

FIRST DIVISION

NATIONAL RAILROAD ADJUSTMENT BOARD

The First Division consisted of the regular members and in addition Referee Sidney St. F. Thaxter when award was rendered.

PARTIES TO DISPUTE:

**BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN**

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of S. J. Nuccio, fireman, for reinstatement with seniority unimpaired, and pay for time lost, account of having been dismissed for alleged violation of transportation department rules Nos. 701, 702 and 703; and also for alleged refusal to continue firing engine while moving from Mays Yard to Stuy Docks in vicinity of Walnut Street on night of January 31, 1943.

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

The carrier or carriers and the employe or employes 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 waived hearing thereon.

The extensive record in this case, the voluminous briefs which have been filed, and the importance of the various issues presented justify a more extended discussion than is customarily the practice in announcing awards by this Division.

The first two contentions set up by the Carrier in its brief relate to procedure and should be disposed of at the outset.

Firstly, it is contended that the claim is barred because not presented within the thirty day period prescribed by Article 39 (b) of the Agreement which reads as follows:

"Any grievance that may exist and is not rectified must be presented in writing by the party aggrieved to the Master Mechanic or Trainmaster within thirty days of its occurrence, to the end that proper action toward its abatement may be taken without unnecessary delay."

Award 5217 is relied on by the Carrier to support its claim that the present grievance, not presented in writing within thirty days, cannot be considered. But the rule interpreted as a bar in 5217 is entirely different from the one now before us. It operates as an absolute bar to the consideration of a grievance not presented within sixty days. It reads as follows:

"Grievances not presented within sixty (60) days shall not thereafter be considered."

Other awards cited are similarly distinguishable.

The provisions of the rule with which we are concerned may perhaps be considered as directory and not mandatory and for the benefit of the employe rather than for the Carrier. But it is unnecessary to decide this point. For assuming that the limitation as to time is for the benefit of the Carrier, the Carrier could waive a provision of the agreement which was for its benefit. Award No. 3211. We think that there was such a waiver in this instance. The Carrier joined in presenting the claim to this Division on a Joint Statement of Facts and defended its position up to final argument to the Division with not even a suggestion that it was barred because of the lapse of time in its initial presentation. Under these circumstances the Carrier must be held to have waived such a defense.

The second defense to the prosecution of the claim is that the demand for "pay for time lost" was never presented to the Carrier or handled as required by the Railway Labor Act, and consequently is barred. This Division, under the provisions of Sec. 3 (i) of the Railway Labor Act, has jurisdiction to hear a dispute only after it has been handled "in the usual manner up to and including the Chief Operating Officer of the Carrier designated to handle such disputes," and after the parties have in this manner failed to adjust it. This procedure is a condition precedent to a consideration of the controversy by this Division and is a requirement which cannot be waived. For the parties cannot by their own act confer jurisdiction on this Division which the statute does not give it. It is contended that the original claim was merely for the reinstatement of the fireman and that nothing was said about pay for time lost until March 23, 1944, when the conference between the parties required by Sec. 3 (i) had ended and the matter was on its way to be presented to this Division. But the letter of March 23, 1944, from the Chairman to the Manager of Personnel of the Carrier giving notice that the claim was to be for reinstatement with seniority unimpaired and pay for time lost, was not the filing of a new claim, which required further consideration by the parties but rather a clarification of the claim as originally filed. The exactness of pleading at law is not required in such a case as this. All that was necessary in this instance was that the Carrier should have reasonable warning as to what would be demanded. We think it clear that the original claim for reinstatement meant reinstatement as of the date of dismissal, and that implicit in such claim was notice that the claimant demanded the restoration of his seniority rights and pay for time lost. We, therefore, hold that the claim as presented to this Division is properly before us.

This brings us to the merits of the controversy.

