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Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 6500
Docket No. 6361
2-LI-EW-'73

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

Parties to Dispute: (System Federation No. 156, Railway Employes' Department, A. F. of L. - C. I. O. (Electrical Workers)
(The Long Island Rail Road Company

Dispute: Claim of Employes:

1. That the Long Island Rail Road, in violation of the current Agreement, improperly denied Electrician Helper Third Railman F. D. Campbell the right to perform service for the Long Island Rail Road.

2. That, accordingly, the Long Island Rail Road be ordered to reinstate Electrician Helper Third Railman F. D. Campbell with all benefits, vacation and seniority rights unimpaired and with compensation for all time lost as a result of said action.

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 were given due notice of hearing thereon.

This is a disciplinary case in which claimant, after having been charged by the Carrier and afforded a hearing as well as an appeal hearing on the original hearing, was dismissed from the service.

On July 7, 1971, claimant suffered an injury to his neck while being transported in the back of Carrier's truck on the Long Island expressway near the Cross Island Parkway in a road construction area. The truck hit a pothole in the road resulting in claimant twisting his neck and further aggravating a similar injury sustained in the same set of circumstances on June 7, 1971.

By letter under date of July 15, 1971, Claimant was notified to report for trial on July 22, 1971, having been charged with "inability to properly perform your assigned tasks safely."

Complainant has been employed by this Carrier since 1959. At the beginning of the hearing, the hearing officer began to read a list of injuries sustained by the Complainant from 1960 to 1971. Complainant's representative at the hearing objected to a reading of these incidents of injuries as reflected in Organization's exhibit B-7 of the record which reads as follows:

> "JJB - As to all of this here, I would like to make a protest pertaining to these statements, that have been read into the record by the Carrier. These should have no bearing on Mr. Campbell's present trial.
>
> LRC - To clarify for the record, a written record of the accidents previously read into the record will be included as part of the record of this trial.
>
> JJB - I would like to protest the statement that Mr. Compton just made relevant to the prior cases."

After reviewing the transcript of the hearing as well as the exchange of correspondence on the property, we find that the charge against the complainant was much too broad in order to enable him to properly prepare his defense. It is quite evident from the record that he was not prepared to answer in detail every incident mentioned by the hearing officer over a 12 year span. It is true indeed that the charge as originally presented, in order to over-come the objection of it being vague and indefinite, need not attain the specificity of a criminal indictment, but it should be sufficiently precise and definite so that the accused may respond with his version of the facts involved to constitute a reasonably adequate defense from his point of view. He should not appear at the hearing and be surprised at the detailed charges levelled against him. Elemental rules of fair play militate against broad general, indefinite and imprecise charges. We will sustain the claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of May, 1973.

NATIONAL RAILROAD ADJUSTMENT BOARD Serial No. 70
SECOND DIVISION

(The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when the interpretation was rendered.)

INTERPRETATION NO. 1 TO AWARD NO. 6500

DOCKET NO. 6361

NAME OF ORGANIZATION: System Federation No. 156, Railway Employes' Department, A.F. of L. - C.I.O. (Electrical Workers)

NAME OR CARRIER: The Long Island Rail Road

QUESTION FOR INTERPRETATION:

Award No. 6500 was rendered by this Board (sitting with another Neutral) on May 30, 1973. The claim was sustained and Carrier reinstated the Claimant, but refused to compensate Claimant for time lost until Carrier was furnished with proof of outside earnings for deduction purposes. The Organization refused.

After several discussions and exchanges of correspondence had failed to resolve the matter, the Organization requested an Interpretation from this Board as follows:

Does the language contained in Item 2 of the Claim of Employes in Award No. 6500, reading:

> "That, accordingly, the Long Island Rail Road be ordered to reinstate Electrician Helper Third Railman F. D. Campbell with all benefits vacation and seniority rights unimpaired and with compensation for all time lost as a result of said action."

and the Award reading:

> "Claim sustained."

allow the Carrier to deduct from Claimant's wage loss any outside earnings?"

The agreement provision involved is Rule 26-D that reads:

> "When an employe is held out of service in connection with an offense and thereafter is exonerated, the charge shall be stricken from his record, he shall be reinstated with seniority unimpaired, and shall be compensated for the amount he would have earned had he not been held out of service."

As noted, neither the Findings nor the Award included any mention of deduction for outside employment.

Initially, the Organization asserts that Carrier is precluded from arguing that it has a right to deduct outside earnings because that issue was raised for the first time in Carrier's Rebuttal. In its Rebuttal, Carrier stated:

> "If for some reason not readily evident to the Carrier, your Board should overrule the Carrier's position and order it to restore Claimant to its employ, Carrier, in conforming with hundreds of awards rendered by your Board over the years, claims the right to deduct any outside earnings Claimant may have had in the interim from the gross amount due him."

