Award No. 2305
Docket No. 2278

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

Referee William H. Coburn

PARTIES TO DISPUTE:

THOMAS B. HADDEN

DES MOINES AND CENTRAL IOWA RAILWAY COMPANY

STATEMENT OF CLAIM: Thomas B. Hadden petitions the National Railroad Adjustment Board to require his employer, The Des Moines & Central Iowa Railway, to abide by its contracts and agreements with the petitioner's representative, the Des Moines & Central Iowa Non-Operating Employes' Union of Des Moines, Iowa. Mr. Hadden is claiming of the Railway a deficiency in three days' pay and three weeks vacation pay, which was paid to him at a rate lower than his job classification of Car Foreman. In addition, Mr. Hadden was discharged without justification, and asks that he be given a co-ordination allowance or a separation allowance under the National Mediation Agreement, to which the railway subscribes. Alternatively, Mr. Hadden requests that he be reinstated as an employe of the Railway and that he be compensated for the period during which he has been wrongfully deprived of this employment.

OPINION OF BOARD: This Board is an appellate body. We may consider only the claim filed and the record made on the property. The parties may not, for the first time, introduce evidence in the proceedings before this Board other than by stipulation. The parties may not properly raise issues before this Board that are not in the record made on the property.

The Statement of Claim, **supra**, is found in the Claimant's Petition to this Board. It is not the Claim presented on the property. We, therefore, will look to the record to ascertain: (1) the nature of the Claim presented on the property; (2) the issues raised on the property; and (3) the evidence adduced by the parties on the property relative to the issues.

Claimant was employed by Carrier as Car Foreman at Des Moines, Iowa.

Carrier posted the following bulletin under date of December 30, 1966:

"To All Concerned:

Effective with the completion of the assignment Friday, December 30, 1966, the Car Foreman position, incumbent T. B. Hadden, is abolished."

Under the same date Claimant wrote to Carrier as follows:

"Referring to your notice of this date relative to the Car Foreman's position, incumbent T. B. Hadden, abolished with the completion of the assignment Friday, December 30, 1966.

You have not given me the five working days notice according to our present agreement. Neither have you mentioned exercising seniority rights.

Will you please arrange meeting with the writer and Union representatives in order that Car Foreman Position at Des Moines, Iowa, may be further handled?"

On January 3, 1967, the President of the Organization wrote to Carrier's General Manager:

"The committee representing the Non-Operating Employes' Union of the Des Moines & Central Iowa Ry. Co., requests that you set a date for a meeting with you, at your earliest convenience, in regards to possible contract violations, in the abolishment of the Car Foreman's position, T. B. Hadden, incumbent, effective at the expiration of assignment. December 30, 1966."

The foregoing documentary evidence of record appears to frame the Claim, as presented on the property.

Carrier admitted it did not comply with the provision of the Agreement requiring five day notice of abolishment of a position and it continued the Claimant in the Car Foreman position for the required five days.

We find nothing in the record made on the property or in the Agreement that restricts management's prerogative to abolish the Car Foreman's position. Nor do we find any evidence to support a finding that Claimant was denied the right to exercise his seniority rights to a Car Repairman position. He did, indeed, exercise the right and was continued in a Car Repairman position until January 13, 1967, on which date he was served with the following notice:

"I have been informed that you are physically unable to perform your duties. Therefore, you are relieved from your duties with the Des Moines & Central Iowa Railway."

Claimant interprets this notice as a discharge; Carrier as a physical disqualification.

There are two letters of record which spell out the issues raised on the property. Under date of March 2, 1967, Claimant, through his attorney wrote to Carrier:

"In our telephone conversation of February 17, 1967, you stated that it is the position of the Des Moines and Central Iowa Railway Company that Thomas B. Hadden was discharged with justification, and that he received all of the wages and benefits due him under contract in existence between the Company and the Non-Operating Employes of the Des Moines and Central Iowa Railway Company.

After reviewing the file extensively, I am of the opinion that Mr. Hadden was discharged without justification and without an opportunity for a hearing or to present evidence of his physical fitness and ability to continue to perform his duties; that he should be compensated at the wage rate of Car Foreman until such time as his employment is lawfully and justifiably terminated; that the three week's vacation pay paid to Mr. Hadden should have been at the Car Foreman's rate, rather than at the Welder's rate; and that he is entitled to a coordination allowance under the Job Protection Agreement currently in effect, or at least a separation allowance under the same Agreement.

