Award No. 9314
Docket No. MW-8036

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

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

(1) The Carrier violated the effective agreement when it failed and refused to accord Messrs. Frank Smokovich, Thomas R. Kroll, Victor J. Siminic, Robert A. Bosk, Arnold Delvaux, Orville Olsen, Donald W. Swanson, Kenneth J. Konkel, Lester W. LaMarch, Clarence Martin, Francis Pilon, Anthony Vardian, Frank Gersich, Glen M. Meyer, Joseph Kutches, Peter Geb, Isadore Casey, Raymond J. Martineau, Stanley J. Kwarciany, Clarence DeMarse, Arthur Sundquist a seniority date as Carpenters and/or helpers as of the time their pay started as such in December, 1953 and January, 1954 and to list their names and seniority dates on the 1954 seniority rosters.

(2) The Carrier now be required to accord each of the employes named in part (1) of this claim a seniority date as Carpenter and/or helper as of the time each claimant's pay started as such in December, 1953 and January, 1954 and to list their names and seniority dates on the 1954 and subsequent seniority rosters, account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: The claimants named in part (1) of our Statement of Claim entered the Carrier's service in December, 1953 and January, 1954 in the capacity of a B&B carpenter helper and/or a B&B carpenter and assisted in the work of repairing the Carrier's ore docks at Escanaba, Michigan on the Peninsula Division.

When the 1954 B&B seniority rosters for the above referred to Division were published and posted on or about March 1, 1954, the claimants' names and seniority dates were not shown thereon.

On or about April 15 the claimants protested the omission of their names on the above referred to rosters, requesting that each be accorded a B&B Carpenter helper and/or a B&B carpenter's seniority date as of the date each claimant's pay started as such and that the aforementioned roster be corrected accordingly.

The protest was received by the Carrier's Supervisor of Bridge and Buildings, however, the protest was declined as well as all subsequent appeals.

or telegram addressed to the employe at the last address filed will consititue proper notice."

The employes on behalf of whom the claim is filed in this case did not, upon being laid off in force reduction, indicate any intention or desire to retain their seniority by filing name and address, in duplicate, as required under the above quoted rule. In the absence of complying with the above rule the employes in this case, if it is assumed they had seniority, forfeited that seniority by failing to comply with the provisions of the rule. It is therefore the position of the carrier that under the provisions of the above quoted rule the claimants in this case forfeited any seniority which they might have acquired on March 20, 1954 or five days subsequent to the date on which they were laid off in reduction of forces. It is therefore the position of the carrier that no claim could possibly be in evidence in this case for any days other than the five days immediately following the date laid off, and claimants having failed to comply with the provision of Rule 11(b) any seniority which they may have acquired was terminated by failure to comply with the provisions of that rule.

It is therefore the position of the carrier first, that this Board should not proceed to hear this case unless the Brotherhood of Railway Clerks, a necessary party, is given notice of the proceeding and allowed to participate therein; second, that an interpretation of the agreements involved in this case which would sustain the claim would result in an agreement in violation of the provisions of the Railway Labor Act; third, that the intention of the parties as evidenced by the method of handling this work throughout the years, including the present agreement negotiated after the claim here is involved arose, shows that it was, is and has been recognized that ore dock laborers are entitled to the winter repair work in preference to outsiders or to any others except regular employes coming under the maintenance of way agreement who worked during the summer months under such agreement; and fourth, that claimants in this case forfeited all seniority, if they had any, when they failed to comply with the provisions of Rule 11(b) of the Maintenance of Way agreement. It is therefore the position of the carrier that this claim should be denied in its entirety.

All information contained herein, except Carrier's Exhibits "E", "F" and "G" and the reference to the conversation between the Maintenance of Way General Chairman and the Clerks' Assistant General Chairman, has previously been submitted to the employes during the course of the handling of this case on the property and is hereby made a part of the particular question here in dispute. These excepted items the carrier understands were fully within the knowledge of the employes during the handling on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: This is the same docket in which by Award 9057 third party notice to the Brotherhood of Railway and Steamships Clerks was ordered. The required notice has now been given.

The claim is that the Carrier violated the effective Agreement when it failed to accord to the twenty-one named employes seniority as carpenters or helpers as of the time their respective pay started as such in December, 1953 or January, 1954, and to list them accordingly on the 1954 seniority roster of

Award No. 9315 relates to the same general circumstances. It involves the claim that on or about March 15, 1954, twenty of these same twenty-one March 1, 1954.

employes were furloughed in force reduction while employes without seniority rights were retained in service, and that each of the twenty employes should be allowed the exact amount he lost because of the violation charged.

