

Award No. 1634
Docket No. 1534
2-PRR-URRWA-CIO-'53

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

UNITED RAILROAD WORKERS OF AMERICA—C.I.O.

THE PENNSYLVANIA RAILROAD COMPANY

EMPLOYES' STATEMENT OF CLAIM: (1) That within the meaning of the controlling Agreement and particularly Regulation 6-A-1, Carman George Berkey has been unjustly dealt with by the carrier on and since March 12, 1951.

(2) That Carman George Berkey is entitled to be restored to service with seniority rights unimpaired and compensated for all time lost retro-active to and including March 12, 1951, by the carrier.

EMPLOYES' STATEMENT OF FACTS: There is an agreement between the parties dated July 1, 1949, copy of which is on file with the Board, and is by reference hereby made a part of this statement of facts.

At the Altoona, Pennsylvania, car shop, the carrier maintains a force of carmen.

Carman George Berkey, hereinafter referred to as the claimant, was injured on February 21, 1950, and was not able to return to work until March 12, 1951, at which time he did report and was denied the right to work, being then told that his employment relation with the carrier had been terminated as of January 15, 1951.

Carrier's Medical Examiner, Dr. Cerchione, issued a "Return to Duty" permit to claimant on December 28, 1950. Due to his physical condition, claimant did not feel able to resume his regular work, therefore, did not accept the medical examiner's return to work order.

Under date of January 5, 1951, the carrier wrote a letter to claimant stating that unless he returned to duty within ten (10) days of date of letter, he would be considered as out of service, unless he gave satisfactory reasons for remaining absent from work.

On January 9, 1951, the claimant's representative did, in his behalf, notify the carrier of the inability of claimant to return to work due to being incapacitated.

Claimant was from January to March 8, 1951, under the care of Dr. Lefkoe, M.D., Philadelphia, Pennsylvania. On March 8, 1951, claimant was released for duty by Dr. Lefkoe, M.D.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Second Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Second Division, is required by the Railway Labor Act, to give effect to the said agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i), confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it. To grant the claim of the employee in this case would require the Board to disregard the agreement between the parties thereto and impose upon the carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The carrier has established that the claimant has been properly handled under the applicable agreement and that he is not entitled to restoration of seniority or to the compensation which he claims.

Therefore, the carrier respectfully requests your Honorable Board to deny the claim of the employee in this matter.

The carrier demands strict proof by competent evidence of all facts relied upon by the claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter, and the establishment of a record of all of the same.

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

Claimant was regularly employed as a car builder in carrier's Altoona Car Shop when he suffered an injury due to an accident occurring on February 21, 1950. A settlement was made by the carrier on February 19, 1951, by which claimant received \$11,250. On December 27, 1950, Dr. A. G. Cernichione, a company medical examiner, examined the claimant and found him physically fit for duty. On January 5, 1951, claimant was notified by mail to return to duty by January 15, 1951, or furnish reasons why he could not do so and, if he did not, his failure to report would be treated as a resignation. Claimant states that he notified the carrier through one Willard Emeigh of his physical inability to report for duty. The record shows that the report was received by one R. L. Baker and communicated to Foreman Meyer, the sender of the notice of January 5, 1951. He was dropped from the service of the carrier on January 15, 1951. The record shows that claimant received benefits from carrier's relief department up to and including

March 12, 1951. He reported for duty on March 12, 1951, and was informed that he had been dropped from the service as resigned. On March 13, 1951, claimant submitted a claim for reinstatement which was denied the next day.

The carrier contends that claimant took no action whatever after the receipt of the letter of January 5, 1951, to protect his rights. The statement of claimant and Baker that they informed Foreman Meyer under date of January 9, 1951, of claimant's inability to return to work, is denied by the carrier. The affidavits of Foreman Meyer and Assistant Foreman Grove that neither saw or talked with claimant during the ten day period are relied upon to establish this fact. No one asserts that claimant talked to either of these men. The claim made is that claimant directed Emeigh to advise Meyer of his inability to return to work and that Emeigh talked to Baker who in turn informed Meyer that claimant was physically unable to report for work. The affidavits of Meyer and Grove do not dispute these allegations or make any reference to them. No other evidence is produced. In other words, the carrier has failed to squarely refute the issue upon which the organization relies. Consequently we cannot say from the record before us that carrier properly dropped the name of claimant from its list of employees as a resigned employe.

It appears from the record that claimant desired to report for work on March 12, 1951. He made application for reinstatement. He had a statement from his personal physician to the effect that he was able to return to light work which should not include heavy lifting or strenuous twisting. The work of a car builder is considered heavy work. The carrier was under no obligation to return claimant to his former position until he could establish that he was able to perform the work of such position. The carrier had paid claimant \$11,250 to cover all of the loss of disability which he had sustained. It was under no obligation to provide light work that did not include heavy lifting or strenuous twisting. It is our considered opinion, therefore, that claimant has not established by the record before us, a right to be returned to his former position because of recovery from his injury. It is true that carrier offered to return claimant to work without pay for time lost, but claimant refused to accept the offer. Under such circumstances, the parties stand in the same position as if no offer had been made. The record does not justify an affirmative award.

AWARD

Claim denied per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of January, 1953.