Mr. Hadden and I would appreciate the opportunity to confer with you or another duly authorized agent of the Company for the purpose of reaching an adjustment in this matter. I would suggest that we meet either on Tuesday, March 7, 1967 or Friday, March 10, 1967, if either of those dates meets with your convenience."

Carrier replied under date of March 7, 1967:

"We acknowledge receipt of your letter dated March 2, 1967.

Your letter contains some inaccuracies which we would like to straighten out for the record.

Thomas B. Hadden was not discharged from the employ of the Des Moines and Central Iowa Railway Company. His former position of car foreman was eliminated, as the Railroad had the right to do under the circumstances.

After the position of car foreman was eliminated, Mr. Hadden elected to exercise his seniority as a carman. The Railroad is not denying his right to take this action. However, it is necessary that Mr. Hadden and all other employes qualify by passing a physical examination for this work. Mr. Hadden failed to pass his physical examination and, accordingly, we were unable to continue his employment. Mr. Hadden failed to follow the prescribed administrative procedures to show that he was qualified physically.

Under these circumstances, we feel that there is nothing further that can be accomplished by a meeting."

Having found nothing in the record made on the property or in the Agreement restricting Carrier's right to abolish the Car Foreman position, the pivotal issue is whether Claimant was wrongfully found physically disqualified to hold the position of Car Repairman to which he would otherwise have a right by virtue of his seniority. This Division is without jurisdiction to adjudicate that issue. Section 3, First (h) of the Railway Labor Act vests exclusive jurisdiction in the Second Division of the National Railroad Adjustment Board to adjudicate disputes involving "carmen." We, therefore, must dismiss the petition before us for lack of jurisdiction.

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.

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

This Division of the National Railroad Adjustment Board must dismiss the petition for lack of jurisdiction.

AWARD

Petition dismissed for lack of jurisdiction.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1968.

DISSENT OF LABOR MEMBERS TO AWARD 2305 (DOCKET 2278) — HADDEN vs DM&C

The reasoning and justification put forth by the majority in this Award are confined to two paragraphs, one appearing on Page (2) and the latter appearing on Page (4) of the Award. In the paragraph on Page (2) we find:

> "We find nothing in the record made on the property or in the Agreement that restricts management's prerogative to abolish the Car Foreman's position. Nor do we find any evidence to support a finding that Claimant was denied the right to exercise his seniority rights to a Car Repairman position. He did, indeed, exercise the right and was continued in a Car Repairman position until January 13, 1967, on which date he was served with the following notice:"

Firstly, the Petitioner herein has never contested Management's prerogative to abolish the car foreman's position. Thus, the majority in resting their decision as to the Petitioner's claim for either coordination or separation benefits under the 1964 Agreement completely miss the point and thrust of the Claimant's argument. As stated, the Petitioner herein has never contested this prerogative of Management but has based this part of his claim on the premise that the Carrier herein, being a signatory to the 1964 Agreement which provides these benefits in the event that the Carrier does abolish the position and thereby deprives Petitioner of his employment, in this instance the Carrier owes the Petitioner the benefits to which he is entitled to under this agreement. Thus, the Petitioner herein claims that he has been deprived of his employment as the result of transfer of work, the abandonment, discontinuance, and consolidation of facilities or services or positions thereof and the contracting out of work by the Company. Evidence, both oral and written, were entered on the record, both in the original petition filed with the Board and the subsequent Petitioner's Brief and Argument and oral evidence given at the hearing before the Referee and the Board. Therefore, we dissent from the Award in this regard on the basis that

the majority have failed and refused to rule on the evidence as presented showing that the Petitioner herein has been deprived of his employment as a result of the several provisions of Section 2 of the 1964 Agreement, as shown by the evidence entered in this case. The majority herein merely dismiss the Petitioner's claim in this regard on the basis that Management had the right to abolish the Petitioner's job. There is no issue on this point, as all parties agree that the Management herein had the right to abolish the Petitioner's job. The Petitioner's entire claim is based upon the fact that having the right to abolish the Petitioner's job, where said job was abolished and the effect of this action by the Carrier was to deprive the Petitioner of his employment within the meaning of the provisions of the 1964 Agreement, that the Carrier herein owed the Petitioner the benefits to which he was entitled under this agreement.

Therefore, the award in this regard is defective for the simple reason that the majority have failed and refused to consider the evidence and the claim of the Petitioner in this regard. Nowhere in Petitioner's oral or written evidence did the Petitioner make a claim that Management did not have the right to abolish the car foreman's position. This point is not even at issue in this case. The only issue in the claim for coordination or separation benefits under the 1964 Agreement is whether or not the Carrier, in abolishing the Petitioner's job, deprived the Petitioner of his employment or placed the Petitioner in a worse position with respect to compensation and rules governing working conditions as a result of the changes in the operations of this Carrier within the meaning of the 1964 Mediation Agreement. The majority herein do not even discuss the issue as to whether or not the changes in operations of the individual Carrier occurred within the meaning of the 1964 Agreement. Therefore, the majority have failed to rule upon Petitioner's claim in this regard. As a result, the Petitioner's claim for coordination or separation benefits under the 1964 Agreement was never ruled upon by the majority in this case. We fail to understand how the majority could have completely ignored the Petitioner's claim and the evidence entered herein by the Petitioner for coordination or separation benefits under the 1964 Agreement.

We further submit that the majority were in error in finding that "nor do we find any evidence to support a finding that Claimant was denied the right to exercise his seniority rights to a Car Repairman Position." Indeed, there is no evidence to support a finding that Claimant did exercise his seniority rights. Claimant's letter of December 30, 1966 states "you have not given me the five working days notice according to our present agreement. Neither have you mentioned exercising seniority rights." The fact that the Company recognized its error in not paying the Claimant for five working days pursuant to the 1946 Agreement, as amended, had nothing to do with Claimant's demand to exercise his seniority rights for a new position pursuant to Rule 3(f), which provides: "Employes whose positions are abolished may exercise rights over junior employes consistent with ability." The award of the majority in this regard is completely in error in that the evidence is undisputed that the Petitioner's job was placed under a new job classification of "Lead Car Man" and was thereafter performed by Employe N. E. Schomer, whose seniority is junior to that of the Petitioner. Therefore, how possibly can the majority find that the Petitioner herein exercised his seniority in view of the evidence presented both in writing and orally at the hearing in this case. It is obvious that if the Petitioner had been allowed to exercise his seniority a meeting would have been held pursuant to the exercise of same (which was not done) and the Petitioner would have replaced Employe Schomer

pursuant to the provisions of Rule 3(f). Thus, here again the Labor Members of the Board vigorously dissent from the finding that the Petitioner did exercise his seniority rights, which finding is clearly contrary and in direct opposition to the evidence which was entered both orally and in writing in this case. It is further significant in respect to seniority that the Carrier representative, Mr. Bussey, admitted at the hearing that no seniority roster was posted or furnished to employe representatives as required by Rule 3(e) of the 1946 Agreement, and also admitted that no hearing was ever held concerning seniority in spite of the Petitioner's written request for such a hearing in his letter dated December 30, 1966. In view of this undisputed evidence, how can the majority herein make a finding in this award that "nor do we find any evidence to support a finding that Claimant was denied the privilege of exercising his seniority rights to a Car Repairman Position." The award herein is clearly in error concerning this part of the Petitioner's claim that he was wrongfully discharged in violation of the several rules of the 1946 Agreement.

On Page (4) of the award, finally, after dismissing the other merits of the claim, it is stated that "This Division is without jurisdiction to adjudicate" the issue of whether Claimant was wrongfully found physically disqualified to hold the position of car repairman. Here again the Labor Members dissent from the decision of the majority as follows: The Petitioner herein is claiming his benefits not only under the provisions of the Railway Labor Act but also under the provisions and benefits of the two Collective Bargaining Agreements between the Company and the Union, namely, the 1946 Agreement (Exhibit 9-H), and the 1964 Agreement (Exhibit E). The Petitioner herein has submitted both oral and written evidence that the Carrier has violated several provisions of both the Agreements in wrongfully discharging the Petitioner and depriving the Petitioner of his employment. We, therefore, submit that this Division has jurisdiction to adjudicate whether or not the Petitioner herein was deprived of his employment within the meaning of the 1964 Mediation Agreement and whether or not the Petitioner was wrongfully discharged within the meaning of the 1946 Agreement. The rights of the Petitioner in this regard are contractual and flow from the Carrier's responsibilities under these two Collective Bargaining Agreements. This Division certainly has the jurisdiction to make a finding a fact concerning Petitioner's rights under these two agreements.

For the above several reasons the Labor Members of the Fourth Division dissent from the award in this case rendered with Referee William H. Coburn.

LABOR MEMBERS

A. T. Otto, Jr.
J. P. Tahney
W. J. Ryan

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