By brief, though not by the record either here or on the property, the objection is raised here that the two dockets constitute the splitting of one claim, which was held improper in Award No. 1215 of this Division and Award No. 6334 of the First Division. In each of those cases, after a claim had been processed to a final award without seeking monetary compensation, a new claim for monetary compensation was held to constitute an improper renewal of a case finally disposed of.

But this is not analogous instance. For here the two separate claims were presented together, processed together on the property, and presented together here, so that neither seeks to reargue a case already decided.

No instance similar to this has been cited or found, where the objection has been raised that two concurrent claims constitue the improper splitting of one cause of action. In any event, the objection comes too late, since it was not raised on the property. It is also clear that the remedies sought in the two claims are not inconsistent, so that the Claimants could not have been required to elect which of the two they would pursue. Consequently, if the objection had been timely raised, the proper remedy would have been the mere combining of the claims, or at least their consolidation for presentation and argument. Since that was not sought or done we must make separate awards.

Furthermore, while the claims are perhaps sufficiently related to have been combined, they are actually different, and have been so treated by the parties in their showings and argument. This Claim relates to Carrier's failure to list Claimants' names and seniority dates on the seniority roster of March 1, 1954; the other claim relates to their furlough in force reduction two weeks later, which, while related to this Claim, is another matter.

The Claimants entered the Carrier's service as Bridge and Building carpenters and helpers in December, 1953 and January, 1954, and were used in the repair of its ore docks at Escanaba, Minnesota. That work is within the scope of the Brotherhood of Maintenance of Way Employes, but a three-party arrangement had been made by which ore dock workers under the Clerks' Agreement, who were furloughed because of the winter closing of lake traffic, could also be used in these repairs.

By a joint letter of the General Chairman of the two Brotherhoods, dated February 1, 1939, it was agreed that preference in employment on Carrier's dock repair work at Escanaba should be as follows:

1. B&B employes holding seniority in that division;

2. Laid off B&B employes holding seniority on any other division; and

3. Laid off ore dock laborers at Escanaba.

The agreement concluded:

> "Additional men who were hired exclusively for dock repairs at Escanaba * * * after the supply of men from the above three sources are exhausted **will not establish seniority** in the B&B Department under the provisions of the Maintenance of Way schedule by such temporary service."

On the basis of that agreement a Memorandum Agreement was entered into between the Carrier and the Brotherhood as of January 2, 1939. It provided for the above three groups, prescribed that those in the third group were to be given preference in this repair work according to their seniority as ore handlers if they had the necessary fitness and ability, and established a fourth group as follows:

> "4. If additional men are required they may be hired from any source available."

With regard to seniority it provided as follows:

> "It is further agreed that men temporarily employed for ore dock repair work * * * under provisions of items 2, 3 or 4 hereof, enter the service only as temporary employes and **do not establish seniority** under provisions of Rule 1, Maintenance of Way Agreement, in B&B seniority district, Escanaba, etc."

A new Memorandum Agreement was made between the Carrier and the Brotherhood on November 13, 1941, effective two days later, cancelling the 1939 Memorandum Agreement. It provided for the same first two groups of men for dock repair work and established groups 3 and 4 as follows:

> "3. Track employes laid off in force reduction, Peninsula Division, * * * provided they have the necessary fitness and ability to perform ore dock repair work.
>
> "4. If additional men are required they may be hired from any source available."

Thus ore dock laborers mentioned in item 3 of the 1939 Memorandum Agreement were placed in item 4 of the 1941 Agreement, which provided with regard to seniority as follows:

> "It is further agreed that men temporarily employed for ore dock repair work * * * under provisions of Items 2 and 3 hereof, enter the service only as temporary employes and **do not establish seniority** under rule 1, maintenance of way agreement, * * * except they file written request to transfer from their present seniority district to the B&B seniority district on which they are given temporary employment.
>
> "It is also agreed that men employed under provisions of Item 4 holding seniority in some other class on the C&NW Railway **will not establish a seniority status** in B&B seniority district, Escanaba, * * *.
>
> "It is further agreed that men employed under provisions of Item 4 from outside sources and having no seniority status with the railway company **will establish seniority status** in B&B seniority districts, Escanaba, Michigan and Ashland, Wisconsin, in line with rules contained in current maintenance of way agreement." (Emphasis ours.)

Thus for senioirty purposes it expressly differentiated between the two groups mentioned in Item 4, and expressly afforded seniority status for men brought in from outside sources.

The wording of the seniority provisions could not have been clearer or its intent more apparent. The Claimants were employed in December, 1953 and January, 1954, while that Agreement was in effect.

