Award No. 863

Docket No. 859

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

The Fourth Division consisted of the regular members and in addition Referee Murray B. Jones when award was rendered.

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters of America that: (1) Yardmaster A. L. Stuard be allowed an additional day's pay for October 4, 1951, on account of being taken off the position to which he was regularly assigned at Hill Yard, to perform extra service at Southern House.

(2) Extra Yardmaster J. C. French be paid a minimum day for October 4, 1951, at Yardmaster rate account not being called to fill the Hill Yardmaster position left vacant during the time Yardmaster Stuard was at Southern House.

EMPLOYES' STATEMENT OF FACTS: On October 4, 1952 Yardmaster A. L. Stuard, regularly assigned to the Hill Yard, was required to go to and perform Yardmaster service at another Yard known as Southern House which is one and three-quarters miles from the Hill Yard, also one and one-half miles beyond the yard limit board.

During the time Yardmaster Stuard was at Southern House his assignment at Hill Yard was not filled. Extra Yardmaster French was available but was not called.

POSITION OF EMPLOYES: Rule 1, Scope of the effective Yardmaster Agreement reads as follows:

> "The term "yardmaster," as used in this agreement, shall be understood to include yardmasters of all grades (including relief and extra yardmasters.)"

"Rule 2, Hours of Service and Overtime:

(a) Eight (8) consecutive hours or less shall constitute a day.

(b) Time in excess of eight (8) hours in any twenty-four (24) hour period shall be paid for at one-and-one-half (1½) times the regular rate.

(c) Where assignments are worked in continuous service, they must be started between:

6:00 A. M. and 8:00 A. M., or

Between 2:00 P. M. and 4:00 P. M., or

Between 10:00 P. M. and Midnight

(d) Where one or two shifts of yardmasters are worked, they may be started anytime between 6:00 A. M. and 4:00 P. M.

(e) Each regularly assigned yardmaster shall have a designated time and place for going on duty and will be relieved at the starting point. Such time and place will not be changed without at least 24 hours advance notice, except in case of emergency."

"Rule 4—Seniority:

(a) Seniority as Yardmaster shall date from time regularly assigned as such, but employees used as Yardmaster for thirty (30) days within a calendar year will automatically establish seniority as of the first day of the thirty-day period, and will respond when called for temporary work as Yardmaster, except when prevented by sickness or other unavoidable cause, or forfeit all seniority rights.

Nothing in this rule prohibits Management from appointing a Yardmaster of their choice by bulletin, and his seniority will date from date of bulletin."

"Rule 6—Rates of Pay:

(c) Relief or extra yardmasters will be paid the rate of the position filled."

The position upon which Yardmaster Stuard was assigned on the claim date is a regular seven day per week assignment. There are no provisions in the effective Yardmaster Agreement permitting the blanking of any position at any time.

Inasmuch as Yardmaster Stuard was required to perform service at two separate and distinct yards, one of which he was assigned to by bulletin, he should be paid two minimum Yardmaster days for the claim date, and inasmuch as Extra Yardmaster French was denied the right to exercise his seniority on the position left open during the absence of Yardmaster Stuard, French should be paid one minimum Yardmaster day. This position is supported by Award No. 700 of this Division.

All that is contained herein has been available to the Carrier.

This claim should be allowed.

Oral hearing is requested.

CARRIER'S STATEMENT OF FACTS: Carrier asserts that the Agreement dated February 15, 1945, between the Railroad Yardmasters of America and the Kentucky & Indiana Terminal Railroad Company was in effect when the instant claim arose.

On the date this claim arose A. L. Stuard was regularly assigned as relief yardmaster, his work week being as follows:

Wednesday,	October 3,	10 P. M.- 6 A. M.	L. S. Junction
Thursday,	October 4,	10 P. M.- 6 A. M.	Hill
Friday,	October 5,	2 P. M.-10 P. M.	Hill

Saturday,	October 6,	3 P. M.-11 P. M.	Market Street
Sunday,	October 7,	11 P. M.- 7 A. M.	Market Street
Monday,	October 8,	3 P. M.-11 P. M.	Fairgrounds
Tuesday,	October 9,	Rest Day	

On Thursday, October 4, 1951, Claimant Stuard reported at the Hill office, his regular point for going on duty that day. Upon instructions from the Trainmaster, Claimant during his tour of duty on this day supervised for several hours the work of the inexperienced Southern House foreman at the Southern House, a freight house served exclusively by K&I yard engines, and a freight house within the jurisdiction of Claimant.

