

Award No. 1711

Docket No. MC-1405-75

2-IGN-I-'53

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

ROBERT L. MOCK—PETITIONER

INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY

DISPUTE: CLAIM OF PETITIONER: Petitioner believes that this dispute involves four (4) questions upon which an award is desired:

1. Whether or not the railroad unjustly suspended or dismissed petitioner from their service by failing to assign him any work from April 29, 1949, until the date hereof, thereby violating Rule 17(a) of the agreement between the International-Great Northern Railroad Company and San Antonio, Uvalde and Gulf Railroad Company, with the System Federation No. 14, Railway Employees Department of A. F. of L., Mechanical Section thereof, effective September 16, 1944, providing as follows:

“If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated, with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said suspension or dismissal.”?

2. In the alternative, whether or not Rule 27 of the agreement aforesaid providing as follows:

“Employees who have given long and faithful service in the employ of the Company and who have become unable to handle heavy work to advantage will be given preference of such light work as they are able to handle.”

has been breached by the railroad in failing to assign petitioner any work?

3. In the event that either question 1 or question 2 are answered “yes,” whether or not the petitioner is entitled to his wages at the prevailing wage rate from April 29, 1949, to the date hereof, and, as a corollary to such question, whether or not he is entitled to a reasonable amount of overtime wages for such period of time?

4. In the event either question 1 or question 2 are answered “yes,” whether or not the petitioner is entitled to be reinstated with his seniority rights unimpaired?

damages only the difference between wages called for by contract and what he would have earned in other employment.

Referee Edward F. Carter in rendering First Division Award 15765, supra, adhered to this recognized rule of common law. This universally established rule, supported by authorities from the various jurisdictions, is set forth in 39 Corpus Juris at pages 116 and 117, as follows:

"A discharged servant cannot lie by unemployed for the remainder of the term, and then claim full compensation; he is bound to make the best use of his time and seek other employment. And the master may show in mitigation of damages that the servant has received compensation, during the unexpired term of the contract, from other employment, or that he may have received compensation in other similar employment by using proper effort. The rule applies, although the contract of employment includes not only the personal services of plaintiff, but also those of such others as are necessary for the performance of the contract. Where the amount received in other employment exceeds that contracted for there can be no recovery."

See also First Division Award No. 11463 (Referee Lewis) on this property, and the following additional awards of that Division of the Adjustment Board: 404, 428, 465, 1055, 3614, 4611, 5862, 6226, 9554, 11463, 11825, 11826, 11846, 11981, 11982, 12074, 12075, 12076, 12077, 12501, 12629, 12878, 12977, 12978, 12979, 13843, 14218, 15765.

CONCLUSION

It is the carrier's position in this case, abundantly supported by the foregoing record that:

(1) Petitioner has not been "unjustly suspended or dismissed" by the carrier; that the Federal Court has previously ruled he has not been discharged or dismissed; and so far as his alleged "suspension" is concerned, if his failure to be working at this may be interpreted as a "suspension", it is due solely and entirely to petitioner's own action in setting up a condition precedent to his return to service (payment for alleged lost wages) which the carrier could not, under the circumstances existing in this case, consistently agree to.

(2) Rule 27, for reasons hereinbefore stated, has no applicability in this case, and the rule has never previously been construed or applied as petitioner would endeavor to have it construed and applied in this case.

(3) Since petitioner has not been dismissed or discharged from service Rule 17 is not and could not here be applicable. This being so, Questions 3 and 4 of the employee's statement of questions in dispute must of necessity be decided in the negative.

(4) The record in this case as shown hereinbefore not only justifies but requires denial in toto of all contentions and claims of petitioner.

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 waived right of appearance at hearing thereon.

Robert L. Mock, who presents this claim to the Board, began his services with the carrier on October 9, 1922, later becoming a machinist. Claimant became afflicted with epilepsy. Carrier's medical advisers, because thereof, recommended Mock should not be allowed to work on top of engines, around pits or with machinery that he might fall into or under in case he should suddenly have an attack. As a result of this advice carrier, sometime in 1939, assigned claimant to a bench job in its South San Antonio Shops. There he continued to work at that job until April 29, 1949 when, due to a substantial reduction in forces at that point, his position was abolished. Since then he has not been assigned to any other work. Claimant contends this action of the carrier was in violation of his seniority rights, particularly as provided by Rule 27 of the agreement which covers him, and that by such action of the carrier he was unjustly dealt with. He asked for a hearing to determine that question. This carrier refused to give him.

Rule 16 of the effective agreement provides in part as follows:

"Grievances. (a) Should any employe subject to this agreement believe he has been unjustly dealt with, the case shall be taken to the Foreman, General Foreman, Master Mechanic or Shop Superintendent, each in their respective order, by the duly authorized Local Committee or their representatives; ordinarily, hearing will be held and decision rendered within 10 days after receipt of grievance.

If stenographic report of the investigation is taken, the aggrieved employe or his representative shall be furnished a copy.

If the result still be unsatisfactory, the right of appeal shall be granted; the appeal to be made in writing to the Mechanical Superintendent and Chief Personnel Officer. Ordinarily, conferences will be granted within ten days of application.

* * * * *

(b) Should the Chief Personnel Officer or his duly authorized representative and the aggrieved employe, or his representative, fail to agree, the case shall then be handled in accordance with the Railway Labor Act.

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NOTE: Neither Rule 16 nor Rule 17 attempts to obligate the Carrier to refuse or grant permission to an individual employe to present his own grievance or, in hearing involving charge against him, to present his own case personally. The effect of these rules, when an individual employe presents his own grievance or case personally, is to require that the duly authorized committee, or its accredited representatives, if it or they in each instance so request, be permitted to be a party to all conferences, hearings, or negotiations between the aggrieved or accused employe and the representatives of the Carrier."

Claimant was, and still is, an employe of the carrier. If he is correct in what he contends then he has been unjustly dealt with. He was, and still is, entitled to a hearing under Rule 16 for the purpose of giving him and carrier the opportunity of presenting the facts to determine that issue. A complete stenographic report of the hearing should be taken so if an appeal is taken therefrom to this Board it will have a record upon which to determine the issue.

We therefore return the claim to the property with directions that a hearing be held within 60 days from the date hereof and that, in accordance with the intent and purpose of the "Note" to Rules 16 and 17, that both claimant and the duly authorized local committee, or its accredited representatives, be

given 10 days notice of the time when and the place where such hearing is to be had so either, or both, may have the opportunity of attending if they so desire.

Claimant admits he is, or at least has been, afflicted with epilepsy. In this respect Carrier's supervisory personnel are not charged with the duty of determining the medical question of his fitness to work because thereof. That is normally a question for doctors to determine. If, as a result of their diagnosis and recommendations, restrictions were placed upon claimant's work activities and carrier, in good faith, acted thereon that would exonerate carrier from any claim of unjust treatment to the extent it limited its actions within such restrictions.

Rule 27 referred to by claimant provides:

"Faithful Service. Employees who have given long and faithful service in the employ of the Company, and who have become unable to handle heavy work to advantage will be given preference of such light work as they are able to handle."

This rule does place on carrier a certain duty when an employee, who has given long and faithful service to it, such as claimant has done, becomes unable to handle all the duties of his position. It does not require carrier to create a position solely with duties which such employee can perform but it does obligate it to give him preference to any position which it has, the duties of which he can perform and to which his seniority would entitle him. Whether or not such a position existed on April 29, 1949 in the district on which claimant had seniority, or has come into existence since, can only be determined by a proper hearing.

AWARD

We return the claim to the property for a hearing to be held in accordance with our findings and for the purpose therein set forth.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1953.