Award No. 5312
Docket No. 5023
2-C&NW-MA-'67

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. 12, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Machinists)

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That the Chicago and North Western Railway Company violated the collective Agreements and unjustly treated Machinist Helper Fred C. Pahnke, Chicago, Illinois, Locomotive Back Shop, when they would not let him return to work August 24, 1964, and discharged him from service on November 9, 1964.

2—That the Chicago and North Western Railway Company violated provisions of Article V, Section 1 (a) of the August 21, 1954 Agreement and Rule 32 of Joint Federated Crafts' Agreement as specified in Director of Personnel's letter of instructions dated April 12, 1961.

3—That accordingly, the Chicago and North Western Railway Company ordered to reinstate this employe with seniority rights unimpaired and compensate him at Machinist Helpers' pro rata rate plus six percent(6%) interest for all wage earnings deprived of, also; fringe benefits (vacations, holidays, premiums for hospital, surgical, medical and group life insurance) deprived of since August 24, 1964, until restored to service.

EMPLOYES' STATEMENT OF FACTS: Fred C. Pahnke, hereinafter referred to as claimant, was employed as a machinist helper by the Chicago and North Western Railway Company on May 7, 1941 at Chicago, Illinois (Chicago and North Western Railway Company hereinafter referred to as the Carrier).

On August 24, 1964, Mr. Pahnke reported for work on his regular position in Building M-6, Chicago Shops, upon returning from a leave of absence.

Mr. Pahnke requested a leave of absence for three (3) months upon advice of Doctor R. Amberson, under provisions of Rule 19, Federated Crafts' Agreement that states in part:

All information contained herein previously has been submitted to the employes during the course of the handling of this case on the property and is hereby made a part of the particular question here in dispute.

Oral hearing before the Second Division is waived, provided the employes also waive hearing, and with the understanding that the carrier will have the opportunity to file a written reply to the employes' submission, and if a referee is appointed, the carrier will be given a hearing before the Division sitting with a referee.

(Exhibits not reproduced.)

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.

The claims are:

1. That the Carrier violated the agreements and unjustly treated Claimant when it would not let him return to work on August 24, 1964, and discharged him from service on November 9, 1964;

2. That the Carrier violated Article V, Section 1(a) of the August 21, 1954 agreement and Rule 32 of the current Agreement "as specified in Director of Personnel's letter of instructions dated April 12, 1961"; and

3. That Claimant be reinstated with seniority rights unimpaired and compensated for all time lost with 6% interest and other benefits until restored to service.

On June 2, 1964 Claimant was given three month's leave of absence at his own request on account of illness. On August 24, 1964 Claimant reported for work with a statement from his doctor that he had recovered and could return to work. The foreman contacted the General Foreman who notified Claimant that he could not return to work without passing a physical examination by the Carrier's medical department. He returned home rather than submit to the examination.

On August 31, 1964 the Local Chairman presented a claim to the foreman for pay lost from August 24, 1964 until Claimant's restoration to service, with 6% interest and other benefits. The claim concluded;

"Time claim and grievance is presented because employes, under the Shop Craft Agreements are not to be required to submit to physical examinations."

On October 22, 1964 the claim was denied by the Carrier by a letter from the General Foreman expressly disagreeing with the above statement and noting that no rule was cited in support of the penalty claim.

The violation of Article V, Section 1 (a) of the agreement of August 24, 1954 charged in Claim 2 is that the foreman did not deny the claim within sixty days. However, as pointed out in Award 4464 and as quoted in the Employe's submission, the requirement of that paragraph is that "the Carrier shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance * * * in writing of the reasons for such disallowance". Obviously the notification from the General Foreman is a notification from the Carrier.

Rule 32 of the Agreement, which is cited in Claim 2, is the grievance procedure rule. No violation of it by the Carrier is shown. The Employe's submission states;

> "* * * Foreman Topp and General Foreman Mittmann's handling of case was appealed and progressed to Master Mechanic A. A. Enders; General Superintendent of Motive Power, E. L. Walston and Director of Personnel, T. M. Van Patten, in their respective order."