That there was an altercation between the trainmaster and the claimant is apparent. He had been in the service of the Carrier for thirty-one years and was dismissed for a violation of Rules 701, 702 and 703 and for a refusal to fire the engine on the trip in question. Though he was undoubtedly in a critical and complaining frame of mind, a careful reading of the evidence taken out at his hearing does not establish that the charge of refusal to fire the engine is sustained. There is nothing but the statement of the trainmaster on this point and that is contradicted by the testimony of the claimant and of the engineer, and every inference from the admitted facts indicates the improbability of such refusal. There may have been a technical violation of the rules in question. It is inherently improbable that an argument of this nature would be carried on in a decorous manner. Human beings are not made just that way. But taking the testimony most favorable for the Carrier, there is disclosed here but one isolated instance of misconduct and the penalty imposed was out of all proportion to the offense.

But there is another and possibly more fundamental reason why this claim must be sustained. The trainmaster was the person who was engaged in the altercation with the claimant, he filed the complaint, at the hearing he was the only witness who offered any pertinent testimony to support the

charge, he then sat in judgment on the truthfulness and weight of his own testimony, and imposed the sentence of dismissal. Such a procedure would be condemned by every court in the land, and the impropriety of it has been pointed out in awards of this Division. Awards 8259, 8785. The Carrier's justification for such procedure, as set forth in its rebuttal, is that it "is universal in hearings of this kind," that the hearing is not a trial as conducted by a court, and that technical rules are inapplicable. But the rule of law, which forbids one person to assume the role of prosecutor, witness, and judge, is not a technical rule. It is an incorporation by courts into this procedure of the ordinary principles of fair play which men customarily adopt in their dealings with one another.

The Carrier contends that, if the claim is sustained credit should be allowed for the earnings of the claimant during the period of his being out of the service of the Carrier. Awards of this Division indicate that such credit has been given in some instances, in others not. Whether it should be given depends on the facts of the particular case. In this instance such credit is not justified. The claimant should be reinstated as of the date of his dismissal with seniority rights unimpaired and with full pay for time lost.

AWARD

Claim sustained.

BY ORDER OF FIRST DIVISION
NATIONAL RAILROAD ADJUSTMENT BOARD

ATTEST: (Sgd.) T. S. McFarland
Secretary

Dated at Chicago, Illinois, this 24th day of May, 1945.

DISSENT TO AWARD NO. 10616, DOCKET NO. 19341

It is held that Carrier waived the provisions of Article 39 (b) by not presenting the question of lapse of time in its presentation up to the final argument to the Division, but the contention squarely presented by the record that claimant waived the rule as to a fair investigation is ignored. Claimant, with his representative, sat through the investigation without objection or suggestion that the investigation was not fair. If carrier, by failing to act, waives the provisions of a rule, certainly claimant by his failure to act must likewise be held to have waived the provisions of the investigation rule. We should not apply a rule to one party without applying it the same way to the other.

As to the contention of the carrier that pay for time lost was never presented to it or handled as required by the Railway Labor Act, the referee correctly states:

"This Division, under the provisions of Sec. 3 (i) of the Railway Labor Act, has jurisdiction to hear a dispute only after it has been handled 'in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes,' and after the parties have in this manner failed to adjust it. This procedure is a condition precedent to a consideration of the controversy by this Division and is a requirement which cannot be waived. For the parties cannot by their own act confer jurisdiction on this Division which the statute does not give it."

There is no evidence in the record that this claim was ever handled—

"* * * in the usual manner up to and including the chief operating officer of the Carrier designated to handle such disputes * * *."

The record shows without dispute that a claim was never presented to the carrier in the usual manner. It was presented only to the designated chief operating officer. Under these facts, and the Referee's finding, we are without jurisdiction.

The following finding is made:

"We think it clear that the original claim for reinstatement meant reinstatement as of the date of dismissal, and that implicit in such claim was notice that the claimant demanded the restoration of his seniority rights and pay for time lost. We therefore hold that the claim as presented to this Division is properly before us."

The finding that "implicit in such claim was notice that the claimant demanded the restoration of his seniority rights and **pay for time lost**," (emphasis supplied) is erroneous. Claim was not made until nine months after the dismissal. Claimant was then employed as a locomotive engineer for another carrier. In all probability his earnings up to that time exceeded what they would have been if he had not been discharged. So far as this record shows he had sustained no loss. Under such circumstances he could not legally recover for a loss he had not sustained. With nothing more, a claim for "reinstatement" only could not carry with it a claim for time lost. That the claim as made nine months after the discharge did not (and was not so intended) include pay for time lost is conclusively shown by the record. Carrier states the—

"* * * claim was progressed and declined and no 'time lost' request was included until receipt of the chairman's letter dated March 23, 1944 * * *."

