

Award No. 655