

SPECIAL BOARD OF ADJUSTMENT NO. 313

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- "(1) The Carrier violated the effective Agreement when it failed to notify and permit B&B Helper T. L. Collins to exercise his displacement rights over a junior B&B Helper on December 26, 1957.
- "(2) B&B Helper T. L. Collins now be allowed pay equivalent to what he would have received had he been permitted to exercise displacement rights over the junior B&B Helper during the period from December 26, 1957, to March 21, 1958."

FINDINGS:

Special Board of Adjustment No. 313, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

The carrier and employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Board has jurisdiction over the dispute involved herein.

We have in this case two questions: One is a question of fact. The other is a question of interpretation, more specifically, it is a question of definition, the definition of continuing violation, a term used in Section 41(c) of the agreement.

We have no trouble with the factual question and the merits of the case. We find that at the time of layoff, December 26, 1957, the claimant made efforts to scale back and find a job to which his seniority entitled him. There is some dispute about what was said in his conversation with E. L. Shore, the carrier representative, but Shore admits in his letter dated April 9, 1958, that the claimant "asked me if there was any place he could exercise his seniority . . ." The claimant on December 26, 1957, wrote the B&B Supervisor, "I will come to work as a Carpenter Class 2 or as a Helper." This was the same day he was furloughed.

These constitute sufficient evidence of claimant's efforts to displace. He did not walk up and down the carrier's property interrogating carpenters and helpers in order to find a junior man at work, but he did everything reasonable, he complied substantially, and in this industry where seniority is such a governing factor, the carrier should have understood that he was ready and willing to displace a helper. It was the carrier's error in overlooking the fact that a junior helper was working.

It was the misinformation given by the carrier that prevented claimant from indicating the position to which he intended to exercise displacement rights as required by Rule 36(c). There was an oversight and a resulting inequity.

The equities of the case are on the side of the claimant. But his right to relief is governed by several limitations in the working agreement. First, he must exercise his seniority rights within 10 days. This he tried to do. In case he is deprived of a right, he must file a claim within 60 days. This he did not do. If the claim is a continuing one, he may file it any time, but he may not recover retroactively for more than 60 days.

We now arrive at the other question in this case, and that is whether or not the act of depriving the claimant of a seniority right in this case was a continuing violation such as is dealt with in Rule 41(c). If so, his claim is filed within time, but his recovery would be limited to 60 days.

Rule 41(a) reads as follows:

"All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based . . ."

Rule 41(c) reads as follows:

"A claim may be filed at anytime for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof . . ."

The rule does not define a continuing violation. In the contract at hand, the parties gave us no clue as to what they meant by a continuing violation. Do we have a continuing violation in the case at hand?

Our laws recognize several kinds of continuing offenses such as continuing trespasses, continuing contempt of court, continuing crimes such as abandonment of children, continuing nuisances, continuing diversion of water rights. They, too, are difficult of definition; they raise problems of when causes of action therefor must be brought, and we get little help from them.

Awards of adjustment boards and special boards are in confusion. The confusion is contributed to, no doubt, because where contracts have special language relative to continuing claims or time claims, the parties may not always have had the same things in mind, and because there is nothing uniform in the time limit provisions or retroactivity provisions.

Back to our case at hand: Assume, for example, that (1) the carrier is failing to pay overtime or (2) working an employee out of his classification without commensurate pay.

Assume there is a provision in the agreement limiting the time for filing any claim to 60 days, but providing that continuing claims may be filed any time, though limiting recovery to no more than 60 days' back pay, similar to what he have in the instant agreement. Assume the carrier is doing acts (1) and (2) above and the action has gone by unnoticed or unchallenged for more than 60 days. Would this permit the carrier to pay less than the prescribed rate with impunity from then on out? Would getting by for 60 days validate the conduct forever? Without deciding the matter, because it is not before us, we think not; we are inclined to believe that these are examples of what the parties had in mind when they referred to continuing claims and that such acts repeated would be the basis for repeated claims.

Take as example No. 3: the carrier discharges an employee unjustly and this goes by unchallenged for more than 60 days, or, example No. 4, furloughs a carpenter while a junior carpenter works and this goes by unnoticed and unchallenged for more than 60 days.

It might be argued in No. 3 and it is argued in No. 4, that the injury or monetary loss continues day after day and that these are therefore continuing claims. We are satisfied that No. 3 is not a continuing claim. We are inclined to believe that No. 4 is not because the complained of act is singular, being pinpointed to a specific occasion, although it undoubtedly resulted in an inequity and the inequity was continuing. There was an act or a neglect or an assignment which occurred once, although the consequences or damages may have continued on. The occurrence in our case had a specific date; it was December 26, 1957. That is when claimant did what was reasonably necessary to displace, and tried to displace, and was told that there was no place for him.

If our case at hand does not constitute a continuing claim, and we believe it does not, then the time limits are applicable. The contract wisely provides that there must be a time when most claims must be erased from the board. In our case the time is past. The time limit runs from the occurrence, not from the date the employee obtains knowledge of the occurrence.

Referees and Adjustment Boards are not soothsayers and "wise men" employed to dispense equity and good will according to their own notions of justice, or kings like Solomon with unlimited jurisdiction and wisdom. We cannot eliminate all inequities. The contract does not give us that authority. We are employed to interpret the working agreement as the parties wrote it.

The inequity which we find here is the kind that this carrier says it tries to correct if and when discovered. The carrier is the only one who can correct this inequity.

This Board has no alternative but to deny the claim.

AWARD:

The claim is denied.

SPECIAL BOARD OF ADJUSTMENT NO. 313

(s) Marion Beatty
Marion Beatty, Chairman

(s) A. J. Cunningham
A. J. Cunningham, Organization Member

(s) A. D. Hanson
A. D. Hanson, Carrier Member

Omaha, Nebraska
November 21, 1960