Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 6711
SECOND DIVISION Docket No. 6587
2-B&O-CM-'74

The Second Division consisted of the regular members and in addition Referee Irving R. Shapiro when award was rendered.

Parties to Dispute: (System Federation No. 30, Railway Employes' Department, A. F. of L. - C. I. O. (Carmen)
(Baltimore and Ohio Railroad Company

Dispute: Claim of Employes:

1. That under the current agreement the Carrier improperly assigned other than Baltimore and Ohio Carmen to repair Tank Car ACFX85032 on November 18, 1971, at New Albany, Indiana.

2. That accordingly, the Carrier be ordered to make the Carmen's Craft whole by additionally compensating Carmen C. R. Mosby and E. Matteson in the amount of four (4) hours each at the pro rata rate of pay.

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.

There is no controversy between the Parties concerning the basic facts underlying this dispute. Carrier admits that its Trainmaster at North Vernon, Indiana had called upon Carmen employed by another Carrier to make repairs on a tank car belonging to Carrier on Carrier property and that this was an error on his part. Carrier seeks to be absolved of responsibility for this violation of the controlling agreement between it and the Petitioner on the ground that the action was taken "without the knowledge or consent of any B&O Car Department Officer". This, it maintains was clearly established by the fact that on the morning subsequent to the improper assignment, its Car Department officials at Jeffersonville, Indiana, believing that the car involved was awaiting repair, dispatched an assistant foreman and two B&O carmen stationed at Jeffersonville to perform the necessary repairs. Upon their arrival at the siding where the disabled

equipment had been set off, they found that the work had been completed by others. The position is not tenable. The trainmaster is a supervisory employee of the Carrier and acts undertaken by him are attributable to his Employer. It is incumbent upon Carrier to properly instruct its agents so that they will adhere to the terms of the controlling agreement in assigning work to be performed on Carrier's equipment. If this were the sole question before us, the claim would have been sustained.

However, the Carrier put in issue the validity of the status of Carmen Mosby and Matteson as the appropriate claimants. It is uncontroverted that Messrs. Mosby and Matteson "worked their regular tour of duty on November 18, 1971" (the date of the violation) "and were paid at the prevailing rate". No where in Petitioner's submission can there be found probative statements to indicate that the claimants would have been the workers who would have been entitled to be assigned to this work. Thus, the remedy sought by Petitioner is in effect a penalty for the admitted violation.'

Although this Board has recognized organization claims that employes be compensated for breaches of Agreements by Carrier, our Awards have always been consistent in requiring some showing of entitlement thereto due to an actual, probable or at least a possible deprivation of work suffered by those for whom the claim was made. Awards cited by Petitioner clearly bear this out.

In Award 3405, the Organization's submission sets forth, "The Carrier ... assigned a stores department employee ... to perform the regular assigned duties of Claimant Wiss ..." (emphasis supplied)

In Award 4489, we held that, "With regard to the issue of awarding damages ... many awards of this Division ... have held that when work is improperly given to one not contractually entitled to it that the claimant, who would have otherwise received the work, may be awarded pro-rata pay for the job for which he was not properly called." (emphasis supplied) In that case, the Position of the Employes opens with "... claimant should have been recalled or held from the crew in order to assist the district lineman..."

In Award 4322 the Employee's Statement of Facts reads in part: "Claimant was on the car inspectors extra board ... Claimant made written request to management to be permitted to work the vacation vacancy..." In our Findings we stated "... a bulletin was issued by management saying certain jobs would not work Monday, September 5 ... but no mention was made in that or any other bulletin of blanking ... the vacation vacancy of which Claimant ... had already filed request to fill".

In Award 4818 we held: "As it took twelve hours time to construct one temporary truck, Claimant was deprived of twenty-four hours work that he might otherwise have performed ... What is being awarded here is for compensatory damages and is not a case in which Carrier is being 'penalized' for a rule infraction. The many Awards which hold that this Board has no authority to assess a penalty to enforce an agreement are, therefore, not relevant." (emphasis supplied) The related holding in Award 5032: "the violation ... resulted in actual damage to Petitioner measured in specific loss of hours of work", and this same concept was followed in Award 5035.

In Award 5341 the Claim of Employes specified that claimants "were working on the adjacent track" as a basis for their contention that they would normally have been assigned the work which had improperly been given to others to do. As indicated in Award 4818, this Division has not adhered to provide a contrary view and we are not in a position to, at this juncture, apply principles not acceptable to this Division.

The commission of the essential facts to support the remedy aspects of the claim was fatal to it.

A W A R D

Claim 1, sustained.

Claim 2, denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 25th day of June, 1974.

LABOR MEMBERS' DISSENT AND CONCURRING OPINION

TO AWARD NO. 6711, DOCKET NO. 6587

The Claim of the Employes in Award No. 6711, Docket No. 6587, was:

"1. That under the current agreement the Carrier improperly assigned other than Baltimore and Ohio Carmen to repair Tank Car ACFX 85032 on November 18, 1971, at New Albany, Indiana.

2. That accordingly, the Carrier be ordered to make the Carmen's Craft whole by additionally compensating Carmen C. R. Mosby and E. Matteson in the amount of four (4) hours each at the pro rata rate of pay."

The Referee in Award No. 6711, Docket No. 6587, sustained Claim 1 of the Employes' claim and the Labor Members concur in this decision.

