Award No. 5487
Docket No. 5177
2-SOU-MA-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James E. Knox 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 Birmingham, Alabama Diesel Shop was turned over to foremen, carmen, laborers and others not covered by the controlling agreement, and that as a consequence thereof Machinists J. O. Sims, J. V. Robbe, W. F. McCarley, Joe H. Fritz, R. G. Vann, A. W. Allison, C. A. Voegeli, B. R. Moulin, Carl A. Moss, H. L. Norton, T. W. Strong, R. D. Hochholzer, A. H. Sorrell, W. J. Bibby, W. E. Wesson, W. S. Montgomery and L. G. Screws were wrongfully furloughed.

2. That accordingly, the Carrier be ordered to restore this work to the class and craft of Machinists, and that Machinists Sims, Robbe, McCarly, Fritz, Vann, Allison, Voegeli, Moulin, Moss, Norton, Strong, Hochholzer, Wesson, Montgomery and Screws be returned to their former positions with pay for all time lost, and in addition be made whole for all fringe benefits lost, such as vacation, holidays and insurance premiums; and that Machinist Sorrell be returned to his former position with pay for time lost from January 16 through March 9, 1965, and in addition be made whole for all fringe benefits lost, such as vacations, holidays and insurance premiums; and that Machinist Bibby be returned to his former position with pay for all time lost from January 14 through March 12, 1965, and in addition be made whole for all fringe benefits lost, such as vacation, holidays and insurance premiums.

EMPLOYES' STATEMENT OF FACTS: J. O. Sims (seniority date 2-20-40); J. V. Robbe (seniority date 2-24-42); W. F. McCarley (seniority date 11-6-40); Joe H. Fritz (seniority date 2-7-23); R. G. Vann (seniority date 3-21-37); A. W. Allison (seniority date 3-24-42); C. A. Voegeli (seniority date 6-14-51); B. R. Moulin (seniority date 6-3-41); Carl A. Moss (seniority date 1-9-26); H. L. Norton (seniority date 8-18-42); T. W. Strong (seniority

and handled in the usual manner on the property through the usual appeals channels. In these circumstances, the Board has no jurisdiction over the claims and demands presented and should dismiss them for want of jurisdiction.

(b) Without prejudice to the position taken in (a) next above, the controlling agreement was not violated and does not support the claims and demands as alleged by the Association.

The Association, as the proponent, has the burden of proving the validity of the claims and demands which it attempts to assert. As clearly evidenced in this record, the Association simply has not assumed the burden of proof.

(c) Section 3, First (i) of the Railway Labor Act does not confer authority upon the Board to issue orders to the Carrier such as those demanded in Part 2 of the claim by the Association. The Board should follow the principles of Awards 4264 and 4866 and others not quoted because it clearly does not have authority to do what the Association is demanding in Part 2 of the claim.

Claims, being barred and the Board having no jurisdiction over them, should be dismissed for want of jurisdiction.

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

Carrier not having seen the Association's submission reserves the right after doing so to make reply 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 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.

On January 15 and 17, 1965, the carrier laid off the machinists at its Birmingham locomotive shop. The carrier contends that it has transferred most of the work formerly performed by these machinists to centralized shops in other cities. It recognizes, however, that " 'foremen and other supervisory employes', electricians and occasionally carmen are performing work necessary to be performed in the servicing and making of minor and/or emergency repairs to diesel electric locomotive units at Birmingham."

The employes, on behalf of those machinists who want to continue to work at Birmingham, claim that this work is machinist work which should be performed by these machinists. Contrary to the carrier's contention, this

is the same claim prosecuted by the employes on the property. On the property the employes explained, "The claims are brought account of those machinists being furloughed and the work rightfully belonging to them by contract being turned over to foremen, laborers, carmen, and others having no contractual right to perform the same." A comparison of this and the other statements of the claim made on the property with the statement of the claim contained in the employes' submission to this Board shows that any difference is one of semantics, not substance. The salutary requirement that claims submitted to this Board be first handled in the usual manner on the property does not preclude rephrasing a claim as long as the substance of the claim is maintained.

The employes based their claim on the agreement of January 27, 1965. They do not attempt to show that the more permissive provisions in effect prior to January 27, 1965, required the recalling of machinists.

Articles III and IV of the agreement of January 27, 1965, restrict the performance of mechanics' work to mechanics if there are any mechanics employed at the point and further restrict the performance of each craft's work to the mechanics of that craft if there is sufficient work to justify employing mechanics of that craft. While these provisions do not apply to work performed prior to January 27, 1965, we have held in previous awards that the provisions apply to work performed after that date even though the pattern for such work may have been established prior to January 27, 1965. Awards 2–5333 (Weston) and 2–5335 (Coburn). Any inference to the contrary in Award 2–5309 (Weston) was clarified in Award 2–5333 (Weston). That the parties realized this effect of the language of the provisions is confirmed by the exception for supervisors who assumed their positions prior to October 15, 1962. There would have been no need for such an exception if the parties had believed that the provisions would not apply to work assignments which were first made before January 27, 1965.

