Award No. 3883
Docket No. 3205
2-CRI&P-CM-'61

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee James P. Carey, Jr., when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 6, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C.I.O. (Carmen)

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the controlling agreement carman Charles G. Birlew, Sr., was unjustly dismissed from the service on June 12, 1957.

2. That accordingly, the Carrier be ordered to compensate Carman Birlew for all time lost at the applicable Carmen's rate for a total of thirty-one 8 hour working days.

3. That the Carrier be ordered to reimburse Carman Birlew in the amount of One Hundred Eighty-two ($182.00) Dollars, the amount due him under the Travelers Insurance Group Policy No. GA-23000, which was cancelled due to his unjust suspension.

EMPLOYES' STATEMENT OF FACTS: Carman Charles G. Birlew, Sr., hereinafter referred to as the claimant, entered the service of the carrier on August 22, 1922 and was subsequently assigned as a car inspector in the train yards, Silvis, Illinois, March 26, 1955, with assigned hours 4:00 P.M. to 12:00 Midnight, Monday through Friday, rest days Saturday and Sunday.

On June 6, 1957 Master Mechanic Thomas mailed a form G-126E by certified mail, Receipt No. 446882, to the claimant, notifying him to report for an investigation to be held at 10:00 A.M. June 10, 1957 in the office of Master Mechanic Thomas. The certified letter was received in the Carbon Cliff Illinois, Post Office June 10, 1957, received and signed for by the claimant June 11, 1957. On June 12, 1957, a Form G-126F was delivered to the claimant, notifying him that he was discharged from the service effective June 12, 1957, with the result that the claimant was discharged from the service without an investigation. The claimant was on June 12, 1957 covered by the Travelers Insurance Company Group Policy No. GA-23000 covering all non-operating employes on which the carrier paid the premium. On July 8, 1957, the claimant became ill and entered the Moline General Hospital, remaining there until

been under his doctor's care since July 8, 1957, and time lost by Mr. Birlew between June 12 and July 8, 1957, was of his own making — first, because he failed to advise the carrier he had not received the June 6, 1957 letter in time for the investigation and, second, because by his own admission in investigation held on September 5, 1957, he admitted he was not in physical condition to report subsequent to May 28, 1957. The employes for the first time, on November 11, 1957, submitted claim for Mr. Birlew's hospital expense, which we understand he incurred between July 8 and 12, 1957, and to sustain this portion of their claim, they will have to show a rule or agreement to cover or a rule or agreement that might have been violated. They can show neither. The negotiated agreement with the organization does not cover any dealings as between the employe and Travelers' Insurance; to the contrary, that is a matter between them. The question of benefits under an insurance policy, not being in the nature of rules, working conditions or rates of pay, is not a subject under jurisdiction of your Board, but a matter depending solely upon actions taken by an employe under the insurance policy under circumstances involved in this case where, of his own accord, he was not available for work.

On the basis of the facts in this case, we respectfully request declination of the claim in its entirety.

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.

Parties to said dispute were given due notice of hearing thereon.

On May 27 and 28, 1957 claimant notified the carrier that he was unable to work on account of illness. On June 6 the carrier mailed him by registered mail, a notice to report for investigation on June 10 and to then and there show cause why his employment should not be terminated. The notice stated that failure to comply with it would result in termination of employment. Clamant did not receive the notice until June 11 and consequently was not present at the scheduled hearing. On June 11 the carrier terminated his employment without a hearing. When it did so, it had no information that the notice to show cause had not been delivered. Claimant's service was terminated as of June 12. He was returned to service September 1, 1957.

Compensation is sought for time lost at the applicable carmen's rate for a total of thirty one 8 hour working days. Reimbursement is also sought in the amount of $182 for medical and hospital expense paid by the claimant in July. This latter claim is based on the theory that if claimant had not been wrongfully discharged, his group insurance under the carrier's existing plan would have been available to cover this expense. Hence the organization maintains that these expenses are consequential damages resulting from the carrier's wrongful act.

Rule 34 of the applicable agreement required that claimant be given a reasonable notice and opportunity to prepare and attend a fair hearing before discipline was imposed. In effect he received no notice of the hearing for he

was discharged without a hearing and before the notice was received. It is therefore evident that his employment was terminated contrary to the provisions of the rule. This rule further provides that if it is found he was unjustly dismissed he shall "be reinstated with his seniority rights unimpaired and compensated for the wage loss, if any, resulting from said * * * dismissal."

As noted, claimant was returned to service on September 1, 1957, and as far as we are able to ascertain from the record, his seniority rights were reinstated. If they were not that should be done. The claim for loss of wages is for 31 days at straight time rate. That claim is allowed. Although more than 31 working days intervened between June 12 and September 1, 1957, it appears that claimant was hospitalized part of the time and not physically able to work more than 31 days. The allowance for wage loss for 31 days is subject to reduction to the extent of compensation earned, if any, by the claimant from other employment, as provided in Rule 34.