While the question of mitigation was raised belatedly, almost as an afterthought, it was presented to the Board for its consideration prior to its Award. Moreover, Rule 26-D was cited by the Organization in its Ex Parte Submission as being applicable to this dispute.

The Organization urges that Award No. 2 of P.L. Board No. 852 must be followed since it involved the same parties and identical issues. There, however, the Board refused to consider the question of mitigation because that question was never raised until after the Board had rendered its Award. The Board stated:

> "The Referee finds that it is improper for either party to seek by way of an Interpretation a ruling on an issue which was not raised ab initio when the case was being argued before the Board. For one or both of the parties to seek an Interpretation here of the Award is not to seek an Interpretation of the present Award, **but rather to seek a new award on a new dispute not properly raised.**
>
> * * *
>
> This is the reason why this Neutral must hold that the question of money damages, if any, and the mitigation thereof, must be pleaded and argued in the proceedings before the Adjustment Board or the Public Law Board, and it must be done timely, i.e., before the Board has rendered its Award and Order."

Award No. 2 of P.L. Board No. 852 is, therefore, not applicable.

On this property there are three awards holding that language identical to Rule 26-D allows the Carrier to deduct earnings from outside employment. They are Second Division Award No. 1398, Third Division Award No. 10878, and Award No. 1 of P.L. Board No. 1173. Accordingly, the Board shall, in the interests of consistency and precedent, follow such awards on this property. Award No. 6500 is interpreted to allow Carrier to deduct earnings from outside employment.

INTERPRETATION NO. 1 TO AWARD 6500 (DOCKET NO. 6361) Serial No. 70

Referee John J. McGovern sat with the Division as a Member when Award No. 6500 was rendered, and Referee Nicholas H. Zumas participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this **12th day of September, 1975.**

DISSENT OF LABOR MEMBERS TO INTERPRETATION NO. 1 TO AWARD No. 6500

This Interpretation is in violation of the Railway Labor Act, the Agreement and the Rules of the Board and the Referee knew this as the following appears on page two of his findings:

> "While the question of mitigation was raised belatedly, almost as an afterthought, it was presented to the Board for its consideration prior to its Award."

The employes in their submission for an Interpretation stated the following:

> "No issue was raised by the Long Island Rail Road Company in the handling of the claim on the property relative to Item 2 of the Claim of the Employes. The Carrier was content to premise its disallowance of the claim solely on the defense that its action complained of was not a violation of the agreement. In Award No. 6500, the Board found this defense without merit; and, no other issues having been raised on the property, it sustained the claim of the employes as presented. The employes are urgently requesting this Neutral to support its initial decision in Second Division Award No. 6500.
>
> As previously stated, the issue of outside earnings was never discussed, either orally or in writing, on the property while the dispute was being progressed in the usual and customary manner. The only reference to any outside earnings, as previously reported, is contained in the Carrier's rebuttal statement as shown in the penultimate paragraph of the Carrier's rebuttal. The Board has consistently held that such late invocation of any matter could not be considered by the Board in making its decision. Neither can it be considered by the Board as having been handled in the 'usual manner' when such issue is back before this same Board for an interpretation to its previous Award.

"Pursuant to the Board's rule making power vested by Section 3 First (v) of the Act, as amended, the Board, on October 10, 1934, duly promulgated its Circular No. 1 'Organization and Certain Rules of Procedure'. This Circular has stood unamended during the 39 years existence of the Board. Under 'Classes of Disputes' the Board reproduced Section 3 First (i) of the Act, supra, which inter alia provides: 'The disputes--shall be handled in the usual manner' on the property 'but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.' The Board followed this with a paragraph in which it enunciated the rule:

> 'No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.'

There follows under the caption 'Form of Submission':

> 'POSITION OF CARRIER: Under this caption the Carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of Carrier's position must affirmatively show the same to have been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute. (Emphasis supplied)'

A like provision is prescribed for 'Position of Employes'. The rules have the force and effect of law. The Board has consistently applied them in the interest of protecting the respective due process rights of the parties, to bar the parties from: (1) introducing evidence before the Board which was not introduced in the handling of the

"dispute on the property and recorded in the submissions; and (2) raising issues before the Board which were not drawn in the record on the property. The rules remove the element of either party being taken by surprise before the Board.

