance premiums is not a wage loss as described in Rule 31 of the agreement."

Thus the Board has heretofore recognized that it was without authority to make an award involving insurance premiums.

The evidence is therefore clear that the Board is without authority to do what is demanded in claim 2.

CONCLUSION

Carrier has shown that:

(a) No work has been contracted to machinists.

(b) The agreement here controlling does not confer work rights upon employes of the machinists' class or craft as alleged by the Association.

(c) Claimants were not wrongfully laid off or furloughed as alleged by the Association. Claimant Nie was on leave of absence filling a political position when the force was reduced on January 17, 1965 at Ludlow and has been so employed during the entire period involved in the claim. Four of the other six claimants are also employed. All refused job offers except Nie who was on leave.

(d) The Board and the Courts have refused to assess penalties or award damages where claimants have not been adversely affected even when there has been a technical contract violation, and there was none at Ludlow.

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

Claim 1 being without basis and unsupported by any provision in the agreement here controlling, the Board is left with no alternative but to deny it.

The Board being without authority to do what is demanded in claim 2 has no alternative but to dismiss it for want of jurisdiction.

(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 claim is that on January 15, 1965, Carrier turned over machinists' work at Ludlow, Kentucky, to non-machinists and as a result wrongfully furloughed six machinists. Carrier denies these charges and contends that Claimants merely were laid off in a force reduction and that after January 15, 1965, diesel maintenance was no longer performed at Ludlow but only at Atlanta and Chattanooga.

Substantially the same situation, issue, agreement and submissions were considered by this Board in its recent Award 5309 which denied a like claim for want of proof. We have reviewed the question in the light of the Organization's Dissent and are not persuaded that Award 5309 is in error. Certainly, there should be no quarrel with the principle emphasized in Award 5309 that the claimant has the burden of proof in cases of this type and to prevail must establish the essential facts. There is nothing strange, overtechnical or unreasonable about that principle. It indeed is basic to any judicial or quasi-judicial proceeding, whether it be before a court of law, administrative agency, arbitrator or this Board. Without adequate facts, the Board confronted as it is with conflicting contentions, is just not in a sound position to sustain a claim.

In any type of litigation, a claimant must meet the problem of securing and presenting the necessary proof. Here, as in the Award 5309 situation, it was Petitioner's obligation to investigate, assemble and submit the evidence supporting its claim. Such evidence would include particularly some facts showing precisely what machinist duties are being performed by non-machinists and the amount of time devoted to those duties. These facts are not peculiarly within the knowledge of management and should be obtainable from eyewitnesses and other sources. If it is established that it is unduly difficult to obtain evidence in certain cases, some latitude might be extended as to the amount of proof needed; a minimum factual showing is, however, necessary in any event.

It is true that in this case, as in Award 5309, a joint check requirement was not in existence on January 15, 1965, when the claim arose since the agreement that created that obligation was not signed until January 27, 1965. However, that point should be clarified in view of the emphasis placed upon it in the Dissent to Award 5309. The fact that the claim antedated the agreement does not relieve Carrier of the joint check requirement. If then a reasonable factual showing had been made by Petitioner, we might have resolved conflicts in evidence against Carrier because of its failure to comply with Petitioner's request for a joint check. The difficulty with Petitioner's position is that it failed to support the claim with essential facts and the absence of a joint check is not sufficient to fill the gap in evidence. In this case, the factual presentation consists merely of a list of machinist duties, the distance from Ludlow to Atlanta and Chattanooga, and Carrier's failure

to consent to a joint check. Clearly, this is not sufficient proof to support a finding that machinist work still exists at Ludlow and is being performed by ineligible employes.

In the light of the foregoing discussion, we will follow Award 5309 and deny the claim for want of proof.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 4th day of December, 1967.

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