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Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6500
Docket No. 6361
2-LI-EW-'73

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

Parties to Dispute: (System Federation No. 156, Railway Employees'
(Department, A. F. of L. - C. I. O.
((Electrical Workers)
(
(The Long Island Rail Road Company

Dispute: Claim of Employees:

1. That the Long Island Rail Road, in violation of the current Agreement, improperly denied Electrician Helper Third Railman F. D. Campbell the right to perform service for the Long Island Rail Road.
2. That, accordingly, the Long Island Rail Road be ordered to reinstate Electrician Helper Third Railman F. D. Campbell with all benefits, vacation and seniority rights unimpaired and with compensation for all time lost as a result of said action.

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.

This is a disciplinary case in which claimant, after having been charged by the Carrier and afforded a hearing as well as an appeal hearing on the original hearing, was dismissed from the service.

On July 7, 1971, claimant suffered an injury to his neck while being transported in the back of Carrier's truck on the Long Island expressway near the Cross Island Parkway in a road construction area. The truck hit a pothole in the road resulting in claimant twisting his neck and further aggravating a similar injury sustained in the same set of circumstances on June 7, 1971.

By letter under date of July 15, 1971, Claimant was notified to report for trial on July 22, 1971, having been charged with "inability to properly perform your assigned tasks safely."

Complainant has been employed by this Carrier since 1959. At the beginning of the hearing, the hearing officer began to read a list of injuries sustained by the Complainant from 1960 to 1971. Complainant's representative at the hearing objected to a reading of these incidents of injuries as reflected in Organization's exhibit B-7 of the record which reads as follows:

"JJB - As to all of this here, I would like to make a protest pertaining to these statements, that have been read into the record by the Carrier. These should have no bearing on Mr. Campbell's present trial.

LRC - To clarify for the record, a written record of the accidents previously read into the record will be included as part of the record of this trial.

JJB - I would like to protest the statement that Mr. Compton just made relevant to the prior cases."

After reviewing the transcript of the hearing as well as the exchange of correspondence on the property, we find that the charge against the complainant was much too broad in order to enable him to properly prepare his defense. It is quite evident from the record that he was not prepared to answer in detail every incident mentioned by the hearing officer over a 12 year span. It is true indeed that the charge as originally presented, in order to over-come the objection of it being vague and indefinite, need not attain the specificity of a criminal indictment, but it should be sufficiently precise and definite so that the accused may respond with his version of the facts involved to constitute a reasonably adequate defense from his point of view. He should not appear at the hearing and be surprised at the detailed charges levelled against him. Elemental rules of fair play militate against broad general, indefinite and imprecise charges. We will sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:

E. A. Killian
Executive Secretary

Dated at Chicago, Illinois, this 30th day of May, 1973.

NATIONAL RAILROAD ADJUSTMENT BOARD Serial No. 70
SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when the interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 6500

DOCKET NO. 6361

NAME OF ORGANIZATION: System Federation No. 156, Railway Employees' Department, A.F. of L. - C.I.O. (Electrical Workers)

NAME OR CARRIER: The Long Island Rail Road

QUESTION FOR INTERPRETATION:

Award No. 6500 was rendered by this Board (sitting with another Neutral) on May 30, 1973. The claim was sustained and Carrier reinstated the Claimant, but refused to compensate Claimant for time lost until Carrier was furnished with proof of outside earnings for deduction purposes. The Organization refused.

After several discussions and exchanges of correspondence had failed to resolve the matter, the Organization requested an Interpretation from this Board as follows:

Does the language contained in Item 2 of the Claim of Employees in Award No. 6500, reading:

"That, accordingly, the Long Island Rail Road be ordered to reinstate Electrician Helper Third Railman F. D. Campbell with all benefits vacation and seniority rights unimpaired and with compensation for all time lost as a result of said action."

and the Award reading:

"Claim sustained."

allow the Carrier to deduct from Claimant's wage loss any outside earnings?"

The agreement provision involved is Rule 26-D that reads:

"When an employe is held out of service in connection with an offense and thereafter is exonerated, the charge shall be stricken from his record, he shall be reinstated with seniority unimpaired, and shall be compensated for the amount he would have earned had he not been held out of service."

As noted, neither the Findings nor the Award included any mention of deduction for outside employment.

INTERPRETATION NO. 1 TO AWARD 6500 (DOCKET NO. 6361) Serial No. 70

Initially, the Organization asserts that Carrier is precluded from arguing that it has a right to deduct outside earnings because that issue was raised for the first time in Carrier's Rebuttal. In its Rebuttal, Carrier stated:

"If for some reason not readily evident to the Carrier, your Board should overrule the Carrier's position and order it to restore Claimant to its employ, Carrier, in conforming with hundreds of awards rendered by your Board over the years, claims the right to deduct any outside earnings Claimant may have had in the interim from the gross amount due him."

While the question of mitigation was raised belatedly, almost as an afterthought, it was presented to the Board for its consideration prior to its Award. Moreover, Rule 26-D was cited by the Organization in its Ex Parte Submission as being applicable to this dispute.

The Organization urges that Award No. 2 of P.L. Board No. 852 must be followed since it involved the same parties and identical issues. There, however, the Board refused to consider the question of mitigation because that question was never raised until after the Board had rendered its Award. The Board stated:

"The Referee finds that it is improper for either party to seek by way of an Interpretation a ruling on an issue which was not raised ab initio when the case was being argued before the Board. For one or both of the parties to seek an Interpretation here of the Award is not to seek an Interpretation of the present Award, but rather to seek a new award on a new dispute not properly raised.

* * *

This is the reason why this Neutral must hold that the question of money damages, if any, and the mitigation thereof, must be pleaded and argued in the proceedings before the Adjustment Board or the Public Law Board, and it must be done timely, i.e., before the Board has rendered its Award and Order."

Award No. 2 of P.L. Board No. 852 is, therefore, not applicable.

On this property there are three awards holding that language identical to Rule 26-D allows the Carrier to deduct earnings from outside employment. They are Second Division Award No. 1398, Third Division Award No. 10878, and Award No. 1 of P.L. Board No. 1173. Accordingly, the Board shall, in the interests of consistency and precedent, follow such awards on this property. Award No. 6500 is interpreted to allow Carrier to deduct earnings from outside employment.

INTERPRETATION NO. 1 TO AWARD 6500 (DOCKET NO. 6361) Serial No. 70

Referee John J. McGovern sat with the Division as a Member when Award No. 6500 was rendered, and Referee Nicholas H. Zumas participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
 National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 12th day of September, 1975.