Award No. 547
Docket No. MW-542

NATIONAL RAILROAD AJUSTMENT BOARD
THIRD DIVISION

Arthur M. Millard, Referee

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILWAY CO.

STATEMENT OF CLAIM: "Claim of Joe Tomlinson, John Fjeld, et al, section foremen and laborers, that the Carrier violated current agreement, particularly Rule 4-(f) thereof, by assigning section foremen and laborers to five (5) hours per day from November 1, 1933, until March 1, 1934, and that being thus irregularly assigned they be paid the difference between what they earned on the short time assignment and what they would have earned had they been properly assigned to eight (8) hours per day on each day that they were assigned, or worked, less than eight (8) hours per day."

STATEMENT OF FACTS: The parties jointly certified to the following statement of facts:

"On November 1, 1933, section foremen and section laborers were assigned to work five (5) hours per day and were continued in such assignments until March 1, 1934."

There is in evidence an agreement between the parties bearing effective date of October 1, 1926.

POSITION OF EMPLOYES: "Having received unofficial information that the Carrier contemplated assigning its track forces to five hours per day on November 1, 1933, General Chairman Castle sought and received an interview with Mr. C. M. Dukes, Assistant to Vice President, on October 25, 1933, with the view of, if possible, prevailing upon the Carrier to refrain from actually putting into effect such irregular assignment. Being unable to prevail upon the Carrier to refrain from the contemplated five hours per day assignments, Mr. Castle wrote Mr. Dukes under date of October 26, 1933, . . ., referring to conference of October 25, pointing out that under Rule 4 (f), which reads:

> 'Except by mutual agreement, regulary established daily working hours will not be reduced below eight (8) to avoid making force reduction.'

assignments could not be reduced below eight hours per day except by mutual agreement, requesting that the Carrier give further consideration to the matter before assigning its track forces to five hours per day in order to avoid claim for pay.

"To that letter Mr. Dukes replied under date of October 31st, . . . suggesting that employes meet him in conference on November 4th for the purpose of further discussing the entire matter.

ment as a result of the carrier's action in putting into effect the five hour day, it was necessary for them to make such claim for money payment within the period prescribed by Rule 5-(n). This they did not do. Many grievances are presented to the carrier each year, which do not result in any claims for money payment. It seems too clear for argument that any discussions with Mr. Dukes concerning the matter prior to or at the time the five hour day was put into effect, cannot be construed as claims for money payment, because no such claims had then accrued.

"A further contention of the employes will probably be that mediation proceedings were instituted January 18, 1934, and that this had the effect of complying with the rule. The answer to that contention is apparent. The filing of mediation proceedings can in no sense be construed as a compliance with Rule 5 (n), which requires the claim to be filed with the Superintendent. These mediation proceedings were not instituted for the purpose of enforcing a money payment. Furthermore, these mediation proceedings were withdrawn by the Organization, at the suggestion of the Mediator, on July 11, 1934, and no further proceedings were pending anywhere until these proceedings were filed before this Board in 1937."

"The obvious purpose of Rule 5-(n) was to fix a reasonable and fair time within which employes should present their claims for money payments, and thus avoid the piling up of large claims, in this case involving several hundred thousand dollars, a long time after the dispute. This rule is as much a part of the Schedule as any other rule, and it must be observed."

OPINION OF BOARD: This claim covers an alleged violation by the Carrier of the rules of the current agreement between the parties, effective October 1, 1926, in assigning section foremen and laborers on the lines of the Carrier to five (5) hours per day instead of eight (8) hours per day from November 1, 1933, to March 1, 1934; and that such employes, approximately 1100 in number, be paid the difference between what they earned on the short time assignment and what they would have earned had they been assigned to eight hours per day on each day they were assigned to work less than eight hours per day.

In support of their contention the employes cite Rule 4 (f) of the existing agreement and submit various decisions and awards of this Third Division of the National Railway Adjustment Board as having a bearing on the dispute at issue.

The Carrier submits that the rules of the agreement for the period covered by this claim were such as to admit of the action taken and contends that the claim is wholly barred from consideration by the provisions of Rule 5 (n) of the agreement, which provides that grievances involving money payments accruing under the terms of agreement will not be applied prior to ninety days from the date of presentation to the Superintendent.

