Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7496
SECOND DIVISION Docket No. 7228
2-SPT-MA-'78

The Second Division consisted of the regular members and in addition Referee Walter C. Wallace when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Southern Pacific Transportation Company

Dispute: Claim of Employes:

1. That the Carrier violated Rules 33 (a) and 57 of the current controlling Agreement; also, Article III of the Agreement dated September 25, 1964, when it assigned supervisors and officers to operate Hegenscheidt Tread Lathe (hereinafter referred to as Tread Lathe) from May 15, 1975 through May 30, 1975 (exclusive of Saturdays and Sundays).

2. That, accordingly, the Carrier be ordered to pay an additional eight (8) hours compensation at the straight time rate for each date indicated hereinabove to be divided equally between Machinists J. A. Farewell and A. Andreotti (hereinafter referred to as Claimants) who are qualified to perform such work and were available.

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.

The Carrier installed a new tread lathe in its Sacramento General Shops of foreign manufacture and utilized the instructions of a factory representative in its operation. Beginning on May 15, 1975 the representative instructed Carrier supervisors and officers in its operation. Carrier alleges that machinists, assigned to the operation, were also instructed at the same time. The instructions involved actual machine operation and the output of productive work in the form of remachined wheels. There is some dispute as to the duration of this activity with the organization alleging it covered 16 days until May 30, 1975 while the Carrier specifies the dates as May 15, 16, 19, 21, 22, 23, 27, 28, 29, June 2, 3, and 4, 1975.

The claim is non-specific in that it alleges Carrier "assigned supervisors and officers to operate" the lathe in violation of Rules 33(a) and 57 of the controlling agreement along with Article III of the Agreement dated September 25, 1964. The Organization seeks eight hours compensation at the straight time rate for each date, to be divided equally between two named machinists as Claimants who were available and qualified to do the work.

The claim was progressed on the property in accordance with the controlling Agreement up to and including Carrier's highest officer designated to handle such matters and the claim was denied at all levels. Rule 57 describes machinists work which clearly includes work described here. Article III provides:

> "Article III - Assignment of Work - Use of Supervisors - None but mechanics or apprentices regularly employed as such shall do mechanics' work as per the special rules of each Craft except foreman at points where no mechanics are employed...."

Rule 33 provides:

> "None but mechanics or apprentices classified as such, shall do mechanics' work as per special rules of each craft, except foremen at points where no mechanics are employed. This rule does not prohibit foremen, in the exercise of their supervisory duties, from performing mechanics' work. At points where there is not sufficient work to justify employing a mechanic of each craft, the mechanic or mechanics employed at such points will, so far as capable, perform the work of any craft that may be necessary."

Carrier raised a threshold question to the effect the claim is general, vague and non-specific in that it lacks essential facts as to the specified dates or times of occurrences during the period May 15 and 30, 1975 and the general nature of the action complained of, and places Carrier under an undue burden to identify the necessary facts. We are not disposed to favor this objection. The claim could have been more specific but we believe it met the minimum standards for specificity. Carrier interposed this objection on the property but there is no indication that it had difficulty preparing its defense or understanding the basis for the claim. Certainly, the Carrier should not be forced to develop the facts for the organization's claim but we believe that was not the case here and this objection is not well taken.

On the substantive issue, Carrier defends its actions on at least two grounds. The first seems to claim that supervisory work involved here has been carried out in the past and, in effect, a practice has been established. This is detailed in a memorandum from Plant Manager R. H. Sixby to W. E. Catlin, Carrier's Labor Relations Officer, dated October 13, 1975. Sixby alleges that as far back as 1968 named supervisors along with assigned machinists, electricians and sheet metal workers all received the same instruction from Factory Representative, Ed Stewart, as to the operation and maintenance of the lathes and each took a turn at the control panel. It is also alleged that supervisory work in other forms continues. The Organization produced written statements from eight (8) employees which in varying ways purport to contradict the Sixby allegation concerning supervisory work. The Board is not capable of resolving conflicts in evidence and the most that can be said on this issue is that it is controverted. As for the issue of "past practice" the proponent of such practice must establish its existence by substantial evidence, we must conclude on this record such burden has not been met.

