Award No. 3883
Docket No. 3205
2-CRI&P-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C.I.O. (Carmen)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement carman Charles G. Birlew, Sr., was unjustly dismissed from the service on June 12, 1957.

2. That accordingly, the Carrier be ordered to compensate Carman Birlew for all time lost at the applicable Carmen's rate for a total of thirty-one 8 hour working days.

3. That the Carrier be ordered to reimburse Carman Birlew in the amount of One Hundred Eighty-two ($182.00) Dollars, the amount due him under the Travelers Insurance Group Policy No. GA-23000, which was cancelled due to his unjust suspension.

EMPLOYES' STATEMENT OF FACTS: Carman Charles G. Birlew, Sr., hereinafter referred to as the claimant, entered the service of the carrier on August 22, 1922 and was subsequently assigned as a car inspector in the train yards, Silvis, Illinois, March 26, 1955, with assigned hours 4:00 P. M. to 12:00 Midnight, Monday through Friday, rest days Saturday and Sunday.

On June 6, 1957 Master Mechanic Thomas mailed a form G-126E by certified mail, Receipt No. 446882, to the claimant, notifying him to report for an investigation to be held at 10:00 A. M. June 10, 1957 in the office of Master Mechanic Thomas. The certified letter was received in the Carbon Cliff Illinois, Post Office June 10, 1957, received and signed for by the claimant June 11, 1957. On June 12, 1957, a Form G-126F was delivered to the claimant, notifying him that he was discharged from the service effective June 12, 1957, with the result that the claimant was discharged from the service without an investigation. The claimant was on June 12, 1957 covered by the Travelers Insurance Company Group Policy No. GA-23000 covering all non-operating employes on which the carrier paid the premium. On July 8, 1957, the claimant became ill and entered the Moline General Hospital, remaining there until

discharged on July 16, 1957. Upon leaving the hospital the claimant presented his bill for $182.00 to the Travelers Insurance Company and was advised that the carrier had notified them that the claimant had been discharged and was not eligible for coverage, which was subsequently paid by the claimant. The claimant was reinstated August 29, 1957 and returned to work on September 1, 1957.

The carrier has declined to adjust this dispute on any acceptable basis and the agreement effective October 16, 1948, as subsequently amended, is controlling.

POSITION OF THE EMPLOYES: It is not in dispute that the claimant established and maintained seniority rights in the sub-division, carmen, and under Rule 27, captioned, seniority. It is submitted that a review of the evidence of record in this dispute reveals the following facts:

1. That the notice addressed to the claimant notifying him to report for an investigation in the office of Master Mechanic Thomas at 10:00 A. M. June 10, 1957, was not received and signed by him until June 11, 1957.

2. That the claimant was unjustly discharged June 12, 1957 without first being given an investigation.

3. That because of the unjust action on the part of the carrier, the claimant was deprived of coverage due him under the Travelers Hospital Group Plan.

Rule 34, captioned, "Discipline", reads, in part as follows:

"No employe shall be disciplined without a fair hearing by designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employe and his duly authorized representative will be apprised of the precise charge and given reasonable opportunity to secure the presence of necessary witnesses."

For the carrier to have been in compliance with the foregoing rule would have resulted in a notice being posted at a reasonable time in advance of the investigation, which was not done in the instant case. Further, there can be no doubt that Master Mechanic Thomas knew at 10:00 A. M. June 10, that the claimant had not received the certified notice for the reason he, himself, did not receive the return receipt until after it was signed by the claimant June 11, 1957.

The responsibility for serving the notice for an investigation in the instant case was not a joint responsibility but the concern of the carrier who preferred the charges.

Rule 34 further provides:

"If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired and compensated for the wages lost, if any, resulting from said suspension or dismissal."

It is, therefore, submitted that the evidence of record clearly discloses that the claimant's service rights were violated and that he was unjustly dismissed from the service within the intent and meaning of the applicable rules.

Therefore, the employes' statement of claim is subject to be sustained in its entirety by the Members of this Honorable Board.