As to the application of Rule 5 (n) to this instant case, the Board submits that, while no evidence is introduced indicating the presentation of any grievances involving money payments to the Superintendent of the Carrier, this claim does not represent a grievance in the sense in which the term is used in the Agreement, but is a claim made by the General Chairman of the Brotherhood of Maintenance of Way Employes, one of two parties to an agreement, or schedule of the rules, hours of service and working conditions, between the Employes and the Carrier, and is a contention of one of the principals of an Agreement with the other over the application of rules, hours of service and working conditions, whose proper application is a matter of mutual or joint responsibility.

Under these conditions there are no limitations that can be applied to discussions and questions concerning the proper application of rules, hours of service or working conditions contained in the schedule, or the rules, hours of service or working conditions which they involve; those are subjects to be determined in joint conferences and negotiations, or, failing in this, to be

interpreted in the manner provided, as in this instance, by the terms of the Amended Railway Labor Act; and the Board rules that in this instant claim Rule 5 (n) of the existing agreement does not apply.

With respect to the individual presentation of claims in connection with disputes of parties to agreements, the Board further submits that under the provisions of the Amended Railway Labor Act, approved June 21, 1934, parties to a dispute "may be heard either in person, by counsel or other representatives, as they may respectively elect" and the presentation of this claim in behalf of the employes affected, by the proper officer or officers of the Brotherhood is a proper procedure, in that such organization is the recognized representative of the employes involved, and one of two parties to an agreement governing rules, hours of service and working conditions existing between the Carrier and the employes covered by the agreement and as such the Brotherhood is authorized and qualified to individually and collectively represent the employes in such disputes as may arise or be conducted in connection with the application of rules, hours of service or working conditions whose proper application is a matter of mutual or joint responsibility.

Under these conditions the Board submits that the Carrier has advanced no valid objection as to the proper procedure in the presentation of this dispute to this Third Division of the National Railroad Adjustment Board and the Board further rules that the case and the subject involved is properly before the Board.

Considering the merits of this claim and the application of Rule 4 (f) of the agreement to this dispute, as submitted by the employes, there is no question between the parties at issue that the reduction made by the Carrier was occasioned by economic requirements but no evidence has been introduced by either party to this dispute which would enlighten the Board as to the effort made by the Carrier, previous to the reduction being put into effect, to secure the agreement of the employes to the contemplated reduction in working hours as required by paragraph (f) of the rule.

According to the evidence submitted, the reduction in the number of working hours was put into effect on November 1, 1933. Prior to that time, or on October 25, the matter of the reduction was discussed between the officials or representatives of the parties to the agreement; but no mutual agreement was reached nor is any evidence introduced as to the discussion that took place at the conference that was held between the parties to the agreement.

In connection with paragraph (g) the fact is evidenced that as periods and conditions exist when a proper reduction of expenses can be accomplished by laying off junior men, so on the other hand is the fact evidenced that periods will exist and conditions will arise when reductions cannot be accomplished in this manner and retain the efficiency of the gang; and the only other recourse left to meet the necessary reductions and economic requirements will be by laying off the entire gang.

In view of the conditions outlined and as the facts as to the merits of this claim are not in evidence, the Board submits that the claim be remanded to the parties for further conference and negotiation, with the privilege of presenting further testimony and reinstating the claim before this Board should no agreement be reached by the parties at issue.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That this claim be remanded for conference and negotiations between the parties at issue as outlined in the opinion of the Board and with the privilege of presenting further testimony and reinstating the claim should no agreement be reached by the parties at issue.

AWARD

Claim remanded in accordance with last paragraph of Opinion of the Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 15th day of December, 1937.

DISSENT

This award waives aside a provision of the contract mutually agreed upon by the parties concerning which there is no question of ambiguity of meaning. Rule 5 (n) in unmistakable and simple phrasing classifies grievances into two all-comprehensive groups, viz., grievances involving money payment and grievances not involving money payment. Grievances either do or do not involve money payment; none other can exist. Rule 5 (n) establishes itself, and the parties agreeing to it both enjoy and obligate themselves by its terms. It stipulates "ninety (90) days from the date of presentation to the Superintendent," for application of "grievances involving money payment accruing under the terms of this agreement."

There can be naught but error in an award that proceeds to injure one party to a contract by declaring that a claim involving money payment "does not represent a grievance in the sense in which the term is used in the agreement . . .", thus denying the application of the terms of that contract which specifies what is required in respect to such grievances, and in face of the uncontrovertible evidence that this claim is a grievance involving money payment.

C. C. COOK
J. G. TORIAN
A. H. JONES
GEO. H. DUGAN
R. H. ALLISON.