

Award No. 1403
Docket No. CL-1423

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

"R. L. Moore, Clerk, employed and holding seniority rights in the Store and Mechanical Departments at Muskogee should be paid a call (three hours) as provided for in rules 32 and 34 of the Clerks' Agreement account failure of the management to call him on February 22, 1938, Washington's Birthday, to bill out a car cinders in car—MV-90002."

There is in evidence an agreement between the parties bearing effective date of June 14, 1921.

EMPLOYES' STATEMENT OF FACTS: "On February 22, 1938 (Washington's Birthday), at 5:30 P. M. Mr. J. L. Hannah, Clerk, employed and holding seniority rights in the Muskogee Station and Yard was instructed by Mr. V. D. Mathews (Title Chief Car Record Clerk), to go to Muskogee Station and bill out a revenue car of cinders car No. MV-90002; Mr. Hannah billed the car of cinders 'weight and charges to follow.' On February 23, Mr. Wright, Agent, at Muskogee Station, called R. L. Moore Clerk, at Store Department at Shopton Oklahoma, on the telephone and told him that it would be necessary that he (Mr. Moore) make a revenue way-bill covering this car because the car originated at Shopton, Oklahoma. On February 24, Mr. Wright (Agent) called again and told Mr. Moore, that it would be necessary that he make a 'weight and charges' way-bill on this car at Shopton Oklahoma, and that he was issuing a waybill correction on the 'weight and charges' way-bill that was made at Muskogee Station on February 22, 1938, cancelling his way-bill as it should not have been billed there in the first place."

POSITION OF EMPLOYES: "The employees contend that the action of the carrier in refusing to call Clerk, R. L. Moore, and in refusing to pay claim violated the following rules in their agreement effective June 14, 1921.

'ARTICLE III

'RULE 3—Seniority Datum.—Employes seniority begins at the time their pay starts in the respective seniority districts and in the respective seniority group in which employed.

'By seniority group is meant, the class of employes designated by paragraphs 1, 2 or 3 of Rule 1.'

Board, and the carrier reserves the right to make a further statement when it is informed of the contention of the petitioner, and requests an opportunity to answer in writing any allegation not answered by this submission."

OPINION OF BOARD: The controlling facts in this case are not in dispute. Briefly stated they are. R. L. Moore is a clerk employed and holding seniority rights in the Store and Mechanical Department located at Shopton, Oklahoma, which is a station designated on the time card. J. L. Hannah is employed as a clerk to the Agent at Muskogee, Oklahoma, holding seniority rights in the Muskogee Station and Yard district. On February 22, Washington's Birthday, the Carrier called Clerk Hannah, an employee holding seniority rights in the Muskogee Station district, to go to the Muskogee Station and bill out a revenue car of cinders. It is claimed this car should have been billed out of Shopton Station by Moore, an employee in that seniority district who had been doing the billing of this material for a number of years. The record also discloses that on the next day, February 23, the Agent requested the claimant to make revenue way bill on the car of cinders in question because the car originated at Shopton.

This Board has repeatedly held that the Carrier is not permitted to remove work from the confines of one seniority district and assign it to employees although covered by the same agreement in another seniority district. See Awards 99, 198, 753, 973 and 975. When the Carrier called Hannah, an employee in the Muskogee Station seniority district, to perform work belonging to employees in the Store and Mechanical Departments' seniority district at Shopton, to the detriment of the rights of the latter employees as it did in this case, Carrier violated the current Agreement and it should reimburse the affected employee.

It is the contention of the Carrier that the claim is barred by the operation of Rule 24, claim not having been filed until 23 days after the alleged violation. Rule 24:

"UNJUST TREATMENT.—An employee who considers himself otherwise unjustly treated, shall have the same right of hearing and appeal as provided in Rule 22 of this agreement, providing written request is made to his immediate superior within seven days of the cause of complaint. Except that the time limit within which complaints may be filed as to the rating of any position shall be sixty days from the date the rate complained of was made applicable to the employee or assignment."

