

Award No. 13169
Docket No. CL-12909

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5009) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-1, 2-A-2, and 3-A-1, at the Freight Station, East St. Louis, Illinois, Southwestern Region, when it arbitrarily removed Loader Henderson Gines from the gang of Tallyman T. Waters, to which he had been assigned by bulletin award, and placed him in the gang of Tallyman W. W. Reeves, effective September 9, 1958.

(b) The Claimant, Henderson Gines, should be allowed eight hours pay a day for September 9, 1958, and all subsequent dates until the violation is corrected and the Claimant is restored to the position which was awarded to him.

(c) Any and all other employees who might have been displaced as a result of the above violation should be allowed eight hours' pay a day for September 9, 1958, and all subsequent dates until corrected. [Docket 637.]

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employees in which the Claimants in this case held positions and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board.

trary to the general rules of contract law. To do so would be to perform an act without legal effect and, indeed, contrary to law.

Section 3 (p) of the Railway Labor Act, dealing with suits in the Federal Courts for the enforcement of those awards of your Honorable Board which contain a monetary award, provides, in part:

" . . . Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be prima facie evidence of the facts therein stated."

This provision contemplates that such suit "shall proceed in all respects as other civil suits" with the exception that the findings of the Adjustment Board as to the stated facts will be accepted as prima facie evidence thereof. It is clear this provision contemplates the application of the same rule of damages and the same rule against penalties in enforcing contracts as are applied in civil suits generally. An award contrary to these principles would be unenforceable as a matter of law.

For the foregoing reasons, it is respectfully submitted that your Honorable Board may not properly enter such an award in this case.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreements and to decide the present dispute in accordance therewith.

The Railway Labor Act in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out "of grievances or out of the interpretations or application of Agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreements between the parties thereto. To grant the claim of the Employees in this case would require the Board to disregard the Agreements between the parties and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown it was not restricted in the action taken and that no violation of the Agreement resulted from such action; that, therefore Claimants are not entitled to the compensation claimed.

Therefore, the Carrier respectfully submits your Honorable Board should dismiss or deny the claim of the Employees in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant bid in a job as a loader on a new freight handling platform gang. He worked one day with this gang after which the foreman transferred him to another gang doing the same work, at the same place, at the same time, at the same rate of pay. In effect, the Claimant was made to switch jobs with a loader on another gang.

The employes assert that the switch was arbitrary and in violation of the seniority rights of the Claimant. The Carrier does not give a specific reason for the switch but generally supports it on the grounds that loaders are not assigned to any specific gang "but were utilized consistent with operational requirements."

Despite the fact the important question of sanctity of assigned position is involved here, the circumstances are unique and the opinion is intended to apply only to these unique circumstances.

At the time of the claim, loaders were assigned to gangs, but not to any specific gang. While it was usual for the loader to work with the same gang once assigned, the Carrier maintains, and it is not refuted by the employes, that loaders were switched from one gang to another from time to time. In fact, one of the principals in this dispute, Clay, had worked on a different gang than the one from which he was switched just prior to the switch prompting this claim.

Earlier, the practice had been to use symbols or to number the gangs for identification. As a result, loaders were specifically identified with gangs. If the claim had arisen under these circumstances Claimant's seniority rights would have been violated if he were switched from gang to gang. At the time of the claim, however, the practice was, and the employes concede, not to number the gangs; instead they were known by the name of the Tallyman in that gang. This blurring of identity of specific gang assignment, plus the occasional switching of loaders from one gang to another constituted a new practice at this freight station so that it cannot properly be found that switching the Claimant was in violation of his seniority rights.

In view of this practice at the time of the claim and because the Claimant was not personally disadvantaged by the switch, the claim should not be sustained. The fact that the Carrier has returned to the system of numbering the gangs since this claim was filed should obviate the unique circumstances which gave rise to the dispute.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December, 1964.

**LABOR MEMBER'S DISSENT TO AWARD 13169,
DOCKET CL-12909**

Two matters disturb me insofar as this Award 13169 is concerned:

First: the Referee was led to believe, by a Member of the Board who was not handling the case, that the issue involved had been resolved and, therefore, it would not take long to write a decision. The circumstances surrounding conveyance of such information to the Referee is the only thing unique about the case.

Secondly: the decision itself, for the reason that one cannot distinguish between the import of the identification used to designate an employee's assignment, whether it be (1) a number, (2) a symbol, or (3) a name.

The Opinion seems to indicate that had the Gang been numbered, the results would have been different. Admittedly, the Gang was not numbered as had been the practice at one time. Neither was it "symboled" as had been done in instances. It was not designated as "Johnson's Gang" as was the practice because, at the time it was bulletined for bids, there was no Tallyman, such as "Johnson", assigned; and it was therefore bulletined, bid in and awarded as "New Gang". Having obtained the position of Loader in the "New Gang" through the exercise of his seniority, Claimant should not have been removed therefrom and caused, against his will, to exchange places with one junior to him in seniority.

Such actions make a mockery of the entire bidding and seniority provisions whereby employees are awarded positions based on seniority, fitness and ability.

The "distinguishing points" found by the Referee are totally unsound, and the Dissentor cannot help but believe that expediency, rather than reason, dictated the decision. I, therefore, dissent from this highly improper and most erroneous Award.

D. E. Watkins
Labor Member
1-5-65

**REFEREE'S ANSWER TO LABOR MEMBER'S DISSENT TO
AWARD 13169, DOCKET CL-12909**

The implied irregularity of a Board Member is unfounded. An honest mistake of fact was made in execution of administrative responsibilities. The matter was considered and corrected in the presence of the dissenting Labor Member before the Opinion was prepared. It had no bearing on the decision.

/s/ R. J. Ables,
Referee

January 9, 1965