

Award No. 15153
Docket No. MW-15694

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it refused to permit Track Laborer Tony D. Kenworthy to displace a junior track laborer on Extra Gang No. 261 effective September 2, 1963. (Carrier's File 2579.)

(2) Track Laborer Tony D. Kenworthy now be reimbursed for the exact amount of monetary loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant has established and holds seniority as a track laborer in the Track Department as of April 4, 1963. Mr. Lloyd L. Hay has established and holds seniority as a track laborer in the Track Department as of May 1, 1963.

On Friday, August 30, 1963, the claimant, who was and had been working as a regularly assigned track laborer with Extra Gang No. 264 since April 4, 1963, and Mr. Hay, who was assigned to Extra No. 260 as a machine operator, were laid off on account of force reduction. Mr. Hay immediately contacted Roadmaster R. D. Jones and requested and was granted permission to displace a junior track laborer in Extra Gang No. 261.

On Saturday, August 31, 1963, the claimant went to the office of Roadmaster Jones and made proper request for permission to displace a junior track laborer in Extra Gang No. 261. Even though the claimant had greater seniority as a track laborer than Mr. Hay, Roadmaster Jones declined the claimant's request, stating that there was no track laborers assigned to said extra gang who were junior to him.

Moreover, even though the claimant had compensation for services rendered the Carrier credited to 11 or more of the 30 calendar days immediately preceding the Labor Day holiday (Monday, September 2, 1963), including the work day immediately preceding said holiday (Friday, August 30, 1963)

3 (Carrier's Exhibit A, Sheets 9, 10 and 11), which he stated were being introduced for the express purpose of:

"* * * refuting what Mr. Deavers quoted as a statement of Roadmaster R. D. Jones in his letter of January 21, 1964."

The undersigned's declination of this claim is contained in the record as Carrier's Exhibit A, Sheets 12, 13, 14 and 15. An actual photo-copy reproduction of Roadmaster R. D. Jones' letter of January 19, 1964, (Carrier's Exhibit A, Sheet 16) was attached to the undersigned's letter of March 30, 1964, (Carrier's Exhibit A, Sheets 12 through 15).

For reasons beyond the control of either the Carrier or the Organization, and which are set out in the correspondence subsequent to the undersigned's declination of this claim, it was necessary that the conference which Mr. Jones had requested be postponed from time to time and it was not until November 11, 1964, that it was possible for the parties to meet and discuss this case in conference. The time limit in which this claim could be appealed to the Third Division was, by mutual agreement, extended to July 1, 1965, as shown by the record herein.

This is a classic example of a case of disputed facts. Furthermore, the facts that are in dispute are facts that are absolutely essential to either the sustaining or denial of this claim. Before any kind of a decision can be reached on the merits in this case it is going to be necessary for the Third Division to determine the answer to the question:

Did Roadmaster R. D. Jones, on August 31, 1963, refuse to permit Claimant Tony Dee Kenworthy to exercise his seniority and displace a junior laborer working on Kenworthy's seniority district, or did he not do this?

Once the above question is answered, the disposition of this case is a simple matter as there is no dispute between the parties as to the application of the rules involved, and the rules themselves are clear and unambiguous.

The controlling Agreement, No. DP-357, effective February 1, 1928, with revisions to September 15, 1961, is on file with the Third Division, National Railroad Adjustment Board.

Actual photocopy reproductions of the correspondence exchanged by the parties during the handling of this claim on the property is attached hereto as Carrier's Exhibit A, Sheets 1 to 42 inclusive.

(Exhibits not reproduced.)

OPINION OF BOARD: The following facts are not in dispute — On Friday, August 30, 1963, Claimant, Tony D. Kenworthy, who had been working as a regularly assigned track laborer with Extra Gang No. 246 was laid off on a force reduction. On the same day one Lloyd L. Hay, another employee, was also laid off on account of force reduction and immediately contacted Roadmaster Jones, requested and was granted permission to displace a junior track laborer in Extra Gang No. 261.

The following contention by Claimant is in dispute — It is claimed by Claimant that on August 31, 1963, he went to the office of the Roadmaster

and made a proper request in the exercise of his seniority, as provided for in the controlling agreement, to displace a junior track laborer in Extra Gang No. 261; that, though Claimant had greater seniority than Mr. Hay, the Roadmaster declined his request, stating that there were no track laborers assigned to the said extra gang who were junior to him; that by reason of the violation of the agreement, Claimant was deprived of eight (8) hours pro rata pay for Labor Day and of the opportunity to work and receive eight (8) hours' pro rata pay for the following days: September 3 through September 6, 1963, inclusive.

Carrier denies that Claimant made any request to displace any junior employe on August 31, 1963, but to the contrary contends that the first request made by Claimant to displace a junior employe was on September 6 and that he was placed on Monday, September 9.

The question to be determined is: Did Roadmaster Jones on August 31, 1963, refuse to permit Claimant to exercise his seniority and displace a junior track laborer working on his seniority district, or did he not?

Carrier maintains that the record presents an irreconcilable conflict in the facts in this case — claimant asserting that such a conversation did take place in the Roadmaster's office on August 31, 1963, the Roadmaster categorically denying it; Carrier contends that because there is such a conflict this Board has no right to adjudicate this claim.

Claimant having presented this claim has the burden of proving it. Aside from the statements of the Claimant and the Roadmaster, what other related facts do we have in the record — (1) through a previous error on the part of the Roadmaster, admittedly, on August 31, 1963, Claimant's name had been omitted from the seniority roster; (2) that on Carrier's work record of the laying off of Claimant on a force reduction on August 30, 1963, prepared and signed by the Roadmaster there appears under "Remarks" a notation that he "did not have seniority to place"; (3) the fact that a fellow employe saw and talked to Claimant in the vicinity of the Roadmaster's office on August 31, 1963 (we cannot consider any hear-say statement made by such employe).

The first denial of the conversation as contended for by Carrier appeared in the record as of January, 1964, and was a qualified denial in that the Roadmaster had stated that he did not recall Mr. Kenworthy coming to his office on August 31, 1963. It was not until April 6, 1964, seven months removed from the date of the alleged conversation that there appears in the record to have been a categorical denial by the Roadmaster that Kenworthy had come to his office on August 31, 1963.

From the foregoing appraisal of all the facts, including the related facts, appearing in this record it is our conclusion that the facts in this case preponderate in favor of Claimant's contention herein and that he has sustained the burden of proof required.

We have not discussed Carrier's contention that the Claim presented to this Board substantially varies from the one presented on the property as there is no support in the record for such a contention.

Claimant is entitled to recover damages for his loss of earnings on Labor Day, September 2, 1963, and for the earnings he lost from September 3 to September 6, 1963, at the pro rata rate of pay.

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 Employees involved in this dispute are respectively Carrier and Employees 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 19th day of January 1967.