

Award No. 1341

Docket No. 1269

2-L&N-CM-'49

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

**SYSTEM FEDERATION No. 91, RAILWAY EMPLOYES'
DEPARTMENT, A. F. of L. (Carmen)**

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1. That the carrier's dismissal of Carman James A. Manning, effective April 9, 1948, was not authorized by the current agreement.

2: That accordingly, the carrier be ordered to reimburse him for all time lost between the dates of April 9 and December 17, 1948.

EMPLOYES' STATEMENT OF FACTS: James A. Manning, hereinafter referred to as the claimant, was regularly employed by the carrier at Birmingham, Alabama, as a carman with a seniority dating on the carmen's seniority roster of April 28, 1947. On February 16, 1948, the claimant was charged with bringing suit against the carrier and was summoned to appear for a hearing at 1:30 P. M., February 20, 1948. The date of the hearing was subsequently changed and held at 1:30 P. M., February 26, 1948, at Boyles, Alabama. This is affirmed by copies of letters submitted and identified as Exhibit A, dated February 16, 1948, and Exhibit A-1, dated February 19, 1948, respectively, addressed to the claimant with copy to local chairman of the carmen by Mr. T. H. Cremer, master mechanic.

The hearing was held as scheduled and copy of the transcript record is submitted, identified as Exhibit B, and on the basis of that record, the claimant was discharged on April 9, 1948.

This is verified by copy of the letter submitted bearing the same date, addressed to the claimant by Mr. T. H. Cremer, master mechanic, identified as Exhibit C.

On December 17, 1948, at 7 A. M., the claimant was restored to service with his seniority rights, in accordance with a letter addressed to him by Mr. R. E. McWilliams, master mechanic, and dated December 14, 1948, identified as Exhibit D.

The Agreement effective September 1, 1943, is controlling.

POSITION OF EMPLOYES: It is submitted that "bringing suit against the L&N Railroad Company" with which this claimant was charged, Exhibit A, constitutes no infraction of any provisions of the collective bargaining

(Objection sustained.)

Q. In the event an employe notices something abnormal or wrong with another employe, to whom should he report it, if any-one?

(Objection sustained.)

Q. Have you issued any instructions with reference to reports of abnormalities or anything wrong with an employe?

A. No. It is a safety rule to report any hazardous conditions or any unsafe conditions that might exist.

Q. Does that include the reporting of any person who is acting abnormally or unsafely?

A. Yes, sir, that would come in that.

Q. Was that rule in effect at the time Mr. Manning was hurt or subsequent to that time?

A. Yes, sir.

Q. I will ask you whether or not, in compliance to that rule, Mr. Knopp made any report to you about Mr. Manning's condition?

(Objection sustained.)"

From this the jury must have concluded that had the court permitted the witness to answer the question, he would have admitted receiving such report from Knopp and probably other employes also. Carrier asserts that before claimant was dismissed it had no knowledge of the facts shown in court by claimant and his witnesses, nor did it have any knowledge of any report made to Hall by Knopp or any other employe. Carrier does not knowingly permit an employe to remain on the job and receive wages for service he is not reasonably capable of performing, either for the purpose of minimizing the damages it may have to pay for injuries or for any other purpose. And carrier submits that claimant's condition as shown by the testimony in this case would have amply justified it in disqualifying him because of his disability and that it would have done so, had it known the facts and been able to confirm them while claimant was attempting to work. It is not a sufficient answer to carrier's contention to say, as the organization says in effect, that all the testimony of the claimant and his fellow employes that claimant was unable to work is false and that Foreman Hall's testimony tending to establish the contrary, must be accepted by this Board as true, notwithstanding the fact that such testimony was rejected by the jury, if it was not actually discredited.

It having been established both as a matter of law and as a matter of fact that claimant was not physically able to properly perform his duties and that he has recovered a substantial verdict and judgment based upon that fact, carrier insists that this claim should be denied.

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.

We are concerned here only with claimant's ability or lack of ability to perform the duties of car repairer between April 9, 1948, the date of his dismissal, and December 17, 1948, the date of his reinstatement.

The record reveals that on February 4, 1948, the carrier's district surgeon concluded from consultations and x-rays that claimant had recovered from his injury and thereupon discharged him for duty. Fifteen days thereafter claimant resumed his work and the record shows that he worked regularly and to the satisfaction of his foreman until he was removed from service by the carrier, without cause and for a reason other than physical unfitness on April 9, 1948. By the foregoing, claimant's fitness for work at the time of his discharge was fully demonstrated.

No convincing proof was presented by carrier indicating a change in claimant's physical condition thereafter.

Post-accident demonstration of ability to work is lacking in the cited awards. This case also differs factually from cases subject of Awards No. 1186 and 1297 because here the litigation instituted by claimant is under appeal; hence, there has been no final adjudication of the question of claimant's permanent disability to support the assumption that such was his condition during the period in question.

Carrier points out the fact that there would have been an interruption in claimant's service during the period in question, necessitated by need to prepare and try the suit instituted by him against the carrier. The record reveals that the trial took three days, October 4-6, 1948. It is assumed, somewhat arbitrarily, that an equal time was needed for the preparation for a trial as important as this. Accordingly six working days shall be deducted in computing the compensation which we find due claimant for the period in issue.

AWARD

Claim sustained as modified above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 11th day of August, 1949.