Award No. 270
Docket No. 266
2-ACL-MA-'38

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

RAILWAY EMPLOYES' DEPARTMENT, A. F. OF L. (Machinists)

ATLANTIC COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: Request for reinstatement of Machinist M. C. Pope to service with the Atlantic Coast Line Railroad Company, at Wilmington, North Carolina, with seniority unimpaired and pay for time lost since dismissal from service July 5, 1935.

EMPLOYES' STATEMENT OF FACTS: Machinist M. C. Pope entered service of the company at Wilmington, North Carolina, on July 28, 1922, working continuously at Wilmington until July 4, 1935. Mr. Pope, while working at Wilmington, had a room on Third Street near the Atlantic Coast Line shops, returning to his home approximately fifty miles away at Warsaw, North Carolina, on week-ends.

About 11:00 o'clock on the night of July 4, 1935, Mr. Pope was awakened from his sleep, on Third Street in Wilmington, by the intrusion of three negro girls in his room, ranging in age from ten to thirteen years. Almost simultaneously with the intrusion of parties in his room, eleven city police officers appeared, arresting Mr. Pope and placing him in jail. On the morning of July 5, 1935, a company police officer visited Mr. Pope at the jail, and informed him that it was the request of Master Mechanic Bulluck that he surrender his annual pass as he would be held out of service until the matter in which he was involved was cleared up. Mr. Pope surrendered his pass and upon being released on bond, the same date, went to his home at Warsaw, North Carolina, to await a jury trial of his case in the Superior Court of New Hanover County, on August 8, 1935.

Mr. Pope was tried on the charge of prostitution and assignation, to which charge he plead not guilty—jury returning a verdict of not guilty as to all counts in the bill of indictment, which bill of indictment will be made a part of the record in this case. Upon being acquitted at court trial, on August 8, 1935, Mr. Pope immediately returned to the Atlantic Coast Line shops and applied for his job, to be informed by General Foreman Williams that he could not go to work until permitted to do so by General Superintendent Motive Power Paul. Mr. Pope then visited Mr. Paul, who informed him that he would make an investigation. Approximately two weeks later, on August 21, 1935, Mr. Paul informed Mr. Pope by letter that he was being held out of service by Master Mechanic Bulluck on the charge of absenting himself without permission.

this case, the management advised this Division of the existence of a system board of adjustment on that property covering the class of employes who were endeavoring to file an ex parte submission, and held that the National Railroad Adjustment Board was without jurisdiction to docket and hear a case where such system board existed. This Division sustained the position of the management and advised the representatives of the employes, under date of January 17, 1935, that:

> "In the opinion of this Division the law clearly contemplates that where a System Board of Adjustment exists, all disputes of this character should be referred to such Board, and you are so advised."

Similarly, in January, 1935, this Division refused to receive or docket a case filed on behalf of an employe of the Louisville and Nashville Railroad and under date of January 23, advised the representative of the employe as follows:

> "In the opinion of this Division the law clearly contemplates that where a system board of adjustment exists, all disputes of this character should be referred to such Board, and you are so advised."

Again, in February, 1935, an employe in the mechanical department of the Atlantic Coast Line sent notice to this Division of his intention to file an ex parte submission, and, in reply, the respondent advised the Division of the existence of a System Board of Adjustment on the Atlantic Coast Line Railroad covering the employes of the mechanical department, and requesting that the Division dismiss the case because of lack of jurisdiction. The position of the company was sustained by this Division.

The Division, in the three cases cited, held that it was without jurisdiction to receive or hear a case involving a carrier on which there exists a System Board of Adjustment to which such case could be carried. And the present case is even stronger than the ones already ruled upon by your Division, since the claimant in this case failed to carry his case to the Board within sixty days after the decision by the highest official to whom appeal could be taken, and under the terms of the agreement under which this complainant was working, his case "was closed and cannot be handled further." The respondent, therefore, asks that this Division reaffirm the position it has taken in the cases hereinbefore cited.