The second ground for Carrier's justification relates to the portion of Rule 33 which states: "This rule does not prohibit foremen, in the exercise of their supervisory duties, from performing mechanics work." It was also argued that because of the nature of their responsibilities, supervisors are required to have a working knowledge of machinery used by those under their jurisdiction. The rules here do not sanction such a broad and far reaching exception. It is not unusual in supervisory work clauses to provide exceptions for training and instructional purposes. That was not done here and it is not the function of this Board to add to or change the wording of the agreement reached by the parties. Moreover, it would be a mistake of significant proportions to sanction an interpretation of this provision that depends upon findings as to Carrier's primary intention.

Carrier contends that foremen and other supervisors may perform craft work when it is performed incidental to the exercise of their supervisory duties. We have reviewed the cases cited and we are not persuaded the rule covers a situation such as we have here. Award 1550 (Wenke) involved supervisory inspection work based upon a long standing practice; Award 2880 (Ferguson) involved a "slight assist" by a foremen to two electricians; Award 4233 (Johnson) involved sending a diesel foreman out to determine the nature of the trouble and the Carrier did not assign such supervisor to perform electrician's work; Award 5222 (Weston) involved a foreman doing the work of a Carman by heating and driving rivets for one hour and five minutes. And it was held this work was in the regular exercise of his supervisory duties.

Other than Award 5222, last mentioned, we do not view the awards cited as controlling here. Even the award by Referee Weston involves work of slightly more than one hour compared with work covering twelve to fifteen days here. As opposed to this authority, the Organization cites awards

more in point. Award 4626 (Whiting); Award 5411 (Coburn); Award 5894 (Golden); Award 7361 (Twomey); Third Division Award 20552 (Lazar). We believe the awards cited by the Organization are controlling in this case and the claim is sustained. We conclude the dates involved during the period May 15 to May 30, 1975 are, in fact, May 15, 16, 19, 21, 22, 23, 27, 28 and 29. Carrier's specific explanation for the exclusion of other dates is unrefuted and we adopt its view.

The claim seeks an additional eight hours compensation at the straight time rate for the dates of such work and such amount to be divided equally between machinists J. A. Farewell and A. Andreotti who are alleged to have been qualified and available to perform such work. This money claim is sustained on the assumption such claimants were deprived of earning opportunities on the dates indicated. No contention is made in this record otherwise nor is it contended that such payment would be a penalty. If Carrier had a basis for objecting to this claim on some basis it was not made on the property and it cannot be entertained here.

A W A R D

Claim sustained in accordance with the Findings.

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 14th day of April, 1978.

Carrier Member's Dissent to Award No. 7496

(Referee Walter C. Wallace)

We become disturbed when the Majority, in reaching a conclusion, ignores Carrier's version of the facts of a case, ignores a documented past practice, and then, in making a monetary award, does so on the basis of an "assumption". Quite simply, Carrier argued strongly that this was a broad, general claim which failed to specify what work was performed by supervisors, when it was performed, and how much time was consumed and that therefore, since Petitioner did not meet his burden of proof, it was impossible to make a proper evaluation of the claim and it should be dismissed. In reaching it's conclusion, the majority chose to accept, at face value, arguments raised by the Petitioner in their submission which were contrary to the facts Carrier had shown on the property.

The follow relevant excerpts from Carrier's rebuttal are demonstrative of Carrier's position in this regard:

"Petitioner simply presents general assertions that during this period, machinist employes did not operate the lathe, Carrier's supervisors and officers performed productive work on the lathe in question and all training of Carrier's supervisors and officers has never been conducted in the manner here disputed on the property previous to the date of this claim. All these general contentions are in direct conflict with Carrier's Statement of Facts and evidence that was shown to Petitioner on the property; yet, Petitioner's initial submission fails to give any specific details of training procedures here in dispute or the extent of alleged 'productive work' performed or clarify its contention that machinists are entitled to receive their training exclusively by factory representatives separate and apart from Carrier's supervisors and officers."