The Director of Personnel's letter of April 12, 1961 referred to in Claim 2 in relation to Rule 32, merely states the order of appeals of claims and grievances "for the time being, and until otherwise advised." The appeals were apparently taken to the officers named except for the final appeal to the Director of Personnel, who was not specified for the purpose in the letter.

No violation has been shown of any of the provisions specified in Claim 2.

The Employe's submission cites as an exhibit a letter dated November 5, 1957, from the General Superintendent of Motive Power to other railroad officials stating as follows:

> With reference to our letter of November 5, 1957 concerning physical examination of all employes: 'That part of letter which states furloughed employes out of service over 60 days must be re-examined before they will be permitted to return to service, is cancelled in so far as Clerks, Signalmen, Maintenance of Way and Federated Crafts are concerned.' "

However, that letter revoked a general practice requiring physical examinations as a prerequisite to all returns to service after furloughs, and did not relate to resumptions of work after sick leaves, or to physical examinations when actual questions of health or physical condition are presented.

The Employes' submission cites another letter which does relate to such circumstances. It is a letter from the Assistant General Manager, dated August 27, 1934, which appears at pages 133-135 of the Current Agreement. It expressly states that such examination will be required "if, in the opinion of the supervising officer it is apparent that the health or physical condition of an employe is such" that an examination should be had for his welfare, and if the result of the examination indicates that his continuance in service would be a hazard to himself and others, a conference would be held and an independent doctor agreed upon for an examination and findings to dispose of the question.

In this instance the Claimant refused to take the examination which should have been the first step in the process; therefore the further procedure outlined in the letter of August 27, 1934 could not be followed. It does not appear

from the record that the Carrier acted contrary to the procedure thus outlined, or that it violated the agreement or unjustly treated Claimant in not permitting him to return to work on August 24, 1964 after his disability leave without a physical examination. In M., St. P. & S. Ste. M. Railway vs. Rock, 279 U.S. 410 (1929) the Supreme Court of the United States said:

> "The carriers owe a duty to their patrons, as well as those engaged in the operation of their railroads, to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service * * *."

The statement of Claimant's doctor indicates that the disability for which he obtained the three-months' leave of absence was a lumbo sacral strain, and under the circumstances it cannot be held unreasonable for the Carrier to require a physical examination by its medical department as a prerequisite to the Claimant's return to work, especially since there was a further proviso that in the event of disagreement an independent doctor would be selected whose decision would be final.

Meantime, on October 22, 1964, Claimant was instructed by letter to report to the Carrier's medical department within seven days after its receipt for a physical examination. He reported, but refused to submit to the examination. On November 3, he was instructed by registered letter to appear on November 6 for an investigation on the charge of failure to report for a physical examination as instructed. He appeared and admitted his refusal, giving as his reason:

> "As far as I recall, I remember that if any Shop men were off sick, it was not necessary to submit to a Physical Examination."

On November 9, 1964 he was dismissed from the service because of his failure to report for a physical examination as required.

Claimant's discharge on November 9, 1964 is mentioned in Claim 1, but is not properly before us. Under the Railway Labor Act the only claims which can come before this Board are claims which have been properly made and progressed on the property.

The claim which is properly before us, namely that the Carrier violated the Agreements by refusing to permit Claimant to return to work on August 24, 1964 without a physical examination, is not sustained by the record.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 26th day of October, 1967.

LABOR MEMBERS DISSENT TO AWARD 5312

The Carrier Members voting with the Referee constituted the majority in Award 5312. They erred when they stated in pertinent part:

> "The violation of Article V, Section 1(a), of the Agreement of August 21, 1954, charged in Claim 2, is that the Foreman did not deny the claim within 60 days. However, as pointed out in Award 4464 and as quoted in the Employes' Submission, the requirement of that paragraph is that: 'The Carrier shall, within 60 days from the date same as filed, notify whoever filed the claim or grievance * * * in writing for the reasons for such disallowance.' Obviously, the notification from the General Foreman is a notification from the Carrier."