However, Claim 2 of the Employes' claim in Award No. 6711, Docket No. 6587, was denied and the Labor Members dissent.

In an effort to justify denying Claim 2 of Employes' claim, the following statement was made in Award No. 6711, Docket No. 6587:

> "However, the Carrier put in issue the validity of the status of Carmen Mosby and Matteson as the appropriate claimants. It is uncontroverted that Messrs. Mosby and Matteson 'worked their regular tour of duty on November 18, 1971' (the date of the violation) 'and were paid at the prevailing rate.' No where in Petitioner's submission can there be found probative statements to

"indicate that the claimants would have been the workers who would have been entitled to be assigned to this work. Thus, the remedy sought by Petitioner is in effect a penalty for the admitted violation.

Although this Board has recognized organization claims that employes be compensated for breaches of Agreements by Carrier, our Awards have always been consistent in requiring some showing of entitlement thereto due to an actual, probable or at least a possible deprivation of work suffered by those for whom the claim was made. Awards cited by Petitioner clearly bear this out."

after which a short summary of Second Division Award Nos. 3405, 4489, 4322, 4818, 5032, 5035 and 5341 was given in an effort to further justify denying Claim 2 of Employes' claim.

The above listed awards were furnished the Referee to substantiate the Employes' position that when a rule or rules of the agreement are violated, Carrier is subject to the penalty as claimed. The issue as to whether the Claimants were the ones entitled to be assigned the work was not raised in these awards.

In addition to the above listed awards, Third Division Award Nos. 12309, 15385 and 20020 were furnished the Referee in support of the Employes' position.

In handling this claim on the property Carrier, among other things, alleged that the Carmen's Craft suffered no loss of earnings and in their Rebuttal it was stated that if the car had required repairs it would have been performed by two other carmen, not claimants, therefore raising the issue as to claimants being the proper claimants.

To refute this line of argument the Referee was furnished Third Division Award Nos. 1646, 2282, 3376 and 9759.

In Third Division Award No. 1646, Referee Bruce Blake stated:

> "The Carrier contends, however, that, under the rule as interpreted North was not entitled to be called. The essence of the claim is by the Organization for violation of the agreement. The claim for the penalty on behalf of North is merely an incident. That the claim might have been urged in behalf of others having, as between themselves and North, a prior right to make it, is of no concern to the Carrier. * * *.
>
> * * *.
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> Claim sustained."

In Third Division Award No. 2282, Referee Fred L. Fox stated:

> "The claim will be sustained solely in the interest of maintaining the integrity of the current agreement, and as a penalty for what we believe was a violation thereof. As stated by the Emergency Board created by the President in its report of February 8, 1937,
>
> > 'The penalties for violations of rules seem harsh and there may be some difficulty in seeing what claim certain individuals have to the money to be paid in a concrete case, yet, experience has shown that if rules are to be effective there must be adequate penalties for violation.'
>
> Here the amount of money involved is small, and the penalty not harsh; but neither fact should have any bearing on our decision on the basic principle involved.
>
> * * *.
>
> Claim sustained."

In Third Division Award No. 3376, Referee Ernest M. Tipton stated:

> "The Carrier makes the further contention that the Claimant was junior in service to W. H. Nelson who was working the second shift and was available for the work, and further states that the Claimant had indicated that he did not wish to 'double on two shifts except on infrequent occasions'. However, the fact remains that neither he nor Nelson were offered this work. But this claim is for a penalty and this Board has ruled that the Petitioner may make the claim for compensation in the name of any employe, as it is only incident to the violation of the Agreement. See Awards Nos. 1646 and 2282."

In Third Division Award No. 9759, Referee Raymond E. LaDriere stated:

> "The Carrier is correct in asserting that no loss of pay was suffered by anybody, but this same point was dealt with by Referee Wenke (Award 6063) where it was said that the claim is primarily to enforce the scope of the agreement and not for work performed, that if the scope has been violated then a penalty is imposed to the extent of the work lost; that this is done to maintain the integrity of the agreement and that as to who gets the penalty is but an incident to the claim and not a matter in which the Carrier is concerned. This view has been followed in a great number of awards one of the most recent of which is Award 9545 by Referee Bernstein."

See Second Division Award Nos. 1269 and 2214.

One of the basic purposes for which the National Railroad Adjustment Board was established was to secure uniformity of interpretation of the rules governing the relationship of the

Carriers and the Organizations of Employes. See Third Division Award No. 4569.

Referee Jesse Simons stated in his Findings in Second Division Award No. 6201:

> "This critical need for Referees, and Boards, to give the highest consideration and greatest possible weight to prior Awards, is grounded on the premise that it will permit the parties, all the parties, across the country to be supplied with a unitary body of decisions permitting uniform administration of the rules and clauses of the agreements. National agreements, national unions, and nation-wide carriers require such unitary interpretation and application of their respective rights and obligations so contract administration can be a simple straight-forward matter, and adjudication and re-adjudication reduced to a minimum."

Therefore, for the above stated reasons, the Labor Members dissent to the decision rendered in Claim 2 of the Employes' claim.

W. O. Hearn - Labor Member

E. J. McDermott - Labor Member

D. S. Anderson - Labor Member

G. R. DeHague - Labor Member

E. J. Haesaert - Labor Member