Award No. 1880
Docket No. 1685
2-L&N-CM-'55

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Lloyd H. Bailer when the 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 under the current agreement, Carman F. O. Neikirk was unjustly denied free transportation due him when:

(a) On November 14, 1951, the Carrier declined request for foreign line transportation and

(b) On September 27, 1952 declined request for biennial card passes for the years 1953-54.

2—That accordingly the Carrier be ordered to:

(a) Reimburse the purchase price of foreign lines transportation ($196.76).

(b) Furnish biennial card passes for the years 1953-54 to Carman F. O. Neikirk.

EMPLOYES' STATEMENT OF FACTS: On February 14, 1925 F. O. Neikirk, hereinafter referred to as the claimant, was employed by the carrier as carman at their Ravenna, Kentucky shops. He (claimant) worked continuously in this capacity until seriously injured in wrecking service on August 20, 1949 and is now shown on the carmen's seniority roster, which is confirmed by copy of roster submitted herewith and identified as Exhibit A. He worked in other classifications immediately prior to his carman employment beginning April 5, 1921.

In January 1950, the claimant, due to disability, made application for annuity with the Railroad Retirement Board and is now on disability retirement.

On October 5, 1951, the claimant made request of the carrier that he be furnished transportation for himself and dependent wife over foreign

By the terms of paragraphs (h) and (i) of Section 3 of the Railway Labor Act, the jurisdiction of the Board is limited to "disputes involving employes" and arising "between an employe or group of employes and a carrier or group of carriers". Section 1 (Fifth) of the act defines an employe as a person "**in the service of a carrier (subject to its continuing authority** to supervise and direct the manner of rendition of his service) **who performs any work** defined as that of an employe or subordinate official in the orders of the Interstate Commerce Commission now in effect . . ." (Emphasis added.)

As shown in statement of facts, the claimant applied for and accepted the status of an annuitant, in accordance with the Railroad Retirement Act, and in that status has been receiving annuity payments since November 24, 1949. Under Section 2 (a) of the Railroad Retirement Act, claimant could not be eligible for an annuity until after he had "ceased to render compensated service to any person, whether or not a carrier employer . . ." Thus, claimant's application for and his acceptance of annuity payments constitutes a conclusive declaration and confirmation by him of the fact that he ceased to render any service for the carrier as of the effective date of his annuity, and so long as he continues to draw annuity payments he is not an employe within the meaning of the Railway Labor Act and the definition of an "employee" as contained in Section 1 (Fifth) of that Act.

As said by the First Division in Award No. 15130:

> "The claimant has ceased to render any service for the carrier for which he might claim that he is entitled to a pass as a form of compensation for service.
>
> The granting of passes by management is a prerogative of management insofar as it complied with regulations supported by law."

Therefore, since this controversy arose after claimant ceased to be an employe, the Board is without jurisdiction.

* * * * * *

Without in any manner waiving its contention that the Board does not have jurisdiction for the reasons shown in the foregoing, the carrier desires to point out that there is no rule in the collective agreement that requires it to issue free transportation under the circumstances herein cited.

All factual data submitted in support of carrier's contention has been presented to the petitioner herein.

For all or any of the reasons hereinbefore stated carrier insists that this claim should be dismissed because the Board lacks jurisdiction, or, in the alternative, that it should be denied if the Board takes jurisdiction.

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.

Rule 44 of the agreement provides:

> "Employes and those dependent upon them for support will be given the same consideration in issuing free tranportation as is granted other employes in the service."

On March 27, 1948, carrier issued a statement of policy which declared:

> "Employes retired and granted annuity by the Railroad Retirement Board will be granted the same pass privileges as though they were in active service provided they have had 10 or more years continuous service with this company."

Pursuant to said statement of policy carrier has been granting passes to employes receiving disability annuities from the Railroad Retirement Board. This practice has included requesting foreign line transportation for such employes.

In 1950 claimant F. O. Neikirk began receiving a disability annuity from the Railroad Retirement Board, effective as of November 24, 1949. Claimant had entered carrier's service in 1925, and therefore had more that ten years of continuous service with the company. He retained his seniority after entering upon annuity status and is still on carrier's seniority roster.

