Award No. 4975
Docket No. 4870
2-PTRA-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 162, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (Carmen)

PORT TERMINAL RAILROAD ASSOCIATION

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current agreement, Carman W. C. Velasquez was unjustly discharged from service November 22, 1961, through February 9, 1962, inclusive.

2. That the Carrier be ordered to compensate W. C. Velasquez for fifty-eight (58) days time, November 22, 1961–February 9, 1962, inclusive, in the amount he lost in wages during that period, due of being held out of service.

EMPLOYES' STATEMENT OF FACTS: Carman W. C. Velasquez, hereinafter referred to as the claimant, is employed as a carman by the Port Terminal Railroad Association, hereinafter referred to as the carrier at Houston, Texas. On November 14, 1961, Carrier's Assistant Superintendent J. R. Curtis, addressed a letter to claimant, reading:

"Houston, Texas – Nov. 21, 1961
Time: 9:30 A. M.

This investigation is being held pursuant to a notice dated Nov. 14, 1961, reading as follows:

'November 14, 1961

Mr. W. C. Velasquez
7540 Avenue E
Houston 12, Texas

Dear Sir:

It has been reported to the Association Management that you failed to protect your 11 PM, North Yard assignment as a carman on Nov. 11, 1961.

pending as of the date of this submission. In view of the fact that Mr. Velasquez on November 13 knew he was being charged on November 14, 1961, with being absent without proper authority, it certainly does not follow that he was charged and disciplined because he was allegedly injured on November 14.

It is submitted that Mr. Velasquez was guilty as charged and properly disciplined, but should your Board disagree with this assertion, then and in that event any time lost in excess of the time from December 5 to December 14 was of his own making and should not be considered. In the alternative any time in excess of the period from December 5 to January 8, 1962, should not be considered because he was offered reinstatement on January 8, 1962, without any qualifying statements. Further, should the Board erroneously reinstate Mr. Velasquez with pay, we respectfully refer the Board to the last sentence of Rule 25(b) of the Agreement of March 1, 1952, in regard to situations where employes are reinstated with pay, the agreement provides:

> "It is understood that 'wage loss' shall be less the compensation earned in any other employment."

CONCLUSION:

Having conclusively established that the claim in this docket is without merit, carrier respectfully submits that it 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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant's regular assignment was the 11:00 P.M. to 7:00 A.M. shift. He did not report for work on November 11, 1961, because he was arrested at 6:10 that evening and was held until released on bond at 6:57 the next morning. He was not allowed to use a telephone and was unable to get word to his foreman until an hour and a half after his release. Subsequently he was tried and found not guilty of the charge for which he had been arrested.

He worked his regular assignment thereafter until November 14, 1961, when he was injured on duty and found unfit for service until December 5th; during that period the Carrier's personal injury claims department paid him fifteen days' wages.

On November 21, 1961, pursuant to notice, an investigation was held on a charge of violation of Rule 45 of the Carrier's Rules and Regulations, which without any exception or allowance for unavoidable absence or delay provides that "Employes must not absent themselves from duty, * * * without proper authority." That rule is of course limited and controlled by Rule 14 of the Agreement, which provides as follows:

> "In case an employe is unavoidably kept from work, he will not be discriminated against. An employe detained from work on ac-

count of sickness, or for any other good cause shall notify his foreman as early as possible."

On November 22, 1961, Claimant was notified of his discharge effective as of that date; but as above noted, he received pay until found fit for work on December 5th.

During the handling on the property the Carrier offered to return Claimant to service without pay for time lost, and by letters to the General Chairman on January 8, 1962, and to Claimant on January 30th, stated that he could return to duty, as "the discipline assessed against Mr. Velasquez has served its purpose, * * *." The reference to discipline indicated that he was not considered entitled to pay for time lost, although the General Chairman apparently construed it otherwise. It was not until February 9, 1962, that the situation was resolved by the following letter from the Carrier's General Manager to the General Chairman in which he said:

> "At our conference today we discussed the discipline case of Carman W. C. Velasquez, and it was agreed that he is reinstated to service with seniority and vacation rights unimpaired. Should the Organization desire to progress this case further under the Railway Labor Act for time lost, a dispute exists as to the number of days allegedly lost because of such discharge; therefore, this reinstatement is without prejudice to the respective positions of the parties in this regard."

In other words, the Carrier did not even then agree that Claimant was entitled to pay for time lost, but agreed that the question could be submitted to this Board, reserving the right to argue the number of days involved.

It is clear from the record that the Claimant was unavoidably kept from work, that he notified his foreman as early as possible, that his discharge was therefore unjust, and that under Rule 25(b) of the Agreement he is entitled to be "compensated for the wage loss, if any, resulting" therefrom, "less the compensation earned in any other employment."

Since, as above stated, it was not agreed until February 9, 1962, that Claimant might return to work, reserving the right to submit to this Board the question of pay for time lost, and he immediately then returned to work, he is entitled to pay for his regular Saturday to Wednesday assignment, between the discontinuance of his pay for injury and his return to service, less any compensation earned in other employment.

AWARD

Claim sustained, payment to be made for wages lost, to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 14th day of October, 1966.

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