On August 1, 1954, a new three-way agreement was made between the two Brotherhoods and the Carrier. It provided for the same first three groups as the 1941 Agreement, expressly mentioned the "furloughed iron ore dock employes" in Item 4, and expressly provided that "men temporarily employed under provisions of Item 4 **will not establish a seniority status** in B&B seniority district, Escanaba," etc,

Thus the 1954 agreement again changed the seniority provision relative to temporarily employed men with no prior seniority with the Carrier. But the Claimants' rights had already attached under the 1939 agreement and were not thereby divested.

The Carrier argues that it was never the intention of the 1941 Agreement to provide that men from outside sources "**will establish** a seniority status;" that on the contrary, the intention was to say **will not establish** a seniority status," but that the word "not" was inadvertently omitted.

No evidence is offered to sustain that proposition; but the contention is that it is sustained by the lack of any seniority claims by temporary employes between 1941 and 1953. Such an argument might lend support to a possible interpretation of ambiguous or contradictory provisions, but not to the complete reversal of a clearly unambiguous provision like this.

Furthermore, even a cursory reading of the two paragraphs relating to seniority of Item 4 employes shows an obvious intention to differentiate between them and to grant seniority to new employes from outside sources.

It is well settled that this Board must accept Agreements as made by the parties and must not insert or delete words under the guise of construing unambiguous provisions. Courts of equity have the power to reform agreements upon proper showings of mistake, but we do not share that authority, even when mistake is shown, which is not done here. We must accept the provision as adopted by the parties.

It is argued by the Carrier that the 1941 seniority provision is void under the Railway Labor Act as an illegal discrimination against the ore dock laborers who are required to pay dues to this Brotherhood without gaining seniority under it. If there is improper discrimination it is not under this provision granting seniority to Claimants, but under the provision denying it to the ore handlers. The objection, even if open to the Carrier, is therefore not in point here.

Carrier's statement of its Position in its Ex Parte Submission here includes four issues, the last of which is that the Claimants did not qualify for retention of seniority under Rule 11(b) by giving the required notice within five days after being furloughed in reduction of force. The record in this docket does not show the date of any furlough nor mention March 15, 1954, but Carrier's statement of its Position says that the notices were due on or

before March 20; Claimants do not deny the allegation, and we may therefore assume that the furlough was on March 15.

In their "Oral Argument" the Claimants protested that the Carrier had raised the fourth issue here for the first time, and alleged that it had not been discussed on the property and that notice was in fact given within five days after the furlough in reduction of forces. Some confusion results from their references to notices of February 10 and 20, which obviously would relate to two furloughs in February, and not to one on March 15; but as noted above the record in this docket does not show the date of any furlough, so that we are not informed what furloughs there may have been other than that of March 15 as alleged in argument and not denied.

In any event, the Carrier filed a "Reply to Employes' Oral Argument" in which it did not deny the Claimants' statements that this fourth issue was not presented on the property and that the five days' notice required by Rule 11(b) was in fact given. We must therefore accept those statements as true in the absence of evidence in the record to the contrary. There the only argument shown is that by not bidding on bulletins of January 7, 1954 the Claimants showed that they did not want to become "permanent members of B&B crews". (Supervisor Frietz's letter of April 19, 1954, referring to the Organization's protest of the 1954 roster for omitting Claimants' names.)

In Award 8324 this Division said:

> "* * * it is well settled by our awards that new issues not raised on the property, and evidence not brought to the other party's attention while the case was in progress on the property, cannot be considered by this Board. Awards Nos. 1485, 3950, 5095, 5457, 5469, 6657, 7036, 7601, 7785, 7848, 7850. There have been a few departures from this principle, under special circumstances, but in the main the rule has been adhered to.
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> "The reason for the rule is obvious. Genuine efforts should be made to settle disputes on the property, to avoid cluttering the calendar of this Board with cases that could have been settled if the full facts had been brought out and considered. Only by full disclosure of positions and evidence while the case is on the property, can the parties hope to reach agreement."

In any event, it is not apparent what bearing Claimants' action or nonaction after March 15, 1954 can have upon Carrier's failure to list them on the seniority roster of March 1, 1954. They protested the omission on April 15, 1954, which was within the ninety days provided for such protests by Rule 8(a).

Under the Agreement, as modified by the Memorandum Agreement of November 13, 1941, they attained seniority as of the dates of their respective employment in December, 1953 and January, 1954, and were entitled to be listed accordingly on the roster of March 1, 1954.

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 Agreement has been violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 29th day of March, 1960.