The claim for reimbursement of medical and hospital expense in the amount of $182, which was borne by the claimant, would have been satisfied by the insurance company if the claimant's group insurance had not been cancelled when he was discharged. If this were a common law action for the recovery of consequential damages for breach of contract, and if this Board possessed general judicial powers, such medical and hospital expense, if proven, would constitute proper elements of damage. However, this Board has limited power under the law, and it is confined to the interpretation or application of the collective bargaining agreement entered into by the parties.

The contracting parties have specifically agreed that the damages for contract violation such as occurred in this case, is the amount of wages shown to have been lost, less earnings from other sources. Other elements of consequential damage have been excluded by implication. The term "wage" in its ordinary and popular sense means payment of a specific sum for services performed. That is the sense in which the term is used in this agreement. The language of Rule 34 has been in effect since 1941, long before the contracting parties had provided for group insurance for hospital or medical expenses. The insurance program which was in effect in July 1957 was specifically declared in the 1956 agreement to be in addition to the wage adjustments therein provided. It was by the parties own arrangement distinguished from wages. Eligibility for hospital and medical insurance protection is derived from employment status, but it is not in the usual and ordinary sense an integral part of a wage rate. We conclude that this Board lacks the power to order the carrier to reimburse the claimant for his medical and hospital expense.

AWARD

Claim disposed of in accordance with findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 8th day of December 1961.

OPINION OF LABOR MEMBERS CONCURRING IN PART AND DISSENTING IN PART TO AWARD NO. 3883.

We concur in the findings and decision of the Board insofar as they find and hold that the claimant was dismissed in violation of the rules of the applicable agreement, is entitled to reinstatement without impairment of seniority rights and is entitled to be compensated for time lost at the applicable Carmen's rate for thirty-one 8 hour working days.

We dissent from the award insofar as it denies the claimant relief with respect to the loss that he admittedly incurred in the amount of $182.00 of hospital and medical expenses which would have been paid for him by the Travelers Insurance Company but for the carrier's wrongful interruption of the claimant's employment status. The basic defect of the award lies in its treatment of the claim for relief from this loss as a claim for "consequential damages."

Consequential damages are generally considered to be those damages which arise not from the immediate act of the party, but as an incidental consequence of such act. (See Bouvier's Law Dictionary (unabridged) Rawlc's Third Revision, p. 611). It may be assumed for purposes of present discussion that, for example, if a wrongfully discharged employe is consequently without income with which to pay the premium required to keep an individual policy of hospital and medical insurance in force and he incurs expenses which are therefor uninsured, the loss is a consequential damage resulting from his wrongful discharge. It may further be assumed for purposes of present discussion that the Board is without authority to require a carrier to reimburse the employe for such expenses. These assumptions are made for present discussion purposes, without accepting their general validity, in order clearly to distinguish the case at hand from the hypothetical one we have posed in the foregoing assumptions.

At the time of claimant's discharge, which the Board holds to have been in violation of applicable agreement rules, an inseparable part of this employment relationship was his status as an insured employe under Travelers Insurance Company Group Policy Contract No. GA-23000. The wrongful termination of his employment relationship constituted in and of itself a simultaneous termination of his insured status. Rule 34 of the applicable agreement requires that an employe found to have been unjustly dismissed "be reinstated." The award in this case falls short of achieving complete reinstatement. A dismissed employe who is reemployed and compensated for time lost and has his seniority rights restored is not fully reinstated unless his insured status is also restored as of the time it was improperly terminated.

Furthermore, Rule 34 also requires that an unjustly dismissed employe be "compensated for the wage loss, if any, resulting from said . . . dismissal". The majority of the Board, by looking only at the uninsured expense incurred by the claimant rather than at his loss of insured status, asserts that these expenses were not a "wage loss". But it is abundantly clear from the history of wage and insurance negotiations of the non-operating employes that the insurance benefits here involved have been provided in lieu of additional wage increases granted to other railroad employes. The insurance protection provided is therefore definitely a part of the wage an employe earns by his employment. An employe who has been deprived of that protection and does not have it restored has not been fully compensated for his "wage loss" when he has only been paid the cash wage for the time lost through his unjust dismissal.

The fact that the rule was written before the parties had provided for group insurance for medical and hospital expenses does not, as the majority seems to hold, preclude the inclusion in wages thereafter of elements of remuneration in addition to the cash wage. Obviously the rule must refer to whatever is included in wages when the "wage loss" occurs, not to what the wage was when the rule was written. Nor can significance properly be attached to the fact that the 1956 Agreement provides for insurance benefits "In addition to the wage adjustments provided for in Articles I, II, III and IV of this Agreement". It can just as well be argued that the use of this language confirms rather than negates the inclusion of insurance benefits as part of the wage. What is controlling in this respect is the undeniable fact that over the years employes not participating in the insurance benefits have received additional wage increases estimated to be equivalent in cost to the carriers to the cost of providing the insurance protection to the non-operating employes.