The letter of March 23, 1944, was written after the conference of March 1, 1944, during which no claim for time lost was presented, and gave notice of intention to appeal the claim from the decision of the carrier finally denying the claim. In that letter it was stated—

"* * * It is **now** my purpose to submit the claim as follows:
* * *." (Emphasis added.)

Then followed a statement of the claim including pay for time lost. This letter corroborates carrier's evidence that no claim for pay lost was ever made to it. The evidence as a whole is conclusive. No such claim was ever presented and the conclusion of the Referee is not only without support, but is contrary to the record.

There was no contention made that the letter of March 23rd constituted the "filing of a new claim." It was simply notice that a claim never presented to or handled with or by the carrier was to be presented to this Division.

With reference to the finding that the procedure on the investigation—

"* * * would be condemned by every court in the land, * * *"

would not "every court in the land" hold that one with full knowledge of the facts and procedure, and with representation of his own choice, and freedom of action, who sits through a trial or investigation not only without objection but acquiescing therein, will not be heard to complain on appeal.

Dealing with the question of deduction of earnings, the following finding and conclusion is made:

"Awards of this Division indicate that such credit has been given in some instances, in others not. Whether it should be given depends on the facts of the particular case. In this instance such credit is not justified. The claimant should be reinstated as of the date of his dismissal with seniority rights unimpaired and with full pay for time lost."

The undisputed facts are as follows:

Nuccio was discharged February 10, 1943.

On April 22, 1943, he entered the service of another railroad company as locomotive engineer and continued therein.

On November 9, 1943, nine months after the discharge, the first request for reinstatement was made.

No claim for time lost was ever presented or handled with the carrier as required by the Railway Labor Act.

There is no contract provision requiring pay for time lost.

So far as the record shows, Nuccio sustained no loss.

On these undisputed facts the Referee reaches the conclusion deduction of earnings as locomotive engineer "is not justified." In other words, it is held that through the process of discharge, delay in presenting claim, and reinstatement, a profit may be realized and the greater the delay in presenting claim, the greater the profit will be. What "justifies" any such finding? The Referee's attention was called to the holding of the Referee in Award 5862 where it was said of the rule requiring deduction of earnings in other employment:

"A rule such as this, resting in justice and sound common sense, and evolved through the centuries required in the development of our system of laws, should not be disregarded unless the plain language of the agreement so requires."

Likewise, his attention was called to the rule as laid down in decisions of the Supreme Court of the United States and universally applied by our courts, including the court of the State from which the Referee comes. His conclusion is in direct conflict with such universally accepted rule.

The Referee's conclusion herein is also in conflict with his conclusion in Award 10612, where he said—

"It seems far better to know in advance what one's obligation is, even if one does not like it, than to run the risk, while acting in good faith, of subjecting one's self to penalties according to the varying opinions of the different referees who may have before them the same question."

Here he leaves the matter to be decided "according to the varying opinions" of different referees.

O. E. Swan
T. K. Faherty
R. A. Knoff
L. O. Murdock
L. L. McDonald

SUSTAINING OPINION

Ordinarily I think it is better to let a majority opinion and a dissent speak for themselves rather than to seem to prolong a controversy by further discussion. In this instance, however, there are in the dissent certain statements which should not go unanswered.

