Award No. 15699
Docket No. MW-13552

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MONON RAILROAD

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

(1) The Carrier violated the Agreement when, on April 28, 1961, it effected a paper abolishment of the positions of the two (2) junior Maintenance Gang Laborers in each of Maintenance Gangs Nos. 43, 44, 45 and 46.

(2) The Carrier further violated the Agreement when, beginning on May 1, 1961 it recalled and/or assigned two (2) Section Laborers on each section where a Maintenance Gang was working and assigned these Section Laborers to perform the work formerly performed by the Maintenance Gang Laborers whose positions were abolished.

(3) The Carrier further violated the Agreement on or about April 28, 1961 when it furloughed the four (4) Cooks assigned to Maintenance Gangs Numbers 43, 44, 45 and 46.

(4) The Carrier now compensate the two (2) senior furloughed Maintenance Gang Laborers in Maintenance Gangs Nos. 43, 44, 45 and 46 for all monetary loss suffered, retroactive to May 1, 1961 because of the violation referred to in Part (1) of this claim.

(5) The Carrier compensate the Section Laborers referred to in Part (2) of this claim for the difference between the rate of pay they received as Section Laborers and the rate of pay they should have received as Maintenance Gang Laborers.

(6) The Carrier now compensate each of the Cooks referred to in Part (3) of this claim for all monetary loss suffered due to their being improperly furloughed.

EMPLOYES' STATEMENT OF FACTS: The factual situation involved in this case was fully and accurately set forth in the three (3) letters of claim presentation, which read:

OPINION OF BOARD: Carrier moves for dismissal of the claim on the grounds that it does not satisfy Article V of the August 21, 1954 Agreement. The issue was not raised on the property. Motion denied. See NDC Decisions 5, 22, 23, 24.

In technical compliance with the Rules pertaining to reduction and increase in force Carrier took the following actions:

1. Effective with close of work on April 28, 1961, the Carrier abolished two (2) Maintenance Gang Laborers' positions in Maintenance Gangs Nos. 43, 44, 45 and 46; and

2. Effective May 1, 1961 (the first work day following April 28, 1961), Carrier increased by two (2) section laborers each of the Section Gangs on which the above Maintenance Gangs were then operating and assigned the two (2) section laborers to work which had been performed by the laid off Maintenance Gang Laborers.

As a result of those actions the crew consist of each of the Maintenance Gangs was reduced to less than six (6) men. Carrier proceeded to lay off the Cooks assigned to the Maintenance Gangs stating it had no contractual obligation to furnish cooks to a Maintenance Gang consisting of less than six (6) men. It cites Rule 41 which in pertinent part reads:

> ". . . when a gang occupying the outfit consists of six (6) men or more, a cook will be furnished . . ."

Petitioner charges Carrier with a "paper abolishment" of the Maintenance Gangs' positions to accomplish two purposes: (1) elimination of the Cook positions; and (2) having Maintenance Gang work performed by Section Laborers at a lower rate of pay. This it contends was in violation of the spirit of the Agreement.

Carrier's defenses are: (1) it is its prerogative to increase or decrease forces so long as accomplished in compliance with prescribed Rules; (2) there is no Rule which requires that a Maintenance Gang or laborers on a Section shall consist of a specified number of men; (3) Maintenance Gangs and Section Laborers perform the same class of work and enjoy common seniority; and (4) even though the Section Laborers were doing Maintenance Gang work, as alleged by Petitioner, paragraphs (3) and (6) of the claim must be denied because less than six (6) men were "occupying the outfit."

From our study of the record we find: (1) there are no Rules of the Agreement that specifically impair Carrier's management prerogative to determine the consist of employes assigned to Section Laborers or Maintenance Gang forces; (2) the Section Laborers and Maintenance Gang employes do not perform the same work; (3) the actions of Carrier were primarily a scheme to abolish the Cook positions. Anticipating that this Board might make such findings, Carrier argues that we can find no violation of the Agreement unless we can find a violation of a particularized prescribed Rule. A like argument was rejected in Gunther v. San Diego, Arizona E. R. Co., 382 U. S. 257 (1965); see, also, Transportation-Communication Employees Union v. Union Pacific Railroad Co., 385 U. S. 157 (1966), wherein the Court said:

". . . A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. John Wiley & Sons v. Livingston, 376 U. S. 543, 550; cf. Steele v. Louisville & N. R. Co., 323 U. S. 192. '. . . . (I)t is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate . . . The collective agreement covers the whole employment relationship. It calls into being a new common-law — the common-law of a particular industry or a particular plant.' United Steelworkers of America v. Warrier & Gulf Nav. Co., 363 U. S. 574, 578-579."

We reject it here. But, it should be rejected only in those cases in which we are convinced that a party has evaded the spirit of the Agreement in such a manner as to be repulsive to the mandate of Title I, Section 2, First, of the Railway Labor Act that "Carriers, their officers, agents, and employes . . . exert every reasonable effort to maintain agreements. . . ." We find such to be the case herein.

Petitioner's prayer for compensation for Claimants is a recitation of the make whole principle — that is, that Claimants be paid for loss of earnings, if any, resulting from the violation. This we shall award. We find Carrier's defense as to paragraphs (3) and (6) of the Claim to be without merit. Claimants are entitled to be made whole for any loss of earnings flowing from the violation. Carrier may not create factual circumstances in violation of the Agreement and then premise an argument on those facts. Such is sophistry.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June, 1967.

CARRIER MEMBERS' DISSENT TO AWARD 15699
DOCKET MW-13552 (Referee John H. Dorsey)

The Majority properly has found that the Carrier's action was "in technical compliance with the Rules" and that "there are no Rules of the Agreement

that specifically impair Carrier's management prerogative to determine the consist" of its work gangs. Therefore, its ultimate conclusion that Carrier's conduct "evaded the spirit of the Agreement in such a manner as to be repulsive to the mandate" of the Railway Labor Act is no support for a sustaining Award.

We dissent to such quixotic reasoning which is utterly foreign to any concepts heretofore followed by our Boards.

C. H. Manoogian
R. A. DeRossett
W. B. Jones
J. R. Mathieu
W. M. Roberts

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