Award No. 3476

Docket No. 3193

2-NYC-FO-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Lloyd H. Bailer when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 103, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.-C. I. O. (Firemen & Oilers)

THE NEW YORK CENTRAL RAILROAD COMPANY (New York District)

DISPUTE: CLAIM OF THE EMPLOYES:

1. That under the current agreement Laborer Austin Stellato was unjustly dealt with when he was denied seniority and the right to return to service on February 7, 1955, and subsequent thereto.

2. That accordingly the carrier be ordered to return the aforementioned laborer's name to the seniority roster, restore him to service and compensate him for all time lost since February 7, 1955.

EMPLOYES' STATEMENT OF FACTS: Laborer Austin Stellato (hereinafter referred to as the claimant) was employed by the New York Central Railroad Company (hereinafter referred to as the carrier) as such at Harmon, New York. The claimant was injured and operated on by carrier doctors on July 20, 1953, and August 7, 1953. On February 7, 1955, the claimant requested that he be returned to service and such request was accompanied by a written statement of T. I. Hoen, M. D., carrier Doctor, who operated on the claimant. The carrier paid all the bills which is confirmed by statement of claimant wherein he states he paid no bills. In addition, Dr. Hoen states the carrier paid the bills in statement dated June 30, 1958. The carrier refused to return the claimant to service and compensate him for all lost wages, contending the following in their letter of December 19, 1955:

> "Claim was denied inasmuch as Mr. Stellato had sued this carrier and obtained a substantial award based on testimony that he was permanently and completely disabled for future railroad service."

The dispute was handled with carrier Officials designated to handle such affairs who all declined to adjust the matter.

The agreement affective August 15, 1952, as subsequently amended, is controlling.

earned in other employment during that period. It appears from the record that Miss Allen earned $10.00 during the time she was laid off."

The Division's attention is also directed to the following portion of the court's oral opinion and findings of fact and conclusion of law in the case of Brotherhood of Maintenance of Way Employes, by Luther E. Rhyne, a member of the said Brotherhood and an officer thereof, being its general chairman of employes of the Quanah, Acme and Pacific Railway v. Quanah, Acme and Pacific Railway Company, (District Court of the United States, Northern District of Texas, Dallas Division No. 772 Civil):

"It would not be right to allow him to recover what he would have made from the defendant Railway and also keep in his pocket what he did make with other employers during the time."

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the Board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

The claim is without merit and 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.

On June 4, 1953, claimant Stellato injured his back due to lifting an oil drum while on duty for the carrier in his capacity as laborer at Harmon, New York. On July 20 and August 7, 1953, he underwent surgery to correct the condition said to have been caused by this injury. Claimant has not since worked for the carrier. He thereafter brought suit against the carrier in a State court, his complaint stating that "upon information and belief, (he) was permanently injured . . . (that he) will never be able to work again because of his injuries and will be permanently and wholly incapacitated from engaging in manual labor and that by reason thereof plaintiff has been and will be deprived of earnings, all to his damage in the sum of Two Hundred Thousand ($200,000.00) Dollars." (Parenthetical language supplied.) The resulting trial was concluded on November 9, 1954, when the jury awarded claimant $33,227.25. Carrier settled this judgment on November 22, 1954, by payment of the sum indicated.

During the course of the trial, two physicians were called to testify in the claimant's behalf. Both of these witnesses testified that another operation was recommended in order to stabilize claimant's spine and to relieve the pain, but that the anatomical or mechanical defect in his spine was permanent. Each physician also testified that in his judgment the claimant would never be able to do laborious railroad work again. The carrier offered no medical testimony.

On February 7, 1955, claimant requested the carrier to restore him to service. This was less than three months after the conclusion of the trial at which claimant's contentions had prevailed and, so far as the record discloses, no pain relieving operation had been performed on him in the meantime. He presented the carrier with a statement from a third physician, the gist of which was that he had made a remarkable recovery following a convalescence in Florida. The carrier refused claimant's request for reinstatement on the ground that his successful contention and offer of medical testimony in court that he was permanently disabled for further railroad service constituted, in effect, a relinquishment of his employment relationship with the carrier.

We have carefully reviewed the numerous awards of this Board that have been cited during the present proceeding. While it is said that there are two lines of conflicting decisions on cases of this general nature, diligent examination of these decisions reveals the great majority of them contained particular factual circumstances to which weight was given. We, therefore, decide to base our conclusion in the present dispute on the facts that are peculiar to this case.

We are of the opinion that the claim cannot be sustained. The claimant did not supply to the jury medical information that was labeled as conjecture, guesswork, or supposition. He sought to prove that never again would he be able to perform any laboring service in the railroad industry. Carrier offered no contrary medical testimony. The claimant succeeded in his proof. Since he was compensated for permanent disablement in this respect, we do not think claimant is entitled to escape the consequences of his successful endeavor by contending, in effect, that the basis upon which he obtained judgment from the carrier was all a mistake. We do not think it can be successfully asserted that the amount of the judgment rendered claimant was simply compensation for the time lost from carrier's service prior to February 7, 1955. Nor are we entitled to conclude that this sum was intended, in part, to cover medical expenses, since these were not borne by the claimant.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of June 1960.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3476

In adopting a denial award in this docket the majority has demonstrated a total disregard for the rules of the controlling agreement which set forth the procedure governing the separation of an employe from his position with the carrier and removal of his name from the seniority list.

This Board is without authority to review civil court findings, likewise we are not authorized to dispose of disputes presented to us on a basis other than the agreements negotiated pursuant to the Railway Labor Act. This claimant's seniority and employment rights with the carrier are matters

governed by the controlling agreement. The carrier acted in violation of the agreement when they refused to permit the claimant to return to the service, and arbitrarily removed his name from the seniority roster without the benefit of an investigation as provided in the said agreement.

We submit that this Board commits grievous error when it supports or approves either party's disregarding the terms of the agreements negotiated pursuant to the Railway Labor Act and in so doing will destroy the very structure within the industry that this Board was created to preserve.

James B. Zink

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner