Award No. 6209
Docket No. 5415-I
2-DM&CI-I-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

With Referee William H. Coburn

PARTIES TO DISPUTE:

THOMAS B. HADDEN

DES MOINES AND CENTRAL IOWA RAILWAY COMPANY

ON REMAND FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

OPINION OF BOARD: On September 30, 1968, the National Railroad Adjustment Board, by Order of its Second Division, rendered Award No. 5540, sustaining in part a claim filed by Thomas B. Hadden against the Des Moines and Central Iowa Railway Company.

On December 11, 1968, a petition for review of Award No. 5540 was filed by Hadden with the United States District Court for the Southern District of Iowa, Central Division.

On July 1, 1970, the Court rendered its Memorandum of Decision in the case designated as Civil No. 8-2308-C-1, and on September 4, 1970, entered Judgment Order granting Plaintiff's motion for summary judgment and remanding Award No. 5540 to the Second Division of the National Railroad Adjustment Board with instructions to reconsider the award consistent with the directives of the aforesaid Memorandum of Decision and in keeping with the requirements of the Railway Labor Act (45 U.S.C. §151 et seq.)

Pursuant to the Order of Court, the Second Division with the participation of a referee, on July 15, 1971, held another hearing of the dispute at which the parties were represented by counsel and given full opportunity to present their respective positions in the matter. Thereafter, the Second Division met in executive session to discuss the case in the light of the Court's specific instructions and the arguments made by party counsel.

THE COURT'S MEMORANDUM OF DECISION.

The Court has directed the Second Division of the Board to set out in this Award the following:

1. Its jurisdiction, the claims properly before it and the disposition thereof.

2. Whether or not Hadden was thwarted by the Carrier in his attempts to adjust the dispute on the property, and, if it is thought that he was, an appropriate remedy should be fashioned.

3. If some of Hadden's claims are not thought properly before the Board, the reasoning behind such a decision should be given.

4. The Second Division should either give consideration to Hadden's claim that Rule 10 of the 1946 Agreement was violated or set forth its reasons, in this Award, for its failure to do so.

Pursuant to these instructions, and after a review of the record and re-hearing of the dispute, the Board makes the following findings:

JURISDICTION

As was stated in Fourth Division Award No. 2305, (involving these same parties) the Railway Labor Act, as amended (45 U.S.C. §151 et seq.) provides in Section 153 First (h) that each of the four divisions comprising the National Railroad Adjustment Board (Board) shall have jurisdiction over a specified class or craft of employes and that the "proceedings" of each shall be "independent" of the others. It has been made clear that the jurisdiction of each division is exclusive. **(See Order of Railway Conductors v. Swan, 329 U. S. 520).** The jurisdiction of the Second Division is defined as: "To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, **carmen,** the helpers and apprentices of all the foregoing, coach cleaners, power-house employes, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employes." (Emphasis ours.) Accordingly, the Second Division in the case at hand has jurisdiction only over those claims based upon Hadden's contractual rights as a Carman. Those claims encompass (1) Hadden's right to exercise his seniority as a carman; (2) his right to an investigation or hearing in accordance with Rule 2 of the 1946 Agreement; (3) whether or not the Carrier violated Rule 10 of the aforesaid Agreement in failing to furnish employment suited to his capacity; (4) whether he was entitled to be paid for 18 additional working days after January 13, 1967, under Rule 19 of that Agreement; (5) his rights to a coordination or separation allowance under the National Agreement of September 25, 1964 (the so-called Shop Crafts Agreement); and (6) whether he was compensated at the proper rate for three weeks vacation time.

The question of Carrier's right to abolish Hadden's job as a Car Foreman is not within the jurisdiction of the Second Division because the Fourth Division of this Board has exclusive jurisdiction over such supervisory employes.

The question of Hadden's right to a coordination or separation allowance under the Shop Crafts Agreement is one which may not properly be resolved by this Division because Article VI of that Agreement confers exclusive jurisdiction of such disputes upon a Special Board of Adjustment created by the parties to consider and decide grievances concerning the interpretation and application of the employe protective benefits granted by Article I thereof. Accordingly, we decline to assume jurisdiction of the question on grounds that the Second Division is not the proper forum for the resolution of such disputes.

DUE PROCESS

The Court in its Memorandum of Decision directs the Division to find whether or not Hadden was "thwarted" by Carrier in his attempts to adjust the dispute on the property, meaning, as we understand it, whether his procedural rights under the Railway Labor Act and the 1946 Agreement between these parties were observed during the handling of the claim on the property.

In Award 5540, the Board held that the Carrier's refusal to meet with Hadden and his legal representative was not violative of the Railway Labor Act because his union representatives did meet in conference to discuss the dispute with the Carrier ". . . while the underlying claim was being considered on the property, and it is not denied that such officials had an opportunity to examine the physical report dated January 12, 1967." The Court's comments on this finding follow:

> "The answers given by the Second Division merely beg the question presented by Hadden's claim. It is not denied that a discussion took place between the Carrier and the Union. But, the question here is whether Hadden's procedural rights were satisfied by whatever meetings that did take place.
>
> In short, the possibility remains that Hadden was denied some of his procedural rights by the Carrier. If so, the Union's concurrence in such unlawful actions could not make those actions lawful and, for practical purposes, deny Hadden a remedy through the National Railroad Adjustment Board.
>
> This does not mean that the various Divisions of the National Railroad Adjustment Board must determine when a Union has wrongfully abandoned a railway employe's claim. It simply means that the Board, through its various Divisions, must determine whether an employe has been allowed by the Carrier to exercise his procedural rights in connection with a dispute when that matter is put in issue by a claimant. Otherwise, it is a simple matter for an employer to deny the very remedies especially provided by Congress in these types of cases." (Memorandum of Decision, pp. 21-22.)