The Organization filed claim on behalf of Yardmaster A. L. Stuard alleging that he was taken off his position, and a claim on behalf of Extra Yardmaster French who was not called to fill the alleged vacancy of Yardmaster Stuard.

The claims were declined on November 21, 1951, by the highest official of the Carrier designated to handle such matters. Notice of intent to refer this matter to the Fourth Division was filed on December 3, 1951, but not referred to the Fourth Division earlier than August 12, 1952, and possibly not before September 12, 1952, thus well beyond the six month Statute of Limitations period required by Memorandum of Understanding of May 8, 1947.

CARRIER'S POSITION: Carrier will show that:

(1) Division lacks jurisdiction because Statute of Limitation rule not complied with;

(2) Work performed by Yardmaster Stuard on October 4th was within Scope of Agreement;

(3) Work performed by Yardmaster Stuard was within jurisdiction of Hill Yardmaster;

(4) Rule cited by Organization not violated;

(5) Dispute brought about by Yardmaster Stuard's failure to comply with operating instructions; and

(6) Award cited does not support claim here set forth.

The above topics will be discussed in the order set forth.

(1) Division lacks jurisdiction because Statute of Limitation rule not complied with.

Under date of November 21, 1951, the case now before your Honorable Board was declined by Carrier's highest official delegated to handle such matters, evidence of which is attached and marked for identification purposes as Carrier's Exhibit A. Under date of December 4, 1951, Carrier received from the Railroad Yardmasters of America a copy of notice of **intent** to file an exparte submission dated Chicago, Illinois, December 3, 1951, the letter bearing the name of V. W. Smith, Vice President, and implying that 11 copies of an ex parte submission involving the instant case would be sent to your Honorable Board. Since Carrier did not receive the usual communication from the Fourth Division setting forth the date Carrier's submission was due, Carrier notified the Board that it had requested an extension of 30 days from General Chairman Meade in which to file Carrier's submission. (See Carrier's Exhibit B). Executive Secretary Parkhurst under date of January 2, 1952,

wrote Carrier that he had not received up to that date the 11 copies from the Organization on this claim. A copy of Mr. Parkhurst's letter is attached hereto and marked for identification purposes as Carrier's Exhibit C. On August 13, 1952, or more than 8 months later Organization filed a notice of intent to submit an ex parte submission, this notice, (Carrier's Exhibit D) being identical, except for date, with that filed by the Organization on December 3, 1951.

Section 3 of Memorandum of Understanding of May 8, 1947, appearing as Carrier's Exhibit E, reads:

> "All disputes, claims, complaints, and grievances, if not satisfactorily disposed of on the property, shall, if the employes or their representatives desire to handle further, be referred to the appropriate tribunal of competent jurisdiction established by law within six (6) months from date of the decision of the highest official of the Carrier with whom such matters are handled; failing so to handle they are barred and are deemed to have been abandoned and no further handling shall be given them."

Applying the above quoted rule to the dispute here present, the Organization was required to serve on Executive Secretary Parkhurst, on or before May 21, 1952, an ex parte submission unless, of course, the parties to the agreement agreed to extend the time limits. There is no evidence of agreement to extend the six month period set forth in the rule.

This tribunal, Carrier maintains, has consistently ruled that where grievances have not been appealed within the time limit set forth in the agreement, the claim cannot be considered on its merits. Let us examine a few of those Awards.

In Award 734 Referee Carter held:

> "Agreement rules are made to be obeyed. If they are to mean anything, they must be enforced as made against either party to the Agreement. The rule is clear and unambiguous, and not subject to construction. The Claimant failed to make his appeal within 30 days. The Carrier asserted the failure to comply with Rule 12 as a defense. No waiver was made. The decision of Superintendent Mumma has become final because of the failure to appeal within the 30-day limitation. The appeal is a nullity and should be dismissed."

Although the Labor Members filed a dissent to this Award on the basis of the facts involved, they did not, however, disagree with the principle above for they held:

> "We agree with the statement made by the majority of this Division in the OPINION that 'Agreement rules are made to be obeyed. If they are to mean anything, they must be enforced as made against either party to the Agreement.' . . ."

In Award 607, Referee Begley held:

> "* * * The position was filled on August 21, 1947. No claim was made until November 12, 1948.
>
> "Rule 16 of the March 1, 1947 Agreement reads:
>
> 'No claims for pay or adjustment in compensation, except errors in accounting or calculating of pay, shall be considered unless filed in writing within thirty calendar days from date of occurrence on which based. Denial of any such claims by management shall constitute final disposition thereof unless appeal is taken within thirty

calendar days from date of denial, said time limit to govern in each successive appeal.'

"Under this rule the claimant was barred on November 12, 1948 from filing his claim."