It has been well established in the field of contract law and labor agreements that the application of an Agreement must be reasonable as to the intent of the parties negotiating same, which in this instant case includes the due process or procedure of time limits and appeals. The aforementioned conclusion is far from reasonable when one considers this grievance procedure rule in its total context. For example, "(c)":

> **"Article V (c)**
>
> The requirements outlined in paragraphs (a) and (b), pertaining to appeal by employe and decision by the Carrier, shall govern in appeals taken to each succeeding officer, except in cases of appeal from the decision of the highest officer designated by the Carrier to handle such disputes. * * *"

Reasonable men who are knowledgeable in contract law, and most particularly in railroad shop craft agreements, must recognize that the language of paragraph (c), when taken in consideration with paragraphs (a) and (b) of this grievance procedure rule, contemplates that it is a requirement of the employes to file a grievance with the respective designated Carrier officers. Likewise, it is expected that these officers, each in their succeeding order, are required to make a decision within a stipulated number of days (60 days from receipt). Any other application renders this rule an absurdity.

Indeed, no reasonable man would think that if he files a grievance with a local foreman and receives a reply from a much higher official, that his next appeal, according to the agreement, would be to the designated higher officer who has already rejected his original plea. The Referee in this award recognized the necessity of proper procedure when he participated in Awards 4027, 4028, 4029, 4030 and 4031.

The position of the majority here merely reflects an eagerness to circumvent the language of Article V of the August 21, 1954, Agreement, which on this particular property amended Rule 32, the Grievance Procedure Rule in the Shop Craft Agreement. The quoted statement above from Award 5312 definitely denies unto the claimant certain procedures, which the majority grants on to the Carrier. The order of appeals was clear in the record, and in fact, taken cognizance of by the majority when they state:

> "The Director of Personnel's letter of April 12, 1961, referred to in Claim 2 in relation to Rule 32, merely states the order of appeals of claims and grievance."

This should have been sufficient to establish the procedural error on the part of the Carrier. On these bases alone, the claim in toto should have been sustained.

They further state:

> "Rule 32 of the Agreement which is cited in Claim 2 is the grievance procedure rule. No violation of it by the Carrier is shown."

It is clear that, here again, the referee has attempted to create a picture that Rule 32 stands alone, while he knows full well that the record reflects that Rule 32 stands amended by Article V of the August 21, 1954 Agreement, and in this full context, was violated.

The Referee then goes on to state:

> "The employes' submission cites another letter which does not relate to circumstances. It is a letter from Asst. General Manager, dated August 27, 1934, which appears at pages 133-135 of the current agreement. It expressly states that such examination will be required, 'if, in the opinion of the supervising officer it is apparent that the health or physical condition of an employe is such', that an examination should be had for his welfare; and if the result of the examination indicates **that his continuance in service would be a hazard** to himself and others, a conference will be held and an independent doctor agreed upon for an examination and findings to dispose of the question." (Emphasis ours.)

Here, the majority completely ignores the meaning and intent of arbitration Award 471, which is found in Employes' Exhibit F-2, and the subsequent letters as to application of this Award, knowing full well from the record that Arbitration Award 471 was brought about as a settlement of a strike on the carrier property due to the fact that the Carrier was using the physical examination of its employes promiscuously, in a sense on a fishing expedition.

Arbitration Award 471, along with other correspondence made a part of this record, including the majority's own statement in pertinent part: "Indicates that his continuance in service would be a hazard to himself and others", deals with employes who are in the service of the Carrier. This man was out of service, not under pay of any kind, and therefore not subject to a physical examination at all until under pay and in the service of the Carrier.

The Referee then stated:

> "On November 9, 1964, he was dismissed from service because of his failure to report for a physical examination as required.
>
> Claimant's discharge on November 9, 1964, is mentioned in Claim 1, but is not properly before us. Under the Railway Labor Act, the only claims which can come before the Board, are claims which have been properly made and progressed on the property."