CARRIER'S STATEMENT OF FACTS: Carman Charles G. Birlew, Sr., Silvis, was absent from service without permission since May 28, 1957 and on June 6, 1957, notice was sent to him by registered mail, as follows:

> "You have absented yourself from work with this Company in the capacity of Car Inspector since May 28, 1957 without permission, when your services were needed. You are hereby notified:
>
> Arrange to appear with your representative at Office of Master Mechanic on June 10, 1957, at 10 A. M. for formal investigation, at which time you will be required to show good and sufficient cause why your record and seniority with this Company in the capacity shown above should not be closed at once.
>
> Failure to comply with the foregoing instructions will result in your record and seniority being terminated.
>
> /s/ **K. O. Thomas**
> Master Mechanic"

Mr. Birlew did not report for work or for investigation on June 10, 1957, as requested, at which the carmen's representative did attend. Registered receipt from the post office had not been received by the carrier up to June 10, 1957. Therefore, on June 12, 1957, his record was closed, and he was so advised, because of absenting himself from duty since May 28, 1957 without permission from his supervisor The master mechanic explained to the committee that if he failed to show up on June 10, 1957, for cause, another investigation would be held, but if he failed to show up by June 11, 1957, his record would be closed.

It developed that Mr. Birlew, Sr. actually received the carrier's letter of June 6, 1957, on June 11, 1957 and registered receipt was received by the carrier on June 12, 1957, after carrier's letter of June 12, 1957, was dispatched.

The claimant did not, after receipt of the carrier's notice of June 6, 1957, advise any officer of the carrier that he received the notice on June 11, 1957, too late to attend the investigation on June 10, 1957, and Mr. Birlew so testified in a later investigation and, therefore, lacking such advice and failing to report on June 10, his record was closed as indicated.

Nothing further was received in connection with this case until July 24, 1957, when General Chairman Chairman Bretz of the carmen's organization wrote Master Mechanic K. O. Thomas, Silvis, Illinois, as follows:

> "I have been furnished a Form G-126E, dated June 12, 1957, notifying Carman Charles G. Birlew, Sr., Carbon Cliff, Illinois, that he has been removed from service, effective June 12, 1957, because he failed to report for an investigation at 10 A. M., June 10, 1957.

He attached a receipt numbered 446882, certified letter, dated July 11, 1957, stamped July 10th at 4 P.M. over the signature of A. Loring, Carbon Cliff, Illinois, Post Office.

If the information and certified receipt he furnished me are correct, then he did not receive the notice in time to attend this investigation and, therefore, he was removed from service without being given an investigation as required under the applicable rules. For that reason, we request that Mr. Birlew be compensated for such time lost due to the above referred to violation.

Will you kindly handle for correction and advise."

This was the first evidence that Mr. Birlew received the notice of June 6, 1957, too late to attend the investigation on June 10, 1957 or evidence that he intended to do so.

The master mechanic replied as follows on July 31, 1957:

"In regard to your letter of July 24th claiming time for Charles E. Birlew, Sr. for the alleged reason that Mr. Birlew did not receive his notice in time to appear for investigation in the office of the Master Mechanics at Silvis.

The facts are that we have received notice from the Post Office Department that Mr. Birlew received the notice to report for the investigation, but he made no attempt to contact this office in any way so there is only one thing left to do, and that is to close his record. Your claim is therefore respectfully declined."

This case was then appealed to the undersigned on August 7, 1957, requesting pay for all time lost and subsequently declined by the carrier.

In the meantime, without prejudice to our position, and to give the claimant benefit of the doubt, another investigation was agreed to and set for August 30, 1957, by notice of August 20, 1957, to discover the cause and determine claimant's responsibility for being absent without authority since May 28, 1957. The general chairman, on August 23, 1957 then protested such investigation, as follows, but did agree to it if Mr. Birlew was first returned to service:

"I am in receipt of Form G-126E dated August 20, 1957 addressed to Carman Charles G. Birlew, Sr., Carbon Cliff, Ill., reading as follows:

You have absented yourself from work with this Company in the capacity of car inspector since May 27, 1957. Arrange to appear with your representative at the office of Master Mechanic on August 30, 1957, 10 A.M.