In Award 591, without referee, the Board held:

"* * * Further, we are not told upon which date the claim was filed with Chief Clerk Sawyer. The first definite date we have of record with reference to filing the claim is November 13, 1947. That is in excess of thirty (30) days subsequent to the date of accrual of the claim. This Board is bound by the terms of the Agreement before it. Irrespective of any merits a claim may have, the petition to this Board to grant such claim must show on its face that all requirements of the Agreement upon which such claim is based have been complied with. This is especially true when the opposing party raises the objection it does here. We cannot indulge in conjecture or speculation. Hence under Rule 16 this claim cannot be considered."

Of a similar principle also are Awards 754, 649, 607, 592, 562, 549, 493, 218, and 183.

Apparently, what the Organization seeks to do is to interpret the rule to mean that it can file notice of intent to handle the matter before this tribunal within the six months period referred to in Section 3 of the Memorandum above quoted, and any time subsequently, whether it be eight months, one, two or ten years later submit the grievance to this Board for handling. The period for appeal is mandatory. And a notice of intent to refer the matter is not the petition containing a full statement of facts and all supporting data bearing upon the dispute required by Section 3 First (i) of the Railway Labor Act as Amended June, 1934. This case should, therefore, be dismissed for lack of jurisdiction.

(2) Work performed by Yardmaster Stuard on October 4th was within Scope of Agreement.

Rule 1 of the current Yardmasters' Agreement, commonly referred to as the "Scope Rule," reads as follows:

"The term 'yardmaster,' as used in this Agreement, shall be understood to include yardmasters of all grades (including relief and extra yardmasters)."

Since neither this rule nor any other rule in the agreement between the parties does not specifically define yardmasters' work, we must then look to the practice on this property to determine what has been required of yardmasters.

Over the years on this property yardmasters have consistently **supervised** the work of employes engaged in breaking up, making up and handling trains and general yard switching within an assigned district.

What, then, of the specific work required of Relief Yardmaster Stuard? Was it of a supervisory nature? Claimant Stuard performed no duties required of train and/or engine service employes. His instructions were of a supervisory nature and given to the foreman in charge of the crew. Neither orally or by subsequent correspondence did General Chairman Meade deny this.

In view of the circumstances set forth above, Organization is on untenable grounds in asserting that the work required of Relief Yardmaster Stuard was not within the Scope of the Agreement.

(3) Work performed by Yardmaster Stuard was within Jurisdiction of Hill Yardmaster.

The Southern Railway's local freight house, referred to as the "Southern House," is located at 13th and Northwestern Parkway, Louisville. Although this freight house is located on property owned by Southern Railway, the handling of cars into and out of this house has been performed exclusively by K&I switch crews since August 8, 1900. Generally, K&I crews, designated as "Southern House & Elsewhere" crews pick up cars for this freight house at Youngtown Yard, proceed northerly out of that yard, and thereafter move easterly on the K&I main track until they reach the switch leading into the freight house track.

It will be observed that the Organization in both sections of its Statement of Claim refers to the Hill job as the "Hill Yard." That is an improper designation. There is no Hill yard. The Hill job has never been referred to as such. Crews working at the North end of Youngtown Yard, and crews serving all industries north and east of Youngtown Yard are under the jurisdiction of the Hill yardmaster. Experienced foremen need, ordinarily, of course, only to receive their orders from the yardmaster in charge to carry out their work. Occasionally, however, an inexperienced foreman because of his unfamiliarity with the track layout and requirements of a particular industry will require supervision of a personal nature. Such was the requirement of the inexperienced foreman on the night of October 4, 1951.

The foreman being inexperienced sufficiently with the requirements of the Southern House assignment on the night of October 4, 1951, Relief Yardmaster Stuard was instructed by Trainmaster Willis to see personally that his (yardmaster's) "orders" were executed at Southern House with safety, dispatch, and efficiency. Yardmaster Stuard made no protest to Trainmaster Willis that he was being called upon to perform work without his jurisdiction. Subsequently, however, Yardmaster Stuard raised the question with General Chairman Meade, and General Chairman Meade took the position that it was a violation of the agreement for a yardmaster personally to supervise the work of a foreman at that house.

Carrier asserts that not only is it the obligation of a yardmaster to give orders and instructions concerning work within his jurisdiction, but it is his bounden duty upon occasion to see that those instructions are complied with. If a foreman consistently takes an unreasonable amount of time to perform a given task, how, then, we ask, can he determine the cause except by personal supervision? Obviously, he can determine it only by personal supervision. So, also, must the yardmaster supervise personally the activities of an inexperienced foreman. It is an inherent part of his supervisory duties to see that his instructions are followed.

