

Award No. 5396

Docket No. 5220

2-SOU-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Gene T. Ritter when award was rendered.

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That on January 15, 1965, the work contracted to the class and craft of Machinists at the Carrier's Inman Yards Shop was turned over to foremen, carmen, laborers and others not covered by the controlling agreement, and that as a consequence thereof, Machinists A. W. Barden, C. L. Sprayberry, D. L. Strickland, Jr., and D. S. Gheen were wrongfully furloughed.

2. That accordingly, the Carrier be ordered to restore this work to the class and craft of Machinists, and that Machinist A. W. Barden be returned to his former position with pay for all time lost as follows: January 16, 17 (2 shifts), 18, 19, 23, 24 (2 shifts), 25, 26, 30, 31 (2 shifts). February 1, 2, 6, 7, (2 shifts), 8, 9, 13, 14 (2 shifts), 15, 16, 20, 21 (2 shifts), 22, 23, 27, 28 (2 shifts), March 1, 2, 6, 7, (2 shifts), 8, 9, 13, 14, (2 shifts), 15, 16, 20, 21 (2 shifts), 22, 23, 27, 28 (2 shifts), 29, 30. April 3, 4, (2 shifts), 5, 6, 10, 11, (2 shifts), 12, 13, 17, 18 (2 shifts), 19, 20, 24, 25 (2 shifts), 26, 27. May 1, 2 (2 shifts), 3, 4, 8, 9 (2 shifts), 10, 11, 15, 16 (2 shifts), 17, 18, 22, 23 (2 shifts), 24, 25, 29, 30 (2 shifts), 31, 1965;

Machinist C. L. Sprayberry be returned to his former position with pay for time lost as follows: January 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31. February 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28. March 1, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 28, 29. April 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30. May 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 1965;

Machinist D. L. Strickland, Jr., be returned to his former position with pay for time lost as follows: January 18, 19, 20, 21, 22, 25, 26, 27, 28, 29. February 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26. March 2, 3, 4, 5, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, 31. April 1, 2, 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, and continuing through November 12, 1965;

Machinist D. S. Gheen be returned to his former position with pay for time lost as follows: January 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30. February 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 22 (time and one-half time rate), 23, 24, 25, 26, 27. March 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 1965.

EMPLOYEES' STATEMENT OF FACTS: A. W. Barden (seniority date 1-21-44); C. L. Sprayberry (seniority date 7-6-62); D. L. Strickland, Jr. (seniority date 11-51-61); and D. S. Gheen (seniority date 4-14-62); hereinafter referred to as the Claimants, were regularly employed by the Southern Railway Company, hereinafter referred to as the Carrier, as machinists at the Inman Yards Shop. Claimants were furloughed at the close of their respective shifts effective January 15, 1965.

While employed Claimants were assigned various shifts around the clock on a forty-hour week basis, and prior to being furloughed performed all duties required 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.
- Engine truck work.
- Lubricating running gear.
- Adjusting and repairing engines of locomotives.
- Changing and/or adding oil to engines and compressors.
- Door and shutter work.
- Changing car body and engine filters.
- Maintained shop equipment.
- Road trips on machinists work.

While employed at Inman Yards Shop, Claimants were responsible for inspection, maintenance and repair on 13 switch locomotives assigned to the point, and in addition, were responsible for inspection, maintenance and necessary repairs to the consists of locomotives on all freight trains terminating at, or leaving Atlanta, Georgia. The average daily number of freight locomotives subject to the above being 59.

Under date of January 10, 1965, the Carrier's Assistant Vice President, J. G. Moore, wrote the General Chairman advising that "some machinists are being cut off at other points January 15, because their services are no longer needed".

Mr. Moore's letter continued by saying that the machinists to be furloughed were being offered jobs at Atlanta, Georgia or Chattanooga, Tennessee. Upon learning that not "some machinists", but "all machinists" were to be cut off effective January 15, 1965, the General Chairman contacted Mr. Moore by telephone and conference was arranged for the afternoon of January 15, 1965.

During the conference Assistant Vice President Moore advised the General Chairman that from January 15th forward diesel maintenance would only be done at Atlanta, Georgia or Chattanooga, Tennessee Diesel Shops and that despite the argument and protest of the employees the furloughing of the machinists would take place as scheduled.

(6) To cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

Thus Congress in its wisdom has specifically prohibited labor organizations or their agents from exacting sums of money from other industries engaged in interstate commerce where services are not performed or not to be performed. That is exactly the situation here presented to the Board because the Association is here attempting to exact sums of money from the Carrier for services which were **not** performed and which could **not** have been performed by the claimants.