Here the majority has failed to show that the claimant or his organization is not in compliance with the Railway Labor Act—in fact, for good reason. There is no possibility of showing it. The claimant is before this Division by virtue of the procedures of due process provided for under the Railway Labor

Act and the negotiated Federated Shop Craft Agreement. This is a good example of how the referee is willing to ignore certain portions of Article V in order to favor a denial award.

The November 9, 1964, date is as much a part and parcel to the episode as a whole, as are all the other dates which have relevance to giving rise to this instant dispute; and is permitted to be all inclusive, based on the language of Article V, Section (3):

> "A claim may be filed at any time for an alleged continuing violation of any agreement, and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by filing of one claim or grievance, based thereon, as long as such violation, if found to be such, continues. * * * **With respect to claims and grievance involving an employe held out of service** in discipline cases, the original notice of request for reinstatement with pay for time lost **shall be sufficient.**" (Emphasis ours.)

The original claim deals with August 24, 1964, when said claimant was held out of service. All subsequent dates are definitely relative to the first action on the part of the Carrier to restrain the instant claimant from returning to his proper job assignment. To rule otherwise is an attempt at weasel legalistic gymnastics, and certainly not in keeping with ethical due process.

Ultimately, however, the majority appears to rest its decision not upon the agreements before this Division, but upon "a principle which it now creates." Even this principle was brought about in a shaky, vascillating manner when we consider the method used by the majority to bring about a finalized award.

The referee after hearing all final argument by both parties and having the entire deadlocked record before him, retired from the scene to consider the record and argument. Then, according to practice on the Second Division, he presented his proposed award in advance to the Carrier and Labor Members, which finding was also erroneous in nature but did project a different conclusion and finding than the final award. The first proposal reads in pertinent part as follows:

> "With regard to the claim which is properly before us, namely that the Carrier violated the agreements by refusing to permit claimant to return to work on August 24, 1964, without a physical examination, the record does not show such violation. However, in view of the time which is now elapsed, the Division concludes the claimant should be given another opportunity to appear for a physical examination to determine whether he is in physical condition to resume work; and if so, that he be returned to service with seniority and vacation rights unimpaired, but without pay for time lost or other benefits claimed.
>
> **"Claim 1 and 2 denied. Claim 3 sustained to the extent indicated in the final paragraph of the findings."**

It is clear that the present award 5312 is substantially different than the first proposed award. This is due to the fact that the Carrier members requested of the referee the right to re-argue the merits of this case, over the protest and objections of the Labor Member. The referee agreed to such re-

argument, dealing with the same record, same set of facts, with no additions or changes, and did change his findings in substance and finality.

We strongly object and dissent to this practice of the referee not considering his proposed award as final, but rather is willing to use the members of this Division as a sounding board and crutch for his deliberations. There is possible mischief in this type of procedure.

Obviously, the referee does not make an award; but under the unique procedure of this bi-partisan agency, it follows as a natural rule for the party in whose favor the proposed award has been made, to move adoption of the referee's findings.

The pattern of re-argument or rehearing by the parties is nothing novel or new; and in essence, has become institutionalized as a going practice. This "crutch behavior" is encouraging lazy, irresponsible analysis and draftsmanship, which is certainly reflected in this award to the detriment of a 23 year employe. Such De Novo argument was noted as far back as 1940 by one of the members of the Attorney General's Committee on Administrative Procedure for the National Railroad Adjustment Board (William H. Spencer, Professor of Business Law, University of Chicago) when he stated among other things:

> "* * * How far the Board should grant either party the privilege of a rehearing (re-argument), a privilege accorded parties in civil actions within the discretion of the trial judge, is a question of procedure which has given the Board some concern. The Act itself is silent on the issue, and the Adjustment Board as a whole has not seen fit to adopt a specific rule of procedure governing this situation. So far in the experience of the Board, it has always been the Carrier which has requested the privilege of rehearing; and the request has universally been for rehearing before the Division with a referee sitting as a member thereof. * * * (Committee comment) This request is a reflection upon the technical and general competence of the Carrier members who are selected by the Carriers to represent them on the Board."