I have in my files a Form G-126F captioned, 'Notice of Termination of Employment' dated June 12, 1957, addressed to Mr. Charles G. Birlew, Sr., Carbon Cliff, Ill. over the signature of Assistant Master Mechanic J. E. Bergstrom, reading as follows:

You are hereby notified that your employment with this Company and any and all seniority rights held by you have

been terminated as of June 12, 1957 because absenting yourself from duty since May 28, 1957 without permission from your supervisor.

It is quite obvious that in view of the foregoing your notice dated August 30, 1957 is improper for the reason that Mr. Birlew was discharged on June 12, 1957 and has not been absent without leave subsequent to that date, as is evidenced by the fact that a time claim is now pending for all time subsequent to June 12, 1957 because Mr. Birlew was improperly removed from service without being afforded the privilege of an investigation.

We have no objection to you returning Mr. Birlew to service and holding an investigation to determine the cause for his absence from May 28, 1957 to June 12, 1957."

Arrangements were made on August 27, 1957 to return Mr. Birlew to service on August 29, 1957, and on August 27, 1957 Car Foreman Shope and a special agent attempted to deliver the letter of August 27 to Mr. Birlew but he refused to sign receipt therefor. Later in the day Mr. Birlew accepted the letter, but would not sign receipt therefor, but did tell Foreman Shope he could not report at that time because of a "bum" shoulder. On August 28, 1957, the local chairman and Mr. Birlew called on Master Mechanic Thomas and advised the latter that he (Birlew) could not report account physical condition, which is confirmed by following report of Doctor George A. Cook:

"East Moline, Illinois
August 31, 1957

In answer to your letter of August 28, 1957, regarding Mr. C. G. Birlew.

Mr. Birlew has been under my care for a dislocated shoulder and a heat stroke. At present date he has recovered and will be able to return to work, September 1, 1957."

Mr. Birlew was to see a doctor and Mr. Thomas told him that when he was released okay to return to work, which he did on September 1, 1957. The investigation set for August 30, 1957, was, on request, postponed until September 5, 1957, but because of the peculiar circumstances in the entire case no further action was taken as regards Mr. Birlew.

It was not until November 11, 1957 that the organization presented claim also for $182.00 for hospital care, which, of course, was declined.

POSITION OF CARRIER: We contend that Mr. Birlew having failed to report for investigation on June 10, 1957, and making no effort to advise carrier's officers that he did not receive investigation notice in time to attend, left the carrier to believe he did not desire to do so.

His record was properly closed on June 12, 1957. We submit, also, that the carrier then gave the claimant all consideration possible under the circumstances in this case even to the extent of returning him to service and there could, therefore, be no violation of the agreement.

The organization asks for thirty days' pay, without specifying period involved, but we call the Board's attention to the fact that Mr. Birlew was not physically able to return to work prior to September 1, 1957, as he had

been under his doctor's care since July 8, 1957, and time lost by Mr. Birlew between June 12 and July 8, 1957, was of his own making — first, because he failed to advise the carrier he had not received the June 6, 1957 letter in time for the investigation and, second, because by his own admission in investigation held on September 5, 1957, he admitted he was not in physical condition to report subsequent to May 28, 1957. The employes for the first time, on November 11, 1957, submitted claim for Mr. Birlew's hospital expense, which we understand he incurred between July 8 and 12, 1957, and to sustain this portion of their claim, they will have to show a rule or agreement to cover or a rule or agreement that might have been violated. They can show neither. The negotiated agreement with the organization does not cover any dealings as between the employe and Travelers' Insurance; to the contrary, that is a matter between them. The question of benefits under an insurance policy, not being in the nature of rules, working conditions or rates of pay, is not a subject under jurisdiction of your Board, but a matter depending solely upon actions taken by an employe under the insurance policy under circumstances involved in this case where, of his own accord, he was not available for work.

On the basis of the facts in this case, we respectfully request declination of the claim in its entirety.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the 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.

