

Award No. 2229
Docket No. 1923
2-PRR-TWUOA-CIO

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

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

PARTIES TO DISPUTE:

TRANSPORT WORKERS UNION OF AMERICA, C. I. O.
RAILROAD DIVISION

THE PENNSYLVANIA RAILROAD COMPANY (Central Region)

DISPUTE: CLAIM OF EMPLOYES: That under the Current Agreement Car Oiler (helper), Carman Craft, Vito Colella, was unjustly dismissed from the service of the Carrier May 21, 1953, and that accordingly, the Carrier be ordered to restore this employe to service rights, with compensation for all monies lost retroactive to the aforesaid date.

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

At Conway C. T. Yards, Eastern Division, Central Region, the Pennsylvania Railroad Company, hereafter referred to as the carrier, employs a force of carman oilers.

Vito James Colella was, until May 21, 1953, employed at Conway C. T. Yards as a car oiler, and will hereinafter be referred to as the claimant.

While working for the carrier as an oiler on 12-12-52 the claimant suffered injuries to his right hip and right shoulder when he tripped on a railroad tie and fell.

The claimant immediately complied with the rules of the carrier and submitted to examination and treatment.

July 13, 1953, claimant received a letter dated July 9, 1953 signed by Superintendent Dorwart, advising claimant to report for duty within ten days or furnish explanation for remaining absent.

The claimant responded within ten days, with a letter written by him dated July 21, 1953. In this letter, which was presented to the foreman by him, the Claimant expressed a willingness to return to work "without additional delay".

Therefore, even assuming the organization is correct that this is a discipline case, since the claimant has not complied with Regulation 7-A-1 (a) the claim here presented must be denied.

Under the circumstances it is not necessary to discuss the merits of the instant claim, since the claim was not properly filed nor progressed to your Honorable Board and therefore cannot properly be considered or decided on the merits. However, without waiving in any way the above objections and defenses, the carrier wishes to very briefly point out that the claimant, after receiving the letter of July 9, 1953, did not return to work, did not attempt to do so, nor did he present any reason for not then returning to work. Although he did write a letter in which he set forth an alleged basis for his prior failure to return to work, at the time he wrote the letter he was fully aware that his alleged reason could no longer be relied upon to guide his future actions. Under the circumstances the carrier properly assumed he did not intend to return to active duty and therefore marked him out of service.

Furthermore, even if it were assumed, contrary to the facts point out above, that claimant was improperly marked out of service there is no basis for the allowance of alleged back wages. The claimant has since December 1952 continually refused to report for active duty, and he preserved in his refusal after being told to return to work as late as July 9, 1953. Under the circumstances there is no credible evidence that he would have returned to work at any particular later time even if he had not been marked out of service. Therefore, certainly no claim of alleged "all monies lost" can properly be sustained.

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 affect 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 employes 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.

For the reasons set forth above, it is respectfully submitted that the claim here before your Honorable Board has never been properly filed nor handled on the property and, therefore, under the Railway Labor Act is not properly before your Honorable Board, is not supported by the agreement, and must 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.

Claim is made that Car Oiler Vito James Colella was unjustly dismissed from carrier's service and, because thereof, he is entitled to be restored to his service rights and compensated for all monies lost.

Claimant was employed by carrier at its Conway, Pennsylvania. C.T. Yards. On Friday, December 12, 1952, while so employed, he was injured when he tripped on a railroad tie and fell. He was immediately examined by Dr. J. H. Boal, who found him to be physically fit and able to return to work. Claimant did so, completing his tour of duty for that day. However, he did not return to work on the next day nor at any time thereafter. On December 16, 1952, he was examined at the Rochester General Hospital, Rochester, Pennsylvania; on May 21, 1953 by a medical examiner; and on June 16, 1953 by Dr. Eugene F. Berkman. On each of these occasions he was found to be physically fit to work. As a consequence carrier, by letter to claimant dated July 9, 1953, setting forth therein these facts, advised claimant that in view thereof he "had the status of being absent from duty without permission since May 21, 1953" and notified him therein that "if you desire to protect your seniority you must return to work, * * * within ten days from the date on which you receive this letter, or within that same ten day period furnish satisfactory explanation for remaining absent, and your failure to return to work or furnish satisfactory explanation within this ten day period will be considered as indicating to us that you are no longer interested in protecting your seniority and you will be closed out of service with seniority and employe status terminated without further notice." Claimant received this letter on July 13, 1953.

Claimant, in person and by letter dated July 21, 1953 addressed to carrier, sought to explain the reason for his absence and advised carrier he wished to continue his employment. Thereafter, by registered letter dated July 29, 1953 and received by claimant on August 1, 1953, W. G. Dorwart, carrier's superintendent, advised claimant his explanation of why he had been and continued to be absent was not satisfactory and, consequently, advised his services with the carrier has been closed out as of May 21, 1953 and his services terminated as of that date. Thereafter, on August 18, 1953, claim was filed with L. A. Dixon, carrier's master mechanic, because claimant has been "marked out of service." This is the claim that was progressed on the property to the highest officer designated by the carrier to handle such disputes. There was also a claim filed on September 9, 1953 with H. W. Booher, car foreman, on behalf of claimant asking for an adjustment which requested he be restored to service with seniority restored and compensation for all time lost from August 1, 1953. However, this claim was never progressed beyond the car foreman.

Complaint is made of the fact that claimant was never given "a fair and impartial trial" as provided for by Rule 6-A-1 (a) of the parties' effective agreement in discipline cases. Carrier contends this is not a case involving discipline. We think, under all of the circumstances here disclosed, that it was and that claimant should have been given a full opportunity to have presented his side of the case at a trial held for that purpose.

However, carrier contends the claim was not properly handled on the property so as to be here for the purpose of our considering it on its merits. Regulation 7-A-1 (a), in regard to discipline, provides:

"An employe who considers that an injustice has been done him in discipline matters and who has appealed his case in writing to the Superintendent, within ten (10) working days after the employe has received notice of discipline to be imposed, shall be given a hearing."

It was W. G. Dorwart, superintendent, who signed the letter of July 29, 1953, advising claimant his services had been terminated as of May 21, 1953. Con-

sequently an appeal to him in such a situation was neither contemplated nor intended by the quoted rule, for it would serve no useful purpose since he had already passed on the question by not providing a hearing or trial on the charges that he had made against claimant on July 9, 1953. The claim was progressed on the property to the general manager, the highest officer designated by the schedule agreement of the parties to handle such matters. See Regulation 7-B-1 thereof.

The claim must here be limited to that handled on the property, which is that claimant was improperly "marked out of service." We therefore order the carrier to restore the claimant to its services with full seniority rights but deny the claim for compensation.

AWARD

Claim for restoration to service with seniority rights unimpaired sustained but claim for compensation denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 17th day of September, 1956.