

PUBLIC LAW BOARD NO. 2486

AWARD NO. 2

CASE NO. 4

PARTIES TO THE DISPUTE:

Railroad Yardmasters of America

and

Baltimore and Ohio Railroad Company

STATEMENT OF CLAIM:

Claim and request of Railroad Yardmasters of America:

This is a claim made for former Yardmaster E. Mallory, ID 1501754 Cincinnati, Ohio, claiming one pro rata rate day at the current yardmaster's rate of pay for November 9, 1978 and every day thereafter until E. Mallory has been restored to service with all seniority and rights under all local and national agreements. and

(a) Clear the service record of Mr. Mallory of the charges and any reference in connection therewith.

(b) Promptly restore Mr. Mallory to duty with vacation and other rights unimpaired.

(c) Pay Mr. Mallory, in addition to every day thereafter, all wages he would have earned through working overtime and/or doubling and holiday losses.

(d) Pay Mr. Mallory any amount he incurred for medical or surgical expenses for himself or dependents to the extent that such payments would have been paid by Travelers Insurance Company under the then applicable Group Policy and, in event of the death of Mr. Mallory pay his estate the amount of life insurance provided for under said policy. In addition, reimburse him for premium payments he may have to make in the purchase of substitute health, welfare and life insurance.

(e) Pay Mr. Mallory interest at the statutory rate for the State of Ohio for any amounts due under (c) hereof and the claim in first paragraph hereof.

OPINION OF BOARD:

Claimant E. Mallory was a regularly assigned Yardmaster at Carrier's Ivorydale Yards, Cincinnati, Ohio, on the 7:00 AM to 3:00 PM shift. Based upon an incident occurring on November 8, 1978, Notice of Investigation (dated November 8, 1978) was sent to Claimant advising him that:

You are charged with insubordination in that you failed to follow the instructions issued by Assistant Terminal Trainmaster Donald Allender with respect to the yarding of the City Transfer in the East Yard at Ivorydale, Ohio, and with conduct unbecoming an employee, for striking Assistant Terminal Trainmaster Allender following a dispute over these instructions at or about 1:15 PM at Ivorydale Yard, Cincinnati, Ohio on November 8, 1978. (See Carrier's Exhibit "B-1".)

Hearing was held at 9:00 AM Friday, December 1, 1978. Subsequent to the hearing, Claimant was notified by Carrier of his termination as follows:

Mr. Edward Mallory
Yardmaster
Cincinnati, Ohio

Dear Mr. Mallory:

Referring to investigation held in Conference Room (213) in Cincinnati, Ohio at 9:00 AM, Friday, December 1, 1978.

It has been found that you were at fault on November 8, 1978, for insubordination in that you failed to follow instructions issued by Assistant Terminal Trainmaster Donald R. Allender, with respect to the yarding of the City Transfer in the East Yard at Ivorydale, Ohio, and with conduct unbecoming an employee, for striking Assistant Terminal Trainmaster Allender, following a dispute over these instructions at approximately 1:15 PM at Ivorydale Yards, Cincinnati, Ohio.

The discipline administered is dismissal from the service.

Please acknowledge receipt of this letter.

Yours truly,

S/ C. J. Rhoden
Terminal Trainmaster

The Organization appealed this discipline on behalf of Claimant basing its appeal in part on an assertion that because of the multiple roles played by Terminal Trainmaster C. J. Rhoden from the inception of the incident through the assessment of discipline, Claimant was denied a fair and impartial investigation. Careful review of the record shows that the Organization's objections are well founded. Because of this we are unable to reach substantive merits of the instant claim, and we make no finding in that respect.

The multiplicity of roles exercised by Mr. Rhoden is not expressly prohibited by the contract, nor does a mixing of roles per se always nullify the contractual guarantee of a fair and impartial investigation. Such a multiplicity of roles does, however, subject Carrier's handling of the matter to close scrutiny to determine whether, on the facts of the particular case, Claimant's right to a fair and impartial investigation has been upheld.

Terminal Trainmaster Rhoden's various roles in the instant case commenced with his preliminary investigation of the incident occurring between Claimant and Assistant Trainmaster D. R. Allender, on November 8, 1978. At that time Mr. Rhoden was called by Mr. Allender because, the latter claimed, "he had been struck by Mr. Mallory". Subsequent to discussion with the two men, Mr. Rhoden issued the Notice of Hearing and Investigation (supra). There is evidence on the record that prior to the actual hearing Mr. Rhoden held discussions on the issue and evidence to be presented with Mr. K. L. Carius, the presiding hearing officer. At the hearing, Mr. Rhoden testified as a Carrier witness against Claimant. Finally, Mr. Rhoden, by letter of December 8, 1978, notified Claimant of his (i.e., Rhoden's) decision based on the hearing to dismiss Claimant. Probative record evidence establishes that prior to the hearing, Mr. Rhoden had already decided the "facts" of the case against Claimant.

In light of the foregoing, we conclude that Mr. Rhoden's actions so tainted the November 8 proceedings as to obviate the possibility of Claimant's receiving a fair and impartial investigation. We therefore have no alternative but to sustain parts (a) and (b) of the claim as stated supra. We note, however, that Mr. Mallory was offered an opportunity on June 5, 1979 to return to service as a ^{Trainman}~~Trainmaster~~, without pay for time lost, [and without preclusion of his further pursuit of the instant claim.]. Claimant declined to accept Carrier's offer, and should not be permitted to profit from his refusal to mitigate damages while this claim was processed. Therefore, Claimant is restored to duty as of November 9, 1978 with back pay less actual outside earnings, except for the period June 5, 1979 forward, the amount he would have earned as trainman also shall be deducted. There is no basis in the contract for sustaining parts (d) and (e) of the claim.

FINDINGS:

Public Law Board No. 2486, upon the whole record and all of the evidence, finds and holds as follows:

1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that Claimant was deprived of a fair and impartial hearing and investigation.

AWARD

Claim sustained only to the extent indicated in the Opinion. Carrier shall comply with this Award within thirty (30) days of issuance.

Robert F. O'Leary
Robert F. O'Leary, Employee Member

W. C. Comiskey
W. C. Comiskey, Carrier Member

Dana E. Eischen
Dana E. Eischen, Chairman

Date: 10/14/50