When a carrier wrongfully deprives an employe of that protection and is not required to restore it, the carrier profits by a wage saving from its own wrongful act and the victim of the wrongful act suffers an uncompensated wage loss. This is true irrespective of whether the employe incurred medical or hospital expenses during the period of insurance lapse. In our view, in all cases where reinstatement with compensation for wage loss is required the carrier should also be required to pay the premiums necessary to reinstate insured status as of the time of lapse. If this were done the insurer could properly be required to reimburse such employes for covered expenses in those instances where such expenses are incurred.

We therefore hold that it is clear that the claimant is entitled to have his insured status restored as of the time it was improperly terminated. This is inherent both in his right to reinstatement and his right to be compensated for wage loss. These rights flow directly from the application of the rule itself and do not in any way partake of the nature of consequential damages.

The Travelers Insurance Company Group Policy Contract No. GA-23000 makes provision for avoiding lapse of insurance, where there has been a failure to remit premium through error, by making a subsequent remittance. We believe that this principle should be applied where failure to remit is due to an erroneous dismissal. However, if the insurer should not be agreeable to such an application of the principle and should refuse to reinstate insured status as of the time of dismissal, that circumstance should not operate to excuse the carrier from its obligation to restore insured status as of that time. In such event the only way for the carrier to discharge that obligation would be for the carrier itself to become the insurer. The fact that the carrier would then be required to reimburse the employe for the hospital and medical expenses rather than to pay premiums still would not make the claim one for consequential damages. The payment would be made in discharge of the obligation to restore insured status, which the rule itself requires as a part of reinstatement and compensation for wage loss.

/s/ **Edward W. Wiesner**
Edward W. Wiesner
/s/ **C. E. Bagwell**
C. E. Bagwell
/s/ **T. E. Losey**
T. E. Losey
/s/ **E. J. McDermott**
E. J. McDermott
/s/ **James B. Zink**
James B. Zink

Carrier Members' Answer to Opinion of Labor Members Concurring in Part and Dissenting in Part to AWARD NO. 3883

We concur in Award No. 3883 of the Board and wish to add the following comments with respect to that part of the award which holds that the claimant is not entitled to reimbursement for his medical and hospital expenses. Regarding this aspect of the award, the concurring and dissenting opinion filed by the labor members states:

> ". . . It is abundantly clear from the history of wage and insurance negotiations of the nonoperating employes that the insurance benefits here involved have been provided in lieu of additional wage increases granted to other railroad employes.
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> ". . . Over the years employes not participating in the insurance benefits have received additional wage increases estimated to be equivalent in cost to the carriers to the cost of providing the insurance protection to the nonoperating employes."

The labor members then assert that the benefits provided for nonoperating employes in this manner constitute "wages," and are thus covered by the agreement here involved which provides that an employe unjustly suspended or dismissed shall be entitled to recover "the wage loss," if any, resulting from said suspension or dismissal.

We agree with the statements by the labor members, quoted above, regarding the manner in which insurance coverage for nonoperating employes has been established in the railroad industry.

We disagree, however, with the conclusion that this history of the insurance protection for nonoperating employes makes the items here involved wages within the coverage of Rule 34 of the agreement upon which the present claim is based. The insurance protection and benefits thus afforded have been described, and are regarded, as wage equivalents (Report of Emergency Board No. 130, p. 11). It does not follow, however, that a contract provision requiring reimbursement for wage loss encompasses the insured status and the resulting benefits thus properly characterized as wage equivalents. The distinction will be clear if the basic meaning of the term "wages" is kept in mind. Thus, the findings of the Board note that

> ". . . The term 'wage' in its ordinary and popular sense means payment of a specific sum for services performed."

and that

> ". . . Eligibility for hospital and medical insurance protection is derived from employment status, but it is not in the usual and ordinary sense an integral part of a wage rate."

Ballentine's Law Dictionary defines wages as "Payment for services rendered by artisans or laborers receiving a fixed sum per day, week, or for a certain amount of work." Wages thus ordinarily reflect a direct and fairly precise relationship between service performed or time on duty and the amount due as wages. This type of relationship is not characteristic of the

insurance protection and benefits which accrue to nonoperating employes as wage equivalents. The insurance protection under the agreement covering the claim here involved accrued to qualifying employes who rendered the compensated service required by the agreement but did not vary in amount with variations in the service performed by such employes. In fact, it was and is possible, under the agreement, for nonoperating employes to receive insurance protection covering one or more months in which they were or are on furlough. Because of these circumstances, the insured status and the resulting benefits which nonoperating employes receive as wage equivalents do not fit the ordinary and basic concept of wages and are thus outside the scope of the provision entitling wrongfully dismissed employes to recover the wage loss resulting therefrom.

We repeat that the labor members have correctly described the circumstances attending the establishment of claimant's insured status. The costs involved do constitute wage equivalents but are not within the concept of wage loss. The award, therefore, is not properly subject to the criticism contained in the concurring and dissenting opinion of the labor members.

/s/ **F. P. Butler**
F. P. Butler

/s/ **H. K. Hagerman**
H. K. Hagerman

/s/ **D. H. Hicks**
D. H. Hicks

/s/ **P. R. Humphreys**
P. R. Humphreys

/s/ **W. B. Jones**
W. B. Jones