

Award No. 6047

Docket No. 5741

2-N&W-CM-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Don J. Harr when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 16, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. — C. I. O. (Carmen)**

NORFOLK AND WESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That Car Repairer Shelton Bowe was unjustly deprived of his service and seniority rights, when he was discharged from his position on March 14, 1967.

2. That the Carrier be ordered to restore Claimant to service with Seniority rights unimpaired, and compensation at his applicable rate for all time lost as result of his dismissal.

3. That the Carrier be ordered to make Claimant whole for all Vacation rights, and pay premiums for Group Life Insurance for all time he was held out of service.

EMPLOYEES' STATEMENT OF FACTS: Prior to March 14, 1967, Shelton Bowe, hereinafter referred to as the claimant was regularly employed as a car repairer by the Norfolk and Western Railway Company, hereinafter referred to as the carrier, at Carrier's Shop, Columbus, Ohio.

On October 4, 1966, about 11:00 A. M., claimant suffered a back injury while removing a seventy-five (75) ton Joyce Jack from under a hopper car. Claimants' injury was reported to Foreman A. O. Mills, who requested claimant to report with him to the general foreman's office, where a statement of injury was recorded by Chief Clerk C. J. Hunnicutt, and Gang Foreman C. R. Cohagen. After completing said statement, Foreman Cohagen secured an appointment for claimant with carrier's physician Dr. W. T. Paul, who examined claimant and stated to Foreman Cohagen and claimant, that he (Dr. Paul), did not think it was too bad an injury and claimant could return to work. Claimant was given a prescription for pills and Foreman Cohagen had the prescription filled and returned claimant to the Shop. Claimant was off from work nine (9) days due to said injury, returning to work on October 14, 1966.

Carrier has shown:

1. In seeking a remedy in civil court prior to submitting the case to the National Railroad Adjustment Board, claimant has removed the case from the jurisdiction of the board.
2. Claimant has not asserted in this investigation nor proved he was injured at the time and place as claimed.
3. Claimant cannot be restored to service as requested due to his plea that he has been and will in the future be unable to work and earn money.
4. There has not been shown that a loss of wages resulted in this instance and carrier is not required to pay for time lost.

In view of the above, this claim should be dismissed for lack of jurisdiction and/or declined on its merits.

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 was employed as a car repairer at Carrier's shop, Columbus, Ohio. On October 4, 1966, Claimant suffered an alleged injury while removing a 75-ton jack from under a box car.

Claimant reported to Foreman A. O. Mills, made a statement of injury and was examined by Carrier's doctor. Carrier's doctor gave Claimant a prescription and indicated that the injury was not serious and he could return to work. Claimant was off work nine days and returned to work on October 14, 1966.

On January 20, 1967, Claimant was notified to appear for investigation, charging him with making a false claim of personal injury. Investigation was held on January 20, 1967. Because of the protest made by Claimant's representatives, the investigation was reconvened on February 14, 1967. As a result of this investigation, Claimant was notified on March 14, 1967, that he was dismissed from service.

The Employe contends that the handling of this matter by the Carrier violated Rule No. 37 of the effective Agreement.

Rule 37 reads in part:

"* * * at a reasonable time prior to the hearing such employe will be apprised of the charge against him. * * *"

This Rule does not require that the charge be in writing or that it be specific. The oral charge given Claimant by his supervisor met the requirements of Rule 37.

We find that there are discrepancies in the testimony offered on the two dates of the investigation; in particular, the two statements of Mr. Lozier. We do find that the evidence is overwhelming that the Claimant suffered an injury on the date and time in question.

We note that Claimant has filed a civil action in the United States District Court, Southern District of Ohio, Eastern Division. This civil action does not involve the claim before this Board and will not be considered.

Rule 37 provides the remedy when an employe has been unjustly dismissed from service.

Rule 37 reads in part:

" * * * such employe shall be reinstated with his seniority rights unimpaired, and compensation for the wage loss, if any, resulting from said suspension or dismissal."

We will sustain Item 2 of Employees' claim for Claimant's wage loss less any earnings Claimant may have had from other employment.

Under the particular facts in this case Claimant would suffer no wage loss under the rule on days on which he was unable to work because of his physical condition.

Except for restoration of vacation rights, we find no basis in the Agreement for sustaining the remainder of Item 3 of the claim.

AWARD

Item 1 of claim sustained.

Item 2 of claim sustained as set out above.

Item 3 of claim denied except as to vacation rights.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November, 1970.

**CARRIER MEMBERS' DISSENT TO AWARD 6047, DOCKET NO. 5741
REFEREE DON J. HARR**

In this case the Majority placed itself in the role of being the trier of the facts by weighing the evidence and determining the credibility of witnesses notwithstanding the consistent holdings of this and the other Divisions

of the Board over the years that such is not the function of the Board in discipline cases.

For this and other reasons the award is erroneous and we dissent.

J. R. Mathieu

H. F. M. Braidwood

W. R. Harris

P. R. Humphreys

H. S. Tansley