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"Moreover, Carrier's letter dated September 18, 1975 (Carrier's Exhibit "E"), advised Petitioner's General Chairman that the training here involved was conducted by the factory representatives jointly to machinists as well as to two general foremen responsible for supervising shop production and that such training demonstrations of the machine were not performed to produce but rather for the purpose of learning how to operate and maintain this new equipment. On the property Petitioner did not challenge Carrier's position on any of those points but rather Petitioner waited until its initial submission to contend that the training sessions did not include machinist employes (at page 2) and that such action amounted to productive work under the guise of training (pages 3 and 4). Petitioner's bare contentions

"in that regard are untenable in absence of any evidence presented on the property that conflicts with Carrier's version of facts. Petitioner clearly has the burden of proving its version of facts are correct which it has not done and cannot do at this level of appeal."

Notwithstanding the foregoing, plus the fact that the machine subsequently did go into actual productive work on June 5, a few days later, the Majority concluded, on the basis of bare assertions, that the primary purpose of the work which gave rise to the dispute was productive work aimed only at supervisors. Based upon the record, that conclusion is wholly untenable, for the purpose, as stated by the Carrier and not refuted by the Petitioner during the handling on the property, was to train supervisors and machinists about the operation and maintenance of a new piece of machinery.

Lastly, we take exception to the Majority's findings of monetary benefits for the Claimants. As Carrier pointed out at page 4 of their submission, the claimants were "...present during the training period described above." Carrier, during their handling of the claim on the property, advised the General Chairman as follows:

> "At the time each general foreman, foreman and machinist was receiving instructions and training on this machine, the others were present and afforded the opportunity for acquiring further knowledge and training by observing. In this educational process, it was of course necessary for the individuals to operate the machine which was for the primary purpose of learning, not production, even though wheel sets were placed in the machine and turned to proper contour."

Notwithstanding the foregoing facts, the majority concluded that:

> "This money claim is sustained on the assumption such claimant were deprived of earning opportunities on the dates indicated. No contention is made in this record otherwise nor is it contended that such payment would be a penalty."

On the basis of the record, and the relevant excerpts above quoted, we cannot understand the conclusion of the Majority, which is admittedly based on an "assumption" that the claimants were deprived of earning opportunities. The undisputed facts are that they were present during this training period. Further, and of equal importance, there was no argument in the record that the Claimants were deprived of earning opportunities, so it is clear that the "assumption" made by the Majority in sustaining this claim was an assumption made outside of the record. Therefore, the conclusion is erroneous. It is self evident that there is an inherent danger in relying on "assumption" to dispose of labor arbitration cases, and the danger applies with equal potency to both sides in labor-management disputes. In fact, this Board has repeatedly refused to dispose of disputes on the basis of assumption or conjecture:

Second Division 4350 (Shake):

"The Board cannot be expected to enter into the realm of speculation and conjecture to determine the factual background of the dispute."

Second Division Award 4464 (McDonald):

"In support of the merits of their positions, the Organization points to a letter of Carrier's Master Mechanic Sullivan (Ex. "C") stating that: 'There is no maintenance or mechanic's work performed at Hibbing'. From this the Organization then concludes that the Foreman must be doing Engine Watching at Hibbing. This record supports no such assumption, and is devoid of any other evidence that such is the case."

Second Division 6878 (Weston):

"To prevail on the merits, a claim must be supported by proof as distinguished from mere assertion and conjecture. In the present case, the necessary proof is lacking and the claim must be denied."

On the basis of the evidence properly exchanged and discussed between the parties while the claim was being handled on the property, which showed that Machinists were provided the opportunity to participate in the training program conducted by the machine manufacturer's representative along with Carrier's supervisors, and that Machinists also operated the new machinery in the process of this training, there was no violation of the agreement.

The fact that the Majority had to make an "assumption" to find for the Claimants indicates that the Carrier's position regarding the broadness and generality of the claim was, indeed, valid. The claim should have been dismissed on this basis. The Majority erred in concluding to the contrary, and we are thus compelled to register our dissent.

J.W. Gohmann

J.E. Mason

W. B. Jones

B. K. Tucker

G. H. Vernon