The trial court under the Act is on the property-- 'the handling of disputes in the usual manner'. There is where the record is made. It is too late for either party 'to mend its hold' after the record is closed on the property. The Act constitutes the Board as an appellate body-- it is not designed to function as a trial tribunal. This accords with 'custom, usage and practice' of 39 years of interpretation and application of Section 3 of the Act. The experienced sophisticated experts in railroad labor law, on both sides, recognize this.

The parties herein are parties to a National Agreement of August 21, 1954, Article V of which prescribes: (1) the indispensable contents of a claim; (2) with whom the claim must be filed; (3) handling on the property to and including the Chief Operating Officer designated to handle such disputes; (4) time limitations with penalties for failure to meet them, including barring recourse to this Board unless petition is filed with the Board, as provided for in Section 3 First (i) 'within nine months from the date' of the decision of Carrier's highest officer. The volume of disputes that arose throughout the industry as to interpretation and application of Article V and other provisions of the Agreement caused the parties to it, on May 31, 1963, to establish a National Disputes Committee, on which carriers and employes are equally represented, to resolve the disputes. The Committee, relative to Article V disputes, unanimously, in NDC Decisions 3, 5, 17, 20, 22, 23 and 24 held that issues not raised on the property could not be introduced before this Board.

Article V of the August 21, 1954 Agreement gives each party ample time in which to perfect its record in the dispute on the property. If the parties were permitted to introduce new evidence and new issues before this Board, it would vitiate

"the August 21, 1954 Agreement; and, such is beyond the jurisdiction of the Board. The Board has no power to add to or subtract from agreements entered into by the parties. Such a permissive action would, under Section 3 First (p) and (q) of the Act, as amended June 20, 1966, constitute a failure of the Board to 'confine itself, to matters within the scope of the division's jurisdiction' and vest a court with jurisdiction to grant relief to an aggrieved party.

Since 1934, including the June 20, 1966 amendments, Section 3 First (m) has provided that: 'in case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.' The Board has held that such a proceeding does not permit the parties to enlarge upon the record upon which the award was predicated or to raise issues not in that record. Instead the Board has held that an interpretation is, by contemplation of the statute, confined to dissipating ambiguities, real or imagined, in the wording of the award. See the following interpretations identified by their serial number and the name of the participating Neutral sitting as a member of the Board:

Serial No.	Neutral	Serial No.	Neutral
58	Youngdahl	202	Weston
63	Carter	205	Dorsey
67	Messmore	208	Rinehart
79	Carter	209	Dorsey
91	Whiting	211	Ives
106	Coffey	212	Rinehart
144	McMahon	221	Dugan
146	Wenke	223	Engelstein
175	McMahon	224	House
177	Rader	227	Heskett
185	Hornbeck		

The application of the 'make whole' theory, which in reality is the common law of damages, in this case sounds eminently reasonable at first hearing.

"But, it is to be noted that this Board has no equity or other inherent powers. It is a creature of statute. It has no jurisdiction other than that vested in it by the statute. If, in the exercise and application of its statuatory mandated jurisdiction a claimant is the beneficiary of a monetary award that appears to be a windfall, application for a cure should be addressed to the Congress or to the parties for negotiation; and not to the Adjustment Board or the courts, neither of whom can invade the powers reserved to the legislature by the Constitution.

There is no mandate in the Act that the Board apply the common law rule of damages -- the 'make whole principle'. There is a mandate, as shown, supra, that the Board decide issues raised on the property on the basis of the record made on the property.

In the instant case, as stated previously, the record before this Board upon which the Award No. 6500 was made, shows that the only defense to the claim made by the Carrier on the property was that it had not violated the Agreement. No defense was proffered to the allegation of the claim relative to claimed monetary damages if the Carrier's sole defense of no agreement violation was found wanting. The Carrier's sole defense having failed, the measure of monetary damages payable to the Claimant is that computed by the uncontroverted, unambiguous language set forth in Item 2 of the Claim.

Obviously, the Carrier is attempting to negate the findings of Award No. 6500, and for the reasons shown above, the Carrier's arguments are without foundation, and must fall." (Emphasis supplied)

The question of mitigation was raised before the Board prior to the Award. The Board in their Award did not grant the Carrier the right to deduct outside earnings as they requested. Therefore, the Interpretation is in error when it permits the Carrier to deduct outside earnings when Rule 26 (d) reads in part:

"...shall be compensated for the amount he would have earned had he not been held out of service."

and the claim reads in part:

"...with compensation for all time lost..."

and the Award reads:

"Claim sustained."

Therefore, we most vigorously dissent.

D. S. Anderson

M. J. Cullen

G. R. DeHague

W. O. Hearn

E. J. McDermott