OPINION OF THE DIVISION: The carrier in this case relies solely on its claim that the Division has no jurisdiction to handle the case, because a System Board of Adjustment was in existence on the property and the claimant should have appealed to that Board. Failing to do so, within the required limit, he slept on his rights, and the National Railroad Adjustment Board cannot now take jurisdiction. The carrier did not submit any rebuttal to the facts of the case, and, therefore, if the jurisdiction is sustained, the claim is sustained, provided the facts presented by the employes warrant it.

Prior to 1937, there was a system board of adjustment on the property created by joint agreement between the Atlantic Coast Line Railroad Company and employes of the mechanical department, represented by the shopmen's association of the Atlantic Coast Line Railroad Company. Mr. Pope did not belong to the shopmen's association. He could have taken the matter before the System Board, as an individual, but he did not choose to do so The System Board of Adjustment operated under a rule which required that grievances be filed within sixty days after an adverse decision by the proper officer of the company. The carrier insists that since Pope did not bring his complaint within sixty days, he automatically lost his right of appeal, and the matter could not now be opened before the National Railroad Adjustment Board.

The Railway Labor Act permits the creation of System Board of Adjustment for the purpose of adjusting and deciding disputes of the character

specified in Section 3 of the Act. The Act does not lay down any rules for the guidance of such system boards, nor does it authorize a board to lay down rules which would, as in this case, exclude a person from redress if he had not filed his complaint within sixty days.

The carrier relies upon Award No. 186 of this Division, but this decision is not in point. It refers to a case where a matter had been settled by the duly appointed representatives on the property, and this Division decided that it would not take jurisdiction in a case that had already been properly handled and concluded by the parties. The carrier also relies upon communications from this Division, advising complainants to take their cases before the system board during the time it was in operation. This was a normal procedure, inasmuch as the system board was set up to handle the same types of cases as those coming before this Division. When the complaint in the present case was filed with the Second Division, there was no system board in operation, the board having been discontinued in 1937.

The Railway Labor Act specifically provides that disputes growing out of grievances, after being handled on the property, may be appealed to the appropriate Division of the Adjustment Board. This Division has jurisdiction over the case, in view of the fact that it was a dispute arising out of a grievance which had not been settled and which, in fact, had never been before the system board for determination.

The following are the relevant matters with respect to the discharge of the complainant as they appear in the docket. The complainant in this case was arrested on July 5, 1935. A company policeman came to the jail, took away his annual pass, and told him that he was being held out of service until the issue of his case was determined. When he was acquitted on August 8, 1935, he returned to his place of employment, expecting to be restored to his work. The carrier's representative informed him that he had been discharged, because he had been absent, without leave, insisting that he had not been held ont of service, and when he did not appear for work, he was discharged. The carrier insists that the policeman had no authority to inform him, as he did, that he was being held out of service and maintains that the complainant ought to have known that the policeman had no authority to inform him that he was being held out of service.

This position of the carrier is not tenable, however, since a man under the circumstances in which Pope was placed, being told by a police officer of the company that he was to be held out of service, had a right to assume that the policeman was acting at the request of the company officials and, in fact, testified that the police officer told him he was acting at the request of the master mechanic. It must be assumed, therefore, that Pope was held out of service and was not properly discharged under the circumstances. Pope took the matter to the superintendent of motive power, but was refused re-employment on the ground that he had been discharged under carrier's Rule 700.

The evidence indicates that the discharge of Pope was not treated by the carrier as coming under the rule of the agreement with the shopmen's association. The procedure under that agreement was not carried out. The carrier failed to discharge Pope, under the terms of that agreement, for Pope was not given a hearing as required under Rule 22. No such hearing was held.

The conclusion is inescapable that the complainant was not properly discharged and should be restored to his employment.

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.

The parties to said dispute were given due notice of hearing thereon.

AWARD

Claim sustained and compensation is awarded from August 8, 1935, until such time as Pope is restored to his employment.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 7th day of October, 1938.