There is a wide conflict in the awards of this Division as to whether or not Rule 24 is to be deemed to be a cut-off rule or should be limited to situations analogous to discipline. See Awards 417, 444, 521 and 595. In a very recent award, No. 1060, this Division speaking through Judge Hilliard as referee, said:

"* * * Predicated so, the carrier is agreeable to making reimbursement for wage losses from and as of the time when complaint was made, and for seven days preceding that time. It would thus limit its liability on the theory that Rule 29 operates to that effect. The employees contend that Rule 29 deals with wholly different problems and is unavailing to the carrier. It is to be observed that the agreement between the parties is divided into articles, each article bearing an explanatory heading printed in emphasized type. Rule 29, cited by the carrier, is part of Article IV, and is entitled 'Discipline and Grievances.' Rule 45, claimed by the employees to be the only provision applicable in the premises, is found in Article VII, entitled 'Overtime and Calls.' The full text of Article IV indicates that the discipline contemplated there has to do with the manner in which an employee performs his duty, and his grievances, if any, with the treatment accorded him in the course of his employment by the carrier. It is altogether procedural in its scope. Article VII deals with the wage scale in exceptional in-

stances, and Rule 45 thereof applies particularly here. Neither discipline nor grievances is mentioned in the article, nor is either presented for consideration in this proceeding. For aught that appears the employee's services have been satisfactory, and by like token the carrier has not imposed upon the employee. Concededly, at a given time, and continuing for an agreed period, the carrier made overtime use of the employee's services. The agreement provided for that very thing, and how the employee should be compensated in the circumstances appearing. In demanding pay in accordance with the agreement the employee was not preferring a grievance; indeed, he had none. It was as if in a given instance the agreement provided for a daily wage of five dollars, but in relation thereto the carrier mistakenly paid, and the employee unwittingly received, only four dollars a day. Reasonably, the error should be corrected for the period it obtained, not simply from the time the employee awakened to his rights."

In the contract in Award 595, greatly relied upon by the Carrier, the heading is "Grievances" while in the contract involved in this dispute the heading is "Unjust Treatment." We point this out because in the Dissenting Opinion filed by the Carrier Members in Award 1060 emphasis is placed upon the word "Grievances." The problem which confronts us is not in determining what certain words mean but in construing the contract before us. What did the contracting parties mean when they wrote into the Agreement the section headed "Unjust Treatment" and placed it under Article 5 entitled "Discipline and Grievances." We must consider the words in the manner in which they are used and where they are placed in the contract. The words "Unjust Treatment" are generally used in referring to some personal matter rather than to a violation of a contract right. If this is a cut-off rule or a statute of limitations applied to all classes of claims, it seems to us it would have been written into the contract under a separate heading rather than included under the heading of "Discipline and Grievances." A comparison of the contract in Award 1060 with the contract involved in this dispute shows that there is no material difference, and Award 1060 is consequently followed.

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 employee involved in this dispute are respectively carrier and employee 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 the Carrier violated the current Agreement as contended by the Petitioner and Rule 24 has no application to a claim of this nature.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of April, 1941.

Dissent to Award No. 1403, Docket No. CL-1423

That which is stated in the Dissent to Award No. 1404, Docket No. CL-1424, immediately following, as to the misinterpretation of the Clerks'

Agreement in regard to preparation of memorandum waybills applies with equal force and effect to the award in this case. Here the employe who made the memorandum waybill was one under the Clerks' Agreement, the location of whose office and his work was such as to identify him as the logical employe to be called (if any needed to be called) for preparation of the memorandum waybill that was necessary for movement of the car. Nothing in the Clerks' Agreement contravened his use for that purpose. The award is in error.

Similarly, also as in the Dissent to Award No. 1404, Docket No. CL-1424, reference is made to the Dissent to Award No. 1060 as expressing completely our dissent to the non-application of Rule 24 to the claim in the instant case.

(S) C. P. Dugan

(S) R. F. Ray

(S) R. H. Allison

(S) A. H. Jones

(S) C. C. Cook