Parties to said dispute were given due notice of hearing thereon.

On May 27 and 28, 1957 claimant notified the carrier that he was unable to work on account of illness. On June 6 the carrier mailed him by registered mail, a notice to report for investigation on June 10 and to then and there show cause why his employment should not be terminated. The notice stated that failure to comply with it would result in termination of employment. Clamant did not receive the notice until June 11 and consequently was not present at the scheduled hearing. On June 11 the carrier terminated his employment without a hearing. When it did so, it had no information that the notice to show cause had not been delivered. Claimant's service was terminated as of June 12. He was returned to service September 1, 1957.

Compensation is sought for time lost at the applicable carmen's rate for a total of thirty one 8 hour working days. Reimbursement is also sought in the amount of $182 for medical and hospital expense paid by the claimant in July. This latter claim is based on the theory that if claimant had not been wrongfully discharged, his group insurance under the carrier's existing plan would have been available to cover this expense. Hence the organization maintains that these expenses are consequential damages resulting from the carrier's wrongful act.

Rule 34 of the applicable agreement required that claimant be given a reasonable notice and opportunity to prepare and attend a fair hearing before discipline was imposed. In effect he received no notice of the hearing for he

was discharged without a hearing and before the notice was received. It is therefore evident that his employment was terminated contrary to the provisions of the rule. This rule further provides that if it is found he was unjustly dismissed he shall "be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said * * * dismissal."

As noted, claimant was returned to service on September 1, 1957, and as far as we are able to ascertain from the record, his seniority rights were reinstated. If they were not that should be done. The claim for loss of wages is for 31 days at straight time rate. That claim is allowed. Although more than 31 working days intervened between June 12 and September 1, 1957, it appears that claimant was hospitalized part of the time and not physically able to work more than 31 days. The allowance for wage loss for 31 days is subject to reduction to the extent of compensation earned, if any, by the claimant from other employment, as provided in Rule 34.

The claim for reimbursement of medical and hospital expense in the amount of $182, which was borne by the claimant, would have been satisfied by the insurance company if the claimant's group insurance had not been cancelled when he was discharged. If this were a common law action for the recovery of consequential damages for breach of contract, and if this Board possessed general judicial powers, such medical and hospital expense, if proven, would constitute proper elements of damage. However, this Board has limited power under the law, and it is confined to the interpretation or application of the collective bargaining agreement entered into by the parties.

The contracting parties have specifically agreed that the damages for contract violation such as occurred in this case, is the amount of wages shown to have been lost, less earnings from other sources. Other elements of consequential damage have been excluded by implication. The term "wage" in its ordinary and popular sense means payment of a specific sum for services performed. That is the sense in which the term is used in this agreement. The language of Rule 34 has been in effect since 1941, long before the contracting parties had provided for group insurance for hospital or medical expenses. The insurance program which was in effect in July 1957 was specifically declared in the 1956 agreement to be in addition to the wage adjustments therein provided. It was by the parties own arrangement distinguished from wages. Eligibility for hospital and medical insurance protection is derived from employment status, but it is not in the usual and ordinary sense an integral part of a wage rate. We conclude that this Board lacks the power to order the carrier to reimburse the claimant for his medical and hospital expense.

AWARD

Claim disposed of in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1961.

OPINION OF LABOR MEMBERS CONCURRING IN PART AND DISSENTING IN PART TO AWARD NO. 3883.

We concur in the findings and decision of the Board insofar as they find and hold that the claimant was dismissed in violation of the rules of the applicable agreement, is entitled to reinstatement without impairment of seniority rights and is entitled to be compensated for time lost at the applicable Carmen's rate for thirty-one 8 hour working days.

We dissent from the award insofar as it denies the claimant relief with respect to the loss that he admittedly incurred in the amount of $182.00 of hospital and medical expenses which would have been paid for him by the Travelers Insurance Company but for the carrier's wrongful interruption of the claimant's employment status. The basic defect of the award lies in its treatment of the claim for relief from this loss as a claim for "consequential damages."

