

Award No. 1186

Docket No. 1108

2-NP-CM-'47

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee George A. Cook when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 7, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.—CARMEN**

NORTHERN PACIFIC RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That Carman Melvin E. Sundquist was wrongfully deprived of his service rights on February 5, 1946, and unjustly discharged on February 12, 1946, and that accordingly, the carrier be ordered to reinstate him to all of his accumulated service rights with pay for all time lost.

JOINT STATEMENT OF FACTS: Mr. Melvin E. Sundquist was employed in the railway company's car shops at Brainerd, Minnesota, as a laborer on June 2, 1937; promoted to carman helper on June 17, 1940; appointed carman helper apprentice on September 14, 1942; and promoted to carman on September 18, 1943.

On May 10, 1945, while working as a carman in the car shops at Brainerd, Minnesota, Mr. Sundquist was injured by an explosion. On August 2, 1945, Mr. Sundquist filed suit against the Northern Pacific Railway Company in the United States District Court, District of Minnesota, Third Division. The lawsuit was tried in the United States District Court in November, 1945, and a verdict and judgment of \$10,000 was rendered and paid by the railway company.

On January 29, 1946, notice was served on Mr. Sundquist in accordance with the provisions of the current shop crafts' agreement to appear at the office of Mr. J. E. Vanni, shop superintendent of the Brainerd shops, for a hearing on February 5 in connection with lawsuit filed against the Northern Pacific Railway Company. Pursuant to this notice, hearing was held on February 6 in the office of Shop Superintendent Vanni. The hearing was postponed at request of employee's representative. A copy of the transcript of that hearing with exhibits attached is submitted as Joint Exhibit A.

Subsequent to the hearing on February 6, and on February 12, 1946, Shop Superintendent Vanni wrote Mr. Sundquist advising him that he was dismissed from the service of the railway company. Copy of Mr. Vanni's letter of February 12 to Mr. Sundquist is submitted as Joint Exhibit B.

POSITION OF EMPLOYEES: It is submitted that this claimant was an employee subject to all of the terms of the collective agreement, and that there is no bar in Rule 45 thereof, reading:

ages in a suit for permanent total disability, may recover sufficiently to qualify them to work again, but we find no such provision at present."

The Board denied that claim.

Mr. Sundquist's case comes squarely within the principles enunciated in Award 6479 of the First Division.

In case covered by Award 6483 of the First Division, National Railroad Adjustment Board, with Referee Johnson, this Division said:

"This claim differs from Award 6479, Docket 13091, mainly in that here the judgment for damages for total and permanent disability was entered by consent instead of upon a jury's verdict.",

and denied that claim.

At the hearing on February 6, 1945, Mr. Sundquist said (Joint Exhibit A):

"As far as the injuries themselves, they were permanent. The bones were broken and they will never be the same as they were but that does not say that I am not able to do a day's work."

Mr. Sundquist there reiterated his claim that his injuries were permanent but he said he could do a day's work. The doctors who testified for him said he could not work as a carman. His lawyer told the jury his earning capacity was impaired to the extent of \$100 per month. Mr. Sundquist may, according to his own statement, do a day's work, but on the testimony of his own witnesses, not as a carman.

Mr. Sundquist then said (Joint Exhibit A):

"Dr. Derauf has released me from the hospital and I asked him if I could go to work and he said he did not see why I could not go."

Having ignored Dr. Derauf's advice and brought suit and recovered judgment on the basis of permanent injuries and that he could not again work as a carman, Mr. Sundquist is in effect saying that he should have followed Dr. Derauf's original advice. This he did not do. It is now too late for him to rely upon such advice.

On page 2 of Joint Exhibit A, Mr. Sundquist stated:

"* * * the only reason I brought suit against the Company

was because I could not deal with the Local Claim Agent."

Carrier's Exhibit A sufficiently answers this allegation. Mr. Sundquist felt he could get more money from a jury. However, if Mr. Sundquist could not deal with the local claim agent, he could at any time have taken his case up with the general claim agent's office.

The essence of this case is that Mr. Sundquist had an election of remedies. He chose to bring an action against the carrier on the ground of permanent injuries which incapacitated him from again working as a carman. His case was tried and a verdict rendered on this basis. The judgment was satisfied. He is bound by that judgment and is now foreclosed from securing employment as a carman on the basis of his seniority as such.

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.

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

The issue here does not involve the right of an employe to bring suit against a carrier for personal injuries. The claim is that Carman Sundquist was wrongfully deprived of his seniority rights on February 5, 1946, and discharged on February 12, 1946.

The suit was filed against the carrier and it was argued on the basis that Carman Sundquist was permanently disabled. He was awarded \$10,000.00.

Whether or not the judgment or verdict was a just or reasonable one in the disposition of a claim for permanent disability, or whether or not Sundquist is permanently disabled, are not questions to be decided by the Adjustment Board.

The only question involved is whether or not Sundquist was wrongfully deprived of his service rights and unjustly discharged.

He was given a hearing after notice of January 29, 1946, in accordance with rules of the shop craft agreement. The notice stated:

"On the 2nd day of August, 1945, you filed suit against the Northern Pacific Railway Company in the United States District Court at Minneapolis, which was tried on an allegation and proof of severe and permanent injuries which incapacitated you from further performance of your duties as carman, upon which a verdict and judgment of \$10,000 were returned and paid by this company."

On February 12, 1946, the carrier in a letter to Sundquist stated:

"Hearing in connection with this matter was held in my office on February 6, at which hearing you acknowledged that the statements contained in the notice of hearing are correct. Therefore, you are dismissed from the service of this company."

Sundquist had not performed work for the carrier after his injuries on May 10, 1945.

In this case, as heretofore stated, the suit was presented to the court and was argued on the claim of permanent disability and the jury awarded a verdict.

In view of the action taken by Sundquist and the court, it must be held that he was not wrongfully deprived of his seniority rights on February 5, 1946, nor unjustly discharged on February 12, 1946.

AWARD

Claim for reinstatement of all Sundquist's accumulated service rights with pay for all time lost is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1947.