We desire to remind the Board that the "Southern House" is not a classification yard but merely a switching location, considered the same as any of the other privately owned industries served by the K&I. A yardmaster has never been assigned to Southern House because there has never been enough work to warrant such assignment. The responsibility for supervising Southern House work has always been on the yardmaster nearest that House, that is, the Hill yardmaster. Since yardmasters have never been employed at Southern House, it goes without saying that the work at this location was within the jurisdiction of Yardmaster Stuard. The work being within the jurisdiction of Yardmaster Stuard, it must necessarily follow that there was no work to be performed by an extra yardmaster.

(4) Rule cited by Organization not violated.

The only rule that the Organization alleged was violated was Rule 2(e). That rule reads:

> "Each regularly assigned yardmaster shall have a designated time and place for going on duty and will be relieved at the starting

point. Such time and place will not be changed without at least 24 hours' advance notice, except in case of emergency."

Numerically then, the provisions of the rule require:

(1) A regular yardmaster will have a designated time and place for going on duty;

(2) He will be relieved at the starting point; and

(3) In absence of an emergency, the time and place will not be changed without 24 hours' notice.

Relief Yardmaster Stuard, as set forth in Carrier's Statement of Facts, was assigned to the 10:00 P. M.-6:00 A. M. Hill job on October 4, 1951, and on this date:

(1) He went on duty at 10:00 P. M. at the Hill office, the regular point for reporting for duty;

(2) He was relieved at 6:00 A. M. at the Hill office, the regular relief point; and

(3) Neither the time for reporting for duty or being relieved from duty at the Hill office was changed.

Any allegation, therefore, that Rule 2(e) has been violated is without foundation.

(5) Dispute brought about by Yardmaster Stuard's failure to comply with operating instructions.

Under date of April, 1951, K&I Superintendent Emch addressed a letter to various yardmasters, including Claimant A. L. Stuard, which reads as follows:

"April 9, 1951
64½

"Mr. C. Zumer,
Mr. G. M. Wilkins,
Mr. E. G. Crittenden,
Mr. J. Block,
Mr. A. L. Stuard.

"Just recently we had an undesirable delay which was created by three extra men catching the second trick 'I' Yard, none of whom were capable of taking charge of the engine as foreman, and it is my understanding you were unable to get an experienced man as foreman.

"In the event this situation comes up again in order to avoid any further difficulties, you will require an experienced capable man to change his assignment and take charge. Hill Yardmasters will see that these instructions are complied with.

R. B. Emch"

The last sentence, the Board will observe, expressly places on the Hill Yardmaster the duty to see that an experienced foreman is placed on an assignment.

On October 4, 1951, the train service crew assigned to the Southern House was Relief Crew No. 7, and it was composed of the following employes:

Position	Name	Seniority Date
Foreman	Henriott	August 11, 1951
Helper	Rone	June 29, 1951
Helper	Brooks	September 28, 1951

In conference with the Organization, it was developed that:

(1) Foreman Henriott had never before worked at the Southern House;

(2) Helper Brooks had never before worked at the Southern House; and

(3) Helper Rone, an extra man, had only worked at the Southern House on several occasions.

From the foregoing it is apparent, therefore, that the foreman was inexperienced. Hill Yardmaster Stuard was on notice what to do under these particular circumstances yet, nevertheless, set up the very condition which resulted in the Trainmaster instructing Claimant to supervise personally the activities of the inexperienced foreman. The Claimant, Carrier maintains, ought not to be permitted to profit from his own wrongdoing. Such he will be doing if this claim is sustained. It ought, therefore, to be denied.

(6) Award cited does not support claim here set forth.

During conference General Chairman Meade indicated orally that the Organization would rely on Fourth Division Award 700 to support its position in this case.

Before examining Award 700, let us look briefly at First Division Award 14420 to ascertain the requirements necessary to be met before an award can be held as a precedent. Referee Robert G. Simmons in the second, third, and fourth paragraphs of the Findings held:

> "In analyzing awards to determine if they establish a principle that may be said to be a precedent the following elements should be determined: (1) The fact or facts deemed material in making the award as shown by the award. (2) The rule or rules of the agreement, past practices, interpretations, etc., deemed material in making the award as shown by the award. (3) The issue or issues submitted and determined by the award as shown by the award.
>
> "In applying a prior award to a pending claim, if the material facts, rules and issues controlling the decision are substantially the same, then the award may be considered as a precedent. Conversely, if one or more of the elements of the pending claim are not substantially the same, then the prior award is not, generally speaking, a precedent, although it may point the way to a prior conclusion.
>
> "A referee, called to determine specific claims, is not charged with knowledge of all existing rules, agreements, interpretations, precedents, etc., either on the property or in this Division. It is the duty of those submitting claims to submit those matters which it is desired the referee should consider."