Consequential damages are generally considered to be those damages which arise not from the immediate act of the party, but as an incidental consequence of such act. (See Bouvier's Law Dictionary (unabridged) Rawle's Third Revision, p. 611). It may be assumed for purposes of present discussion that, for example, if a wrongfully discharged employe is consequently without income with which to pay the premium required to keep an individual policy of hospital and medical insurance in force and he incurs expenses which are therefor uninsured, the loss is a consequential damage resulting from his wrongful discharge. It may further be assumed for purposes of present discussion that the Board is without authority to require a carrier to reimburse the employe for such expenses. These assumptions are made for present discussion purposes, without accepting their general validity, in order clearly to distinguish the case at hand from the hypothetical one we have posed in the foregoing assumptions.

At the time of claimant's discharge, which the Board holds to have been in violation of applicable agreement rules, an inseparable part of this employment relationship was his status as an insured employe under Travelers Insurance Company Group Policy Contract No. GA-23000. The wrongful termination of his employment relationship constituted in and of itself a simultaneous termination of his insured status. Rule 34 of the applicable agreement requires that an employe found to have been unjustly dismissed "be reinstated." The award in this case falls short of achieving complete reinstatement. A dismissed employe who is reemployed and compensated for time lost and has his seniority rights restored is not fully reinstated unless his insured status is also restored as of the time it was improperly terminated.

Furthermore, Rule 34 also requires that an unjustly dismissed employe be "compensated for the wage loss, if any, resulting from said . . . dismissal". The majority of the Board, by looking only at the uninsured expense incurred by the claimant rather than at his loss of insured status, asserts that these expenses were not a "wage loss". But it is abundantly clear from the history of wage and insurance negotiations of the non-operating employes that the insurance benefits here involved have been provided in lieu of additional wage increases granted to other railroad employes. The insurance protection provided is therefore definitely a part of the wage an employe earns by his employment. An employe who has been deprived of that protection and does not have it restored has not been fully compensated for his "wage loss" when he has only been paid the cash wage for the time lost through his unjust dismissal.

The fact that the rule was written before the parties had provided for group insurance for medical and hospital expenses does not, as the majority seems to hold, preclude the inclusion in wages thereafter of elements of remuneration in addition to the cash wage. Obviously the rule must refer to whatever is included in wages when the "wage loss" occurs, not to what the wage was when the rule was written. Nor can significance properly be attached to the fact that the 1956 Agreement provides for insurance benefits "In addition to the wage adjustments provided for in Articles I, II, III and IV of this Agreement". It can just as well be argued that the use of this language confirms rather than negates the inclusion of insurance benefits as part of the wage. What is controlling in this respect is the undeniable fact that over the years employes not participating in the insurance benefits have received additional wage increases estimated to be equivalent in cost to the carriers to the cost of providing the insurance protection to the non-operating employes.

When a carrier wrongfully deprives an employe of that protection and is not required to restore it, the carrier profits by a wage saving from its own wrongful act and the victim of the wrongful act suffers an uncompensated wage loss. This is true irrespective of whether the employe incurred medical or hospital expenses during the period of insurance lapse. In our view, in all cases where reinstatement with compensation for wage loss is required the carrier should also be required to pay the premiums necessary to reinstate insured status as of the time of lapse. If this were done the insurer could properly be required to reimburse such employes for covered expenses in those instances where such expenses are incurred.

We therefore hold that it is clear that the claimant is entitled to have his insured status restored as of the time it was improperly terminated. This is inherent both in his right to reinstatement and his right to be compensated for wage loss. These rights flow directly from the application of the rule itself and do not in any way partake of the nature of consequential damages.

The Travelers Insurance Company Group Policy Contract No. GA-23000 makes provision for avoiding lapse of insurance, where there has been a failure to remit premium through error, by making a subsequent remittance. We believe that this principle should be applied where failure to remit is due to an erroneous dismissal. However, if the insurer should not be agreeable to such an application of the principle and should refuse to reinstate insured status as of the time of dismissal, that circumstance should not operate to excuse the carrier from its obligation to restore insured status as of that time. In such event the only way for the carrier to discharge that obligation would be for the carrier itself to become the insurer. The fact that the carrier would then be required to reimburse the employe for the hospital and medical expenses rather than to pay premiums still would not make the claim one for consequential damages. The payment would be made in discharge of the obligation to restore insured status, which the rule itself requires as a part of reinstatement and compensation for wage loss.