The evidence is therefore conclusive that the Board and the courts have refused to award damages or penalties in situations where, as here, claimants were not adversely affected in any manner whatsoever, in fact were on duty and under pay on dates here involved.

CONCLUSION

Carrier has conclusively shown that:

(a) Claim submitted to the Board is **not** the claim submitted on the property and handled in the usual manner and is barred and the Board has no jurisdiction over it.

(b) The controlling agreements were not violated and claim is not supported by them.

(c) The Board is without authority to do what is demanded in part 2 of the claim.

(d) The Board and courts have refused to award damages or penalties where, as here, claimants have **not** been adversely affected. In fact, the claimants, as evidenced herein, exercised their seniority rights under the shop crafts' agreement in evidence and took assignments as machinists at the diesel shop in Atlanta on their seniority district and have been employed during the entire period of the claim on a full time basis.

Claim submitted to the Board, not being the claim presented on the property and handled in the usual manner as required by the agreement, the Railway Labor Act, and Rules of Procedure of the Adjustment Board, is barred, the Board has no jurisdiction over it and should therefore dismiss it for want of jurisdiction.

All evidence here submitted in support of Carrier's position is known to employe representatives.

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

(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 employee or employees involved in this dispute are respectively carrier and employee 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.

Claimants contend that on January 15, 1965, Carrier wrongfully abolished their positions at Inman Yards Shop and that their work was turned over to Employees not covered by the controlling agreement. In their Submission to this Board, Claimants allege that they were wrongfully furloughed; that Carrier should be ordered to restore this work to the named claimants and that Claimants be returned to their former positions with pay for all time lost. The Organization contends, in support of the claim, that this work still remains at Inman Yards, and that, therefore, Carrier is without authority to abolish these positions.

Carrier contends that this claim should be dismissed for the reason that there is a variance in the claim as presented on the property and the claim as submitted to this Board. Carrier also contends that the work involved in this instance has disappeared in the Inman Yards or has decreased to the extent that these positions are no longer necessary. Carrier further contends that although a request for a joint check was made by the Organization, and Carrier agreed to make such check, the Organization "lost interest in the matter and Carrier understands it is no longer interested in a joint check."

The Organization contends that request was made for joint check, but that Carrier refused to allow a joint check in that it limited the check to the interview of only Carrier designated supervisors and refused a check of records; that, therefore, it was impossible to accomplish the purpose of a joint check with the limited and restricted rules unilaterally imposed by Carrier.

It is, therefore, incumbent upon this Board to determine first whether or not the variance in the claim, as progressed on the property, and the claim as submitted to this Board, is fatal. The record discloses that all correspondence between the parties while this claim was being progressed on the property pertained only to a claim for 8 hours at straight time on the applicable dates because of alleged violation of Rules 61, 62 and 63 of the Machinists Agreement, together with pay at the overtime rate for an unspecified number of overtime hours. The claim before this Board calls for the Carrier to be ordered to restore this work to the class and craft of Machinists; that the named Claimants be returned to their former position with pay for all time lost, together with pay at the overtime rate for unspecified amounts. In the claim submitted, the Organization also contends that Claimants were improperly furloughed; however, this Carrier has not been charged with violation of Rule 26, which is applicable to furloughing employees.

This Board finds that the claim presented to this Board is not in substance the same claim as progressed on the property, and that, therefore, this claim must be dismissed because of its variance, in accordance with Second Division Awards No. 1471, 2165, 2208, 2582, 3462, 4353, 4621, and 4659.

The finding that this Board lacks jurisdiction because of the fatal variance of the claim, progressed on the property and claims submitted to this

Board, renders a discussion of the merits of this case moot. However, it must be said that under the Job Protection Agreements, Claimants were entitled to an unqualified and full joint inspection in order to determine the facts. It is noted in Second Division Awards Nos. 5336 and 5333, involving the same parties, that Carrier has been, to say the least, reluctant to abide by the Agreement in that it has denied a full and unqualified joint inspection. Joint inspection calls for a joint check of records and interview of all employees who might have knowledge of the facts. If this case were to be decided on its merits, the award would have been to the effect that the parties would be directed to conduct an unqualified and full joint check in order to establish probative evidence in the record. This Board feels that the Carrier was arbitrary and capricious in denying a full check herein and should not in the future deny the Organization their contractual right to a full joint check. In such denial, Carrier is also denying this Board the right to have all facts before it which could result in an erroneous award.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 4th day of April 1968.