Award No. 2925
Docket No. MW-2852

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

(Edward F. Carter, Referee)

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BANGOR & AROOSTOOK RAILROAD COMPANY

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

(a) That George Flemming now classified as B&B carpenter shall be reclassified as plumber and paid the rate applicable to plumber.

(b) That George Flemming shall be paid the difference between the rate that he received as carpenter and that which he should have received as plumber, retroactive to March 20, 1931.

EMPLOYES' STATEMENT OF FACTS: When Arthur Hoyt resigned as plumber on March 20, 1931, George Flemming was assigned to perform the work that had been performed by Hoyt. His headquarters have been and are at Houlton, Maine.

During hours that Flemming was actually working as plumber he has been and is paid the rate applicable to a plumber. During the hours that he has traveled from his headquarters to points on the railroad where plumbing work was to be performed and waiting for trains he has been paid the rate applicable to a carpenter.

The agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: As stated in Employes' Statement of Facts, prior to March 20, 1931, Arthur Hoyt was employed as plumber at a salary of $170.34 per month. In addition to taking care of necessary plumbing work on the railroad Hoyt handled and took care of all work in connection with maintenance of pumping and water facilities for locomotive use. Whenever Hoyt could not handle and take care of this work himself, a helper or some other B&B employe was assigned to assist him.

In February, 1924 George Flemming was engaged by former Superintendent of Bridges & Buildings H. F. Mansfield. Before engaging Flemming, Mr. Mansfield addressed him a letter stating that when plumber Arthur Hoyt retired or left the position as plumber he, Flemming, would be assigned as his successor. When Arthur Hoyt retired or left the service as plumber on March 20, 1931, George Flemming was assigned to succeed him in the position as plumber. However, even though George Flemming was assigned to succeed Hoyt as a plumber he was not paid the monthly rate of $170.34 that Hoyt had received, which the Carrier acknowledges was equivalent to 78½c per hour. Instead of that George Flemming was paid at the rate of 70c per hour for the time that he actually was performing work as plumber or work in connection with maintenance of water service, and was paid at carpenter's rate or 56c per hour for all time traveling

plumber resigned on March 20, 1931, both hotels had been closed and other plumbing work had dwindled to a minimum and after deliberation on the matter the management felt it clearly inadvisable and uneconomical to further continue the job of full time plumber and, therefore, created a dual job of carpenter-plumber. Mr. Flemming was offered the position, he accepted it and is still holding the same job. When doing carpenter's work he is paid 80c per hour and when engaged in plumbing work he is paid 94c per hour.

That the management was correct in its judgment that the need for a full time plumber had passed is borne out by actual check of railroad payrolls between March 20, 1931, and September 1, 1944, revealing that between those two dates Mr. Flemming spent but 37% of his time doing plumbing.

The Brotherhood contends there is a violation of Article V, Section 23, of the agreement in effect at the time of the incident in question. This section reads as follows:

> An employe in the Maintenance of Way Department will be paid the rate belonging to the job he is filling for the time he is doing such work. When temporarily assigned by proper authority to lower rated positions his rate of pay shall not be reduced.

This is not a case where a man was assigned to a higher rated position and not paid a higher rate for doing it; nor was he assigned to a lower rated position and given a lower rate; and this Company considers itself in full compliance with the schedule.

Beginning in 1932 this man made complaints from time to time to Engineering Department personnel that he felt he should have been given the plumber's job. Formal request, however, was not made until 1943 when he finally located the letter (alleged to have been written by his superior) which offered him this job.

Article IV, Section 2, DISCIPLINE AND GRIEVANCES, reads as follows:

> "An employe disciplined or who feels unjustly treated, shall upon making a written request to his immediate superior within ten days from date of advance be given a fair and impartial hearing within ten days thereafter, and a decision rendered within ten days after completion of hearing."

As the circumstances of which the employes complain occurred twelve years before formal complaint was made, they are long since outlawed by this State's Statute of Limitations and also by agreement between the parties to this dispute The handling of this complaint is therefore directly contrary to Article IV, Sec. 2, quoted above. It is also contrary to a similar rule contained in Maintenance of Way agreement effective May 12, 1941.

