Award No. 6351
Docket No. MW-6392

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

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

(1) That Section Foreman Shelby Chesnut, Hoopeston, Illinois, should have been paid on the same basis as would have been paid to a conductor, for services rendered while piloting locomotives around the Wye at Hoopeston, Illinois, on October 14, 1949, and on subsequent dates thereto;

(2) That Section Foreman Shelby Chesnut should now be compensated for the difference in pay received at the Section Foreman's rate of pay and what he should have received if properly paid in accordance with the provisions of this Carrier's agreement with the Order of Railroad Conductors for each time he was called upon to pilot locomotives as referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Mr. Shelby Chesnut is Section Foreman at Hoopeston, Illinois.

There is located at Hoopeston on Foreman Chesnut's section, a Wye which is frequently used by the Nickel Plate Railroad in turning its locomotives. When so used, the Chicago and Eastesn Illinois Railroad requires that a pilot conductor accompany these Nickel Plate engines around the Wye.

Because of Foreman Chesnut's familiarity with the Carrier's tracks and switches in and around this Wye, the Carrier has, on and subsequent to October 14, 1949, used Foreman Chesnut in the capacity of a pilot conductor.

For services rendered by Section Foreman Chesnut while turning these engines on the Wye at Hoopeston, Mr. Chesnut was paid at his Foreman's rate of pay. He was paid at his regular straight time rate for actual time consumed while performing such service during his regularly assigned hours; at his regular time ane one-half rate for actual time consumed while performing such service outside of, but continuous with his regularly assigned work period; and at his regular time and one-half rate of pay for two hours and forty minutes for each date he performed such service on a "call" basis (outside of and not continuous with his regular work period).

The instant claim was temporarily withheld from submission to the Carrier, pending the conclusion of a claim of a precisely similar nature which

ployes consider a certain practice a violation of the rules is the basis for disallowing claims prior to the named dates of violation, such rule cannot be circumvented by placing the specified date an unreasonable time back and by that means giving what would ordinarily be prior acts, the guise of subsequent violations. (See Award 3385)."

The present claim is clearly a bold attempt on the part of Petitioner to extract from the Carrier, based on a favorable award, penalties for similar service allegedly performed many years in the past. On the basis of the facts here submitted only a denial award should be considered for the following reasons:

1. The alleged rule violation complained of first commenced in October 1949.

2. No claim or protest was initiated in behalf of claimant until January 10, 1951.

3. Claim was initiated only after Award 5095 was rendered sustaining claim of a similar nature.

4. In the absence of protest from the employe within a reasonable time after payment of compensation was made, Carrier was justified in assuming that the employe had been properly compensated and had no grievance on that account.

5. The period intervening between the time the alleged violation occurred and when first submitted on the property outlaws further consideration thereof.

Having permitted their grievance to lie dormant, without protest, for so long, to permit Petitioner to now initiate claims involving alleged violations occurring prior to the date of Award No. 5095 does violence to the spirit and intent of the Railway Labor Act. The instant case is not one where retroactive payments prior to date of protest is properly allowable. As stated in Award No. 4281, "Penalties are prescribed as a means of securing the enforcement of agreement provisions; not as a technical basis for the collection of unreasonable and excessive claims." This purpose was accomplished by the decision contained in Award No. 5095. The Carrier paid the considerable penalty there provided, and has applied the agreement accordingly since. To permit Petitioner to now initiate claims for similar occurrences prior to the date of Award No. 5095 will not have the effect of securing enforcement of agreement provisions, but will only serve as a " * * technical basis for the collection of unreasonable and excessive claims." The claim should be denied accordingly.

Carrier affirmatively states that all matters contained herein have been handled with the Employe's representatives.

(Exhibits not reproduced)

OPINION OF BOARD: Claim is here made by a section foreman, one Shelby Chesnut, for the difference in pay he received and that he should have received for performing service as a conductor on October 14, 1949, and all subsequent dates.

Respondent here has historically required the use of a pilot on locomotives of a foreign carrier using its wye to turn its equipment.

The Organization takes the position that an employe covered by the Maintenance of Way Agreement is entitled to the same compensation for performing work ordinarily performed by another craft as the member of such other craft would receive for such performance.

The Respondent here asserts that this claim should not be considered by this Board inasmuch as the same was presented some fifteen months after the work in question was performed.

On the question of whether the delay in presenting this claim, if any there was, should be a bar to consideration at this time, this Board has held many times that the Railway Labor Act contains no time limitation and that where, as here, the effective agreement contains no such limitation or cut-off provision, a claim may be presented at any time. In view of the fact that the Respondent has made no showing that the delay has prejudiced its rights or resulted in monetary loss being suffered, this contention lacks merit. Lapse of time alone is not sufficient.

An examination of the record in this dispute reveals no substantial difference in the work performed, or the circumstances surrounding its performance than existed in the record that lead to the issuance of Award 5095.

The parties here are identical with those in Award 5095. There exists therefore no sound reason that would justify a departure from the principles laid down therein to the effect that the claim here as there is meritorious.

See also Awards 4714 and 3489.

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 Employe involved in this Dispute are respectively Carrier and Employe 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.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of September, 1953.