/s/ **Edward W. Wiesner**
Edward W. Wiesner
/s/ **C. E. Bagwell**
C. E. Bagwell
/s/ **T. E. Losey**
T. E. Losey
/s/ **E. J. McDermott**
E. J. McDermott
/s/ **James B. Zink**
James B. Zink

Carrier Members' Answer to Opinion of Labor Members Concurring in Part and Dissenting in Part to AWARD NO. 3883

We concur in Award No. 3883 of the Board and wish to add the following comments with respect to that part of the award which holds that the claimant is not entitled to reimbursement for his medical and hospital expenses. Regarding this aspect of the award, the concurring and dissenting opinion filed by the labor members states:

> ". . . It is abundantly clear from the history of wage and insurance negotiations of the nonoperating employes that the insurance benefits here involved have been provided in lieu of additional wage increases granted to other railroad employes.
>
> * * * * *
>
> ". . . Over the years employes not participating in the insurance benefits have received additional wage increases estimated to be equivalent in cost to the carriers to the cost of providing the insurance protection to the nonoperating employes."

The labor members then assert that the benefits provided for nonoperating employes in this manner constitute "wages," and are thus covered by the agreement here involved which provides that an employe unjustly suspended or dismissed shall be entitled to recover "the wage loss," if any, resulting from said suspension or dismissal.

We agree with the statements by the labor members, quoted above, regarding the manner in which insurance coverage for nonoperating employes has been established in the railroad industry.

We disagree, however, with the conclusion that this history of the insurance protection for nonoperating employes makes the items here involved wages within the coverage of Rule 34 of the agreement upon which the present claim is based. The insurance protection and benefits thus afforded have been described, and are regarded, as wage equivalents (Report of Emergency Board No. 130, p. 11). It does not follow, however, that a contract provision requiring reimbursement for wage loss encompasses the insured status and the resulting benefits thus properly characterized as wage equivalents. The distinction will be clear if the basic meaning of the term "wages" is kept in mind. Thus, the findings of the Board note that

> ". . . The term 'wage' in its ordinary and popular sense means payment of a specific sum for services performed."

and that

> ". . . Eligibility for hospital and medical insurance protection is derived from employment status, but it is not in the usual and ordinary sense an integral part of a wage rate."

Ballentine's Law Dictionary defines wages as "Payment for services rendered by artisans or laborers receiving a fixed sum per day, week, or for a certain amount of work." Wages thus ordinarily reflect a direct and fairly precise relationship between service performed or time on duty and the amount due as wages. This type of relationship is not characteristic of the

insurance protection and benefits which accrue to nonoperating employes as wage equivalents. The insurance protection under the agreement covering the claim here involved accrued to qualifying employes who rendered the compensated service required by the agreement but did not vary in amount with variations in the service performed by such employes. In fact, it was and is possible, under the agreement, for nonoperating employes to receive insurance protection covering one or more months in which they were or are on furlough. Because of these circumstances, the insured status and the resulting benefits which nonoperating employes receive as wage equivalents do not fit the ordinary and basic concept of wages and are thus outside the scope of the provision entitling wrongfully dismissed employes to recover the wage loss resulting therefrom.

We repeat that the labor members have correctly described the circumstances attending the establishment of claimant's insured status. The costs involved do constitute wage equivalents but are not within the concept of wage loss. The award, therefore, is not properly subject to the criticism contained in the concurring and dissenting opinion of the labor members.

/s/ **F. P. Butler**
F. P. Butler

/s/ **H. K. Hagerman**
H. K. Hagerman

/s/ **D. H. Hicks**
D. H. Hicks

/s/ **P. R. Humphreys**
P. R. Humphreys

/s/ **W. B. Jones**
W. B. Jones