Summarizing: This Company considers itself fully within its rights to abolish a position when there is not work enough to justify its continuance. The Company believes it is complying with the Maintenance of Way schedule when it pays the rate belonging to the job being done. The Company takes the stand that since the grievance was not taken up as provided in Article IV, Section 2, that the Brotherhood is acting contrary to the terms of the agreement between the parties to this dispute.

OPINION OF BOARD: On March 20, 1931 a full time plumbers' position became vacant. The Carrier abolished this plumber position and established a position designated carpenter-plumber and fixed the rate of pay at 70 cents per hour when actually doing plumbing work and 56 cents per hour when performing carpenter and all incidental work. The records show that 37 per cent of Claimant's time was paid for at plumber's rate and 63 per cent at the carpenter rate. A joint check made by the parties and appearing in the record indicates that Claimant actually devoted 72 per cent of his time in performing plumbing service and work incidental thereto and 28 per cent of his time at carpenter work and work incidental to that service.

It is the contention of the Claimant that the establishment of a dual position with two distinct rates of pay, is violative of the applicable Agreement. We find no provision of the Agreement which prevents the establishment of a dual position such as we have here. This Division has recognized the right of the Carrier to establish such positions where it is not done for the purpose of evading the wage rates established by the Agreement. Awards Nos. 1540 and 1541. The Organization attempts to distinguish these cases because they provide fixed hours with fixed rates of pay for each position. In principle, there is no difference between those cases and the one under consideration. The Claimant also asserts that Section 24, Article 5 of the current Agreement, commonly called the composite service rule, has the effect of prohibiting the establishment of such a dual position as we have here. We think not. That rule applies where an employe is required to replace another employe receiving a higher rate of pay, or one receiving a lower rate, by giving him the higher rate in the former instance and his own rate in the latter. It has nothing to do with the fixing of the rates of pay of the positions in the first instance. We think the position of carpenter-plumber was properly established. The fact that it has existed in its present form for 12 years without protest on that ground tends to confirm our views upon the subject.

The Carrier contends that this Division is without authority to consider the claim of Flemming for any pay due him under the Contract because of his failure to make a written request for a fair and impartial hearing as required by Section 2, Article IV of the Agreement in force during the time the Contract was being violated. An employe who feels unjustly treated is required by this rule to make written request for a hearing within the time therein prescribed. This rule has no application to a claim such as we have here. The reasons are well stated in Awards Nos. 1060 and 1403 and it would be unnecessary repetition to repeat them here.

The Carrier also contends that the claim is barred under the doctrine of laches. A recognized authority defines laches as follows: "It is inexcusable delay in asserting a right; an implied waiver arising from knowledge of existing conditions and an acquiescence in them; such neglect to assert a right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity; such delay in enforcing one's rights as to work disadvantage to another." 21 Corpus Juris 210. The doctrine of laches is different from a statute of limitations in that it involves prejudice, actual or implied, resulting from the delay, while a statute of limitations is a bar to the assertion of a claim which arises upon the lapse of a period of time arbitrarily fixed by legislative enactment.

The delay in the present case is not shown to have prejudiced the rights of the Carrier. All of the material evidence is as available now as when the claim arose. If the passage of time alone was sufficient to bar a claim, the rule would rise to the dignity of a statute of limitation, something that was considered and rejected when the provisions of the Railway Labor Act were pending before the Congress. The facts in the present case do not warrant the application of the doctrine of laches. Whether the doctrine could be applied in a proper case before this Board, is a matter which we are not called upon to decide in view of our finding that it would have no application in the present case in any event.

We are of the opinion that the Carrier violated its Agreement when it failed to pay the Claimant at the plumber's rate for all the time he worked as a plumber, as shown by the joint check appearing in the record. To the extent that Claimant has not received plumber's pay for all actual plumbing work done and those things incidental to the plumbing work that are generally considered a part of an assignment as a plumber, the claim will be sustained.

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 the Carrier violated the Agreement when it failed to pay the Claimant the existing plumber's rate for all plumbing work and work incidental thereto.

AWARD

Claim sustained as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of June, 1945