The flaws in this award and the procedure and principles followed in the making of it, leave a lot to be desired, so as to promote a better understanding of the collective bargaining agreement and the human relations involved. Such errors are repugnant to the due process under the Railway Labor Act and Shop Craft Agreement.

We vigorously dissent.

R. E. Stenzinger

C. E. Bagwell

E. J. McDermott

O. L. Wertz

D. S. Anderson

REFEREE'S REPLY TO LABOR MEMBERS DISSENT ON AWARD NO. 5312

Cases decided should not be reargued, but the referee whose desire to be right under the Rules exceeds his pride of opinion should perhaps not be censured for correcting obvious error. As the dissent points out, he wanted to effect Claimant's re-examination for possible restoration to duty, but must regretfully admit that it was obviously untenable in view of Claimant's complete separation from the service on November 9, 1964.

The dissent cites Article V, Section (3) as authority for the proposition that the claim for Claimant's dismissal of November 9, 1964 was properly before this Board even though it was never made nor progressed on the property. The provision of this section as quoted and underlined in the dissent is as follows:

> **"With respect to claims and grievances involving an employe held out of service** in discipline cases, the original notice of request for reinstatement with pay for time lost **shall be sufficient."**

What should properly have been underscored was **"in discipline cases."** This is not a discipline case, and the provision is clearly inapplicable. It was undoubtedly for that reason that the provision was not mentioned in the record nor cited during the proceerings before this Board.

Howard A. Johnson
Referee

LABOR MEMBERS' COMMENTS TO ERRORS IN REFEREE HOWARD JOHNSON'S REPLY TO LABOR DISSENT IN AWARD 5312

It is not the intent of Labor to burden this record with further refutation to the majority's Award 5312. Under ordinary circumstances we would consider that enough has been said. This is not an ordinary error here, though. It is a complete and absolute misunderstanding of fact.

In the Referee's reply, he states among other things:

> "The dissent cities Article V, Section (3), as authority for the proposition that the claim for claimant's dismissal of November 9, 1964, was properly before this Board, even though it was never made nor progressed on the property. The provision of this section as quoted and underlined in the dissent is as follows:
>
> > **'With respect to claims and grievances involving an employee held out of service** in discipline cases, the original notice of request for reinstatement with pay for time lost **shall be sufficient.'**
>
> What should properly have been underscored was 'in discipline cases.' **This is not a discipline case, and the provision is clearly inapplicable. It was undoubtedly for that reason that the provision was not mentioned in the record nor cited during the proceedings before this Board."** (Emphasis ours.)

The record reveals the truth that Article V of the August 21, 1954, Agreement, was discussed in the record by both parties and specifically Article V, Section (3), by the Carrier in their submission (page 11), which we cite in pertinent part:

(Page 11)

"There can be no question concerning the fact that the time limit rule applies to discipline cases, including the claimant's dismissal. Note the specific reference to discipline cases in paragraph 3 of Article V of the Agreement of August 21 1954, which provides:

'3. A claim may be filed at any time for an alleged continuing violation of any agreement and all rights of the claimant or claimants involved thereby shall, under this rule, be fully protected by the filing of one claim or grievance based thereon as long as such alleged violation, if found to be such, continues. However, no monetary claim shall be allowed retroactively for more than 60 days prior to the filing thereof. With respect to claims and grievances involving an employe held out of service in discipline cases, the original notice of request for reinstatement with pay for time lost shall be sufficient.' "

The foregoing definitely proves that the referee is wrong and that this particular point was a part and parcel to the basic dispute before this Division. It is now conceivable to us that apparently the referee did not read the entire record. Such cavalieric treatment of this record is wrong.

R. E. Stenzinger

E. J. McDermott

C. E. Bagwell

O. L. Wertz

D. S. Anderson

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