In accordance with the above-noted 1948 policy statement, carrier renewed biennial passes for claimant and his wife for the years 1951-52. In January 1951 claimant instituted a damage suit against the carrier on the basis of alleged injuries received in its service. He subsequently withdrew that suit but in August 1952 filed another suit against carrier. In November 1951 carrier declined claimant's request for foreign line transportation for himself and his wife, and late in 1952 it declined his request to renew his passes for the years 1953-54. Carrier's reason for both declinations was the fact that claimant had instituted legal proceedings against it.

Carrier contends it has been its "consistent policy to refuse to issue passes to or request foreign line passes for employes who sue it for damages for injuries sustained in the service." Organization does not concede carrier has had such a consistent policy, but we find it unnecessary to make a finding on this point. To the extent that passes are issued at all, Rule 44 requires the carrier to give each employe the same consideration as given other employes. Carrier is thus permitted to exercise its discretion in establishing the conditions under which it will grant free transportation. The Rule does no contemplate an abuse of discretion, however. We find that enforcement of the condition that an employe will not sue the carrier is such an abuse, and therefore is in violation of the Rule.

In view of the foregoing, it must be concluded carrier violated the agreement by refusing to request foreign line transportation for claimant and his wife, and by refusing to issue him passes for the years 1953-54. We do not find carrier should be required to reimburse claimant for the cost of the foreign line transportation here involved, however. This part of the claim is conjectural, since there is no assurance the foreign line would have granted the tranportation if respondent carrier had requested it.

AWARD

Claim sustained as modified above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 1st day of February, 1955.

DISSENT OF CARRIER MEMBERS TO AWARD 1880

The majority in this award have completely ignored the record as well as decisions of the First Division of the National Railroad Adjustment Board and the recommendation of an emergency board.

The record in this case shows that the claimant received disability annuity from the Railroad Retirement Board effective November 24, 1949—some five years prior to this award.

The practice on the Louisville and Nashville Railroad in the case of an employe granted a disability annuity under the Railrod Retirement Act is to permit such a person to retain his seniority standing until the age of 65.

In case the Retirement Board determined that such person sufficiently recovers so as not to be entitled to disability allowance, such person might be restored to service provided he could pass the necessary examinations.

When a former employe is allowed disability annuity, he is not an employe as the term "employee" is defined by the Railway Labor Act.

Section 1, Fifth, of the Railway Labor Act defines an employe to mean—

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *."

Consequently, it cannot be argued that a former employe receiving annuity under the disability provisions of the Railway Retirement Act for some five years can by any stretch of the imagination be considered an employe subject to the continuing authority of the railroad to supervise and direct the manner of rendition of his service. Such an annuitant has no enforceable protective rights under the agreement and cannot have rights until he is restored to active service. The fact that his name is maintained on the roster gives him no enforceable rights under the collective agreement, and he can only be restored to service if (1) the Railroad Retirement Board decides that he is not totally disabled and (2) he can pass the necessary examinations required by the carrier.

This identical question has been before the First Division of the National Railroad Adjustment Board on at least three occasions. The First Division correctly held in each of these cases that the pass privilege is a matter over which the Division has no control, as it is not subject to collective bargaining.

Certain organizations, one of which was the one progressing this claim, served a request on the railroads nationally on or about May 22, 1953, which, if granted, would have given the employes agreement rights to transportation. This request was denied by the railroads, because they held it was not a negotiable matter under the Railway Labor Act. This request, among others, was referred to Emergency Board No. 106, and that Board in its Report to the President of the United States recommended that the request be withdrawn, because "It is a gratuity except when directly related to the employees' services and as such should be left under the control of the Carriers."

Notwithstanding all this—which was specifically pointed out in the record and in the arguments before the referee—the majority, while admitting that the carrier was permitted to exercise its discretion in establishing the conditions under which it would grant free transportation, decided that Rule 44 limits a carrier's discretion and it is required to give a former employe who violates certain pass rules the same rights as given employes who do not, notwithstanding a definite policy of the carrier to the contrary. If, as the majority state, the carrier had discretion in establishing the conditions under which it would grant free transportation, the exercise of that discretion was not subject to review or revision by this Division. Webster's Universal Dictionary defines "discretion" as: "Liberty or power of acting without other control than one's own judgment; as the management of affairs was left to