

Award No. 6142
Docket No. 5976-I
2-EJ&E-I-'71

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

PETITIONER, FRANK DESIDERIO (Carman)
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES:

The employe, Frank Desiderio, claims that he was wrongfully suspended for ninety (90) days for an alleged violation of Work Rule 44 that is fully set forth in the Statement of Facts herein.

PETITIONER'S STATEMENT OF FACTS: On July 10, 1969 Frank Desiderio, the employe on the job in the Elgin, Joliet and Eastern Railway Company car shop, was injured. Immediately thereafter a written accident report was completed and signed by the employe.

On September 29, 1969 the employer, by written letter, ordered the employe to appear at the claims agent's office for purposes of giving a recorded interview.

The employe had at this time retained counsel to represent him and was advised by counsel that the tape recording of a person's statements without their explicit consent was a crime in Illinois and refused, orally, to attend said meeting.

On October 13, 1969 the employe received another notice of a formal investigation to be held by the employer.

That in compliance with the aforesaid notice of October 13, 1969 the employe attended said claims agent's meeting and a partial hearing was had on October 21, 1969. It will be noted therein that the employe advised the employer at that time that he felt it was a violation of the Illinois law to require such a statement and that he had complied with Rule 44 which required him to file an accident report.

On December 15, 1969 the employe filed an action under the Federal Employees' Liability Act in the First Municipal District of the Circuit Court of Cook County, case no. 69M1 307881, and on or about January 8, 1970 the employer, through counsel, filed their appearance and answer in said cause.

CONCLUSION

In this submission the carrier has demonstrated:

1. The instant case is outlawed and barred under procedural aspects.
2. The case is now moot.
3. Claim is invalid on its merits. Rule 44 a secondary issue, insubordination primary.

Because of the reasons outlined above, the carrier respectfully requests a dismissal or a denial award.

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 employees 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.

Since the record shows conclusively that this claim was not handled on the property by the Claimant or his representative in accordance with the provisions of Article V of the August 21, 1954 Agreement, and since no conference relative to this claim was held on the property prior to it being submitted to this Board, we have no alternative other than to dismiss it on these procedural grounds.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 21st day of April, 1971.