The Board again finds that Hadden was not denied any of his procedural rights by the Carrier. Section 2, Second, of the Railway Labor Act, titled "General Duties," reads as follows:

> "Second. All disputes between a carrier or carriers and its or their employes shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employes thereof interested in the dispute."

The record establishes that the Union representing Hadden and representatives of the Carrier did confer on the subject matter of Hadden's claim, at which meeting the Union representatives were shown the medical report of the physician who examined Hadden. There is no evidence in the record before the Board to establish what was said or done at the conference or whether or not Hadden's claim was fully and vigorously pressed. We do know that no appeal from the Carrier's denial of the claim at that conference was taken by

the Union. And we note further from an examination of the 1946 Agreement of the parties that no provision is there made for step-by-step grievance handling or for a formal appeals procedure — subjects which are customarily spelled out in collectively bargained agreements in this industry. Consequently, there is no basis for a finding that Hadden's procedural rights under the 1946 Agreement were violated.

The subsequent refusal of the Carrier again to confer on the subject matter of the claim with another representative of Hadden was apparently based upon the premise that Hadden had not been discharged but rather had been found physically disqualified from performing the duties of a carman.

This aspect of the dispute, as has been noted, was discussed in the first conference with Hadden's Union representatives. Although in the interests of sound and progressive labor relations, the Board believes that the Carrier should have complied with the request of counsel for Hadden for a second conference, nonetheless, we find no legal obligation for it to do so under either the Railway Labor Act or the 1946 Agreement.

Whether on the facts of record in this case, Hadden was "thwarted" by the Carrier in his efforts to obtain a favorable adjustment of his claims on the property is not a relevant question for resolution by the Board. The controlling issue is whether or not he was deprived by Carrier of any procedural rights stemming from either the Railway Labor Act or the 1946 Agreement. We hold that he was not so deprived. As the Court said in **Edwards v. St. Louis–San Francisco Railroad Company** [361 F. 2d.946 (CCA 7th 1966)]:

> "Basically, all that is required of the initial conference on company property is that 'men of good faith must in good faith get together in a sincere effort to resolve their differences.' Rutland Railway Corporation v. Brotherhood of Locomotive Engineers, 307 F.2d 21, 41 (2d Cir. 1962). The federal courts are not the guarantors of any rights of either labor or management at the initial hearing, either by force of the Constitution or the Railway Labor Act, for, as we have said, at that stage the dispute is between private parties and the applicable procedure for settling the dispute is governed by the contract between them."

On the question of whether or not claimant was "permitted by Carrier to exercise his seniority rights, again the record establishes conclusively that during the week of January 2d to 6th claimant elected to assert his seniority by taking a job as car repairman — in accordance with Rule 3 (f) of the Agreement. That rule reads: "Employes whose positions are abolished may exercise rights over junior employes, consistent with ability. The employe thereby displaced may exercise their [sic] rights in the same manner. Thus, there appears to be no basis for a finding that the Carrier thwarted Hadden's exercise of his seniority rights under the 1946 Agreement.

The alleged denial by Carrier of Hadden's right to an investigation or hearing in accordance with Rule 2 of the 1946 Agreement was based upon the averment in the petition filed with the Second Division that "On January 13, 1967, the Employer summarily discharged the Petitioner without an investigation or hearing, in violation of Rule 2 of the said Agreement."

This Board found, however, in Award No. 5540 of the Second Division that ". . . Claimant was not discharged by Carrier. . . ." and that "As to Petitioner's averment that the physical examination was a sham and tantamount to discharge, no probative evidence was offered to support such a finding." The effect of these holdings was that the claim of Rule 2 violation could not be sustained because Hadden was not "dismissed or disciplined" within the meaning of the language of the rule, which, in pertinent part, reads: "An employe who has been in service more than sixty (60) days shall not be **dismissed or disciplined** without an investigation or hearing." In the case law of this industry the foregoing rule language does not encompass the withholding of employes from service for physical disqualifications, but, instead, applies solely to employes facing disciplinary charges. There was, accordingly, no violation of Rule 2 by the Carrier, as alleged.

Rule 10 of the 1946 Agreement reads as follows:

> "Efforts will be made to furnish employment (suited to their capacity) to employes who have become physically unfit to continue in service in present condition."

The Court has directed the Board to consider Hadden's claim that the Carrier violated Rule 10, **supra.** Accordingly, we have reviewed the record and find no evidence of probative value to support the bare allegation that the Carrier made no effort to furnish claimant with suitable employment. Moreover, the Carrier affirmatively stated that no such employment could be found in view of Hadden's then existing physical condition. There is thus no evidentiary basis for a finding that the Carrier violated Rule 10, as alleged.

The Board in Award No. 5540 found that Hadden was entitled to disability pay for 18 days under Rule 19 of the 1946 Agreement. We affirm that holding.

Hadden's claim for three weeks vacation pay at the Car Foreman's rate of pay was denied by the Board in Award No. 5540, holding that Hadden was properly compensated at the rate of the Carman's position to which he was assigned at the time he applied for vacation benefits. We affirm that ruling as a proper interpretation of the vacation agreement in effect on this property at the time the dispute occurred.

The Executive Secretary of the Second Division of the National Railroad Adjustment Board shall file a certified copy of this opinion on remand with the Clerk, United States District Court for the Southern District of Iowa Central Division and serve like copies on the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 1st Day of December, 1971.

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