Let us now look to Fourth Division Award 700. The claim in that award reads:

> "Claim and request of the Railroad Yardmasters of America that:
>
> (1) E. L. Mumford be allowed an additional day's pay for December 12, 1949, on account of being taken off the position for which he had been called at 24th Street Yard, to perform extra service at the passenger yard.
>
> (2) G. F. Cherry be paid a minimum day for December 12, 1949, at yardmaster rate account not being called to fill the 24th Street yardmaster position left vacant during the time yardmaster Mumford was at the passenger yard."

The facts reveal that Claimant Mumford was taken from the 24th Street Yard, his regular job, and instructed to supervise work in the Passenger Yard. The facts further reveal that the Passenger Yard was recognized as a separate assignment, regular yardmasters being employed around the clock at the North end, and, a third trick yardmaster being employed at the South end. It was the practice on that property during the Christmas mail rush to assign yardmasters at the South end of the Passenger Yard to cover the first and second tricks. These additional South end assignments during the holiday season were considered extra work and extra yardmasters were used for this service. However, on the date the claim arose Carrier did not use an extra man when yardmaster service was needed at the South end of the Passenger yard, but, instead, required Claimant Mumford to leave his **regular job** at 24th Street to perform work that an extra man ordinarily was called to perform. Consequently, Claimant based his claim on extra work as established by a past practice. The claim was sustained.

In the instant case, it will be noted, the claim is almost identical to claim filed in Award 700. But that is as far as it goes. As recited before, the Hill Yardmaster in the instant claim merely supervised a foreman at a location that is, and always has been, under his jurisdiction. The Southern House is not a classification yard but is merely a switching location, and is considered no different from other privately owned industries served by the K&I. A Yardmaster has never been assigned to the Southern House because there has never been enough work to warrant such assignment. Therefore, the responsibility of supervising the Southern House work has always been on the yardmaster nearest to that freight house i.e., the Hill Yardmaster. Since yardmasters have never been employed exclusively at the Southern House, or exclusively at the more than 300 other privately owned industries served by this Company, it goes without saying that extra yardmasters have never been called to perform work at that location exclusively. Consequently, a past practice like the one in Award 700 does not exist on this property. Any claim that Yardmaster Stuard performed extra work, or that an extra yardmaster should have been called is not supported by the facts.

Since the factual situation in the instant claim is materially different from the factual situation in Award 700, that award, Carrier avers, should not and ought not be used as a precedent in deciding this case.

* * * * *

Carrier affirms that all data submitted in support of its position have been presented to Organization. The right to answer any data not previously presented by Organization is reserved by Carrier.

Oral hearing is requested.

(Exhibits are not reproduced).

OPINION OF BOARD: This is a claim (1) of A. L. Stuard, Yardmaster, that he be allowed a day's pay for October 4, 1951, because he was taken off his regularly assigned position to perform extra work elsewhere; and (2) of Extra Yardmaster J. C. French that he be paid a minimum day for October 4, 1951, because he was not called to fill the position left vacant by Yardmaster Stuard.

Section 3 of Memorandum of Understanding dated May 8, 1947, appearing as Carrier's Exhibit E, reads as follows:

> "All disputes, claims, complaints, and grievances, if not satisfactorily disposed of on the property, shall, if the employes or their representatives desire to handle further, be referred to the appropriate tribunal of competent jurisdiction established by law within six (6) months from date of the decision of the highest official of the Carrier with whom such matters are handled; failing so to handle they are barred and are deemed to have been abandoned and no further handling shall be given them."

The six months' limitation provision of the rules was not waived by the Carrier. The highest official of Carrier designated to handle these claims denied them on November 21, 1951. The Organization was required to file its ex parte submission with this Board on or before May 21, 1952, and submission was not filed with this Division until September 12, 1952, more than nine months after claims' final declination by Carrier.

Thus, it clearly appears from the record that this Board lacks jurisdiction herein and the claims are barred by the six months' limitation provision in the applicable controlling Agreement.

As shown by the record and brought out at the hearing, this dispute was not progressed to this Board in accordance with the requirements of the controlling Agreement. Therefore, the appeal should be dismissed.

Sustaining this conclusion and opinion are the following Awards of the Fourth Division: Nos. 183, 218, 493, 549, 562, 573, 592, 607, 649, 734 and 754.

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

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Illinois, this 23rd day of January, 1953.