The minority does not complain that the majority have erred in their finding that this claimant was not given a fair trail. By their failure to discuss that fundamental question we may, I think, assume that all members of this Division are in agreement on it. Their objection is that we ever permitted that issues to be decided. The Carrier sought to avoid meeting

it by citing the provision of Article 39 (b), which provides that a grievance must be presented in writing within thirty days of its occurrence. We have found that the Carrier, by joining in the presentation of the claim and defending its position on the merits up to final argument to the Division without raising the question of the lapse of time, waived that provision of the agreement. And with that finding the minority do not seem to disagree. What they say is that because we have found that the Carrier, by proceeding with the hearing before this Division, waived the provision of the rule with respect to the time for presentation of the claim, we must also find that the claimant, by proceeding with the hearing before the railroad officials, "waived the rule as to a fair investigation." It would be hard to find a more perfect example of non sequitur. In the first instance we have found a waiver of a provision of a contract into which the parties have voluntarily entered. In the other we are expected to find a waiver of what is a fundamental right. It may be doubted whether a person would ever be held to have waived his right to a fair trial. Certainly the books record no case where anyone ever attempted to do so. One thing more which seems to have been overlooked. The right to a fair trial was infringed, not by the procedure which took place at the investigation, but because the official, who filed the complaint and was the chief witness in support of the charges set forth in it, rendered judgment on it. That judgment of course was not pronounced until after the investigation had closed and came at a time when the claimant had no opportunity to protest. As a matter of fact did he not have the right to assume that judgment would be rendered by an impartial judge and not by one whom the well recognized rules of fair play would hold to be disqualified? How could he protest at what had not yet taken place and what he had no reason to suppose would happen?

With respect to the contention that the claim "for pay for time lost" was never taken up with the Carrier, I can do no more than reiterate what was said in the original opinion.

The minority insist that credit must be given the Carrier for what the claimant earned in outside employment and call attention to the well known rule of the common law that an employe, discharged in violation of the terms of a contract of employment, can recover as damages only the difference between the wages called for by the contract and what he earned or could have earned in other employment. There is no dispute that such is the rule or law. The trouble is that it has no application to this case. Even though the agreement contains no specific provision providing for pay for time lost on a wrongful discharge, such a requirement is inherent in the very nature of the agreement. And, with the exception of a few cases the rule has been, as shown by an overwhelming number of awards of this Division, that there is no credit given the Carrier for what the employe may have earned in outside employment. This question has been argued and discussed; and the reasons why such credit is not given are clearly and ably set forth in a number of interpretations of awards of this Division. See Interpretations of the following awards: 1058, 3611, 3612, 3756 and 4733. Also see the following awards where the claim was sustained without any such deduction: 60, 66, 2717, 6452, 6481, 6482, 8259, 8360, 8264, 8304, 8376, 8787, 10293, 10294. There are many others.

It is interesting to note that in Award 8304 the same railroad was involved as in this case. To be sure the discipline rule did have a specific provision to the effect that if a dismissal was found unjust, the employe should be reinstated and paid for all time lost. The issue, nevertheless, was exactly the same as in the case now before us, for such a provision, as we have said, is implied even though not expressed. In Interpretation in Award 3756 where there was no such express provision in the rule, adopts the Interpretation in 3611 and 3612 where there was. Award 8304 sustained the claim and there was a dissent joined in by four of the five members of this Division who join in the present dissent, and in that dissent no complaint was made because the claim was sustained with no credit given for what the employe might have earned in other employment.

In Award 3756 the same railroad was involved and exactly the same rule as is before us in this case. We find the following by Referee Swacker in his interpretation of this award:

“This whole subject was discussed at length in Interpretation of Award 3611, Docket 6162. It was there held, which we affirm here, that the phrase (‘pay’ for time lost’) means that contended for by the Organization; there is, the full amount the man would have earned had he not been held out of service. This without any deduction for earnings in other employment.”

It seemed to me at the time the opinion was written in this case that instances might arise where it would be inequitable not to make a deduction, and I accordingly said that whether such deduction should be made “depends on the facts of the particular case.” The minority now complain that this leaves the whole matter in a state of doubt. If the minority is not satisfied to recognize the suggested latitude,— that is, to make the deduction where it seems equitable to do so it can be done under the particular rule involved, I see no alternative but to adhere to the principle enunciated in so many awards of this Division that no deduction will be allowed. I reiterate that so far as the facts of this case are involved there is no justification for such deduction.

SIDNEY ST. FELIX THAXTER
Referee

Dated June 26, 1945 at Chicago, Illinois.