The carrier argues that the exception in Article III for incumbent supervisors permits the challenged work assignments. The provision on incumbent supervisors is not an exception to the prohibition against non-mechanics performing mechanics' work at points where mechanics are employed. It is an exception to the restriction on the amount of mechanics' work supervisors can perform even at points where no mechanics are employed. The exception for incumbent supervisors clearly states that it is available only "at a point where no mechanic is employed." The explanation by Emergency Board No. 160 that this exception for incumbent supervisors would delay the effect of Article III is not inconsistent with the language of that article. The Emergency Board was assuming that the performance of craft work by supervisors was already limited to points where no mechanics were employed and that, therefore, the principal change made by Article III was to restrict the number of hours supervisors could work at such points. This assumption was correct in many cases, see, e.g., Awards 2–3584 (Carey) and 2–1761 (Carter), but was not true in the case of this property. The rules in effect between this carrier and these employes permitted foremen to perform craft work even at points where mechanics were employed. However, the language of Article III clearly repeals these provisions without any exception for incumbent supervisors, and there is no evidence that the parties did not intend the result compelled by this language. (Nothing herein should be construed as passing on the extent to which supervisors can perform what would otherwise be craft work in the course of instructing or training employes. See Award 2–5242 (Johnson).)

Since there are mechanics at this point, the determinative question is whether there is sufficient work to justify the employment of machinists. Article IV provides that in the case of "a dispute as to whether or not there is sufficient work to justify employing a mechanic of each craft . . . the parties will undertake a joint check of the work done at the point." The carrier refused to make such a joint check. The only check in which the carrier would participate was whether a foreman who assumed his position after October 15, 1962, was performing more than the allowable time on craft work. This check not only was insufficient, but was immaterial, for foremen cannot perform any craft work at this point because of the presence of mechanics.

In Award 2–5333 (Weston), we refused to direct a joint check because of the absence of any evidence that there was any machinist work at the point in question. In Award 2–5335 (Coburn), we directed the parties to make a joint check where there was some evidence that machinist work was being performed by others although the evidence was inconclusive to establish that there was sufficient work to justify employing any machinists. These awards are not inconsistent. Read together, these awards held that a joint check is required whenever there is sufficient evidence to show that there is bona fide dispute about whether there is sufficient work to justify employing mechanics of a particular craft. To impose any heavier burden would frustrate the requirement of a joint check. Any suggestion in Award 2–5309 (Weston), that more evidence is required was rejected in Award 2–5333 (Weston). The carrier's admission and the other evidence in this case are more than sufficient to show the existenec of a bona fide dispute. We, therefore, find that a joint check of whether there was sufficient work to justify employing machinists was required by Article IV of the Agreement of January 27, 1965.

The joint check was established as a procedure for determining whether there is sufficient work to justify employing the mechanics of a particular craft. In establishing this procedure it does not appear that the parties contemplated that this determination would be applied retroactively, at least in those cases where the carrier has acted in good faith. This does not mean that a joint check should ignore what occurred prior to the time of the check. Such history is relevant in evaluating whether the period covered by the check is typical. This history can be ascertained by interviewing the employes involved and reviewing the available pertinent records.

In this case, however, the unjustified refusal of the carrier to participate in a joint check of the available work postponed the time for this determination to the possible detriment of the employes. Therefore, the joint check in this case should encompass the additional question of whether there was sufficient work to justify employing machinists as of the time a joint check should have been made pursuant to the employes' request for such a check. This question can be answered by including in the joint check the effect of any significant changes in circumstances between (a) the time covered by the joint check and (b) the time of the employes' request of March 8, 1965 for a joint check or such later time as the parties may determine to be the time when the joint check would have been made. If the parties are unable to determine when a joint check would have been made, they shall include their evidence on this question in their report on the joint check.

It is conceivable that the question of whether the available work justifies employing the mechanics of a particular craft could involve weighing the

need for one craft against another. If the carrier believes this may be so in this case, it should raise the matter with the employes so that the work of such other craft or crafts may be included in the joint check and their representatives may be afforded the opportunity to participate in that check.

AWARD

The parties are directed to conduct a joint check and to report the results of that check to this Board within sixty (60) days in accordance with the above findings. Pending receipt of such report, the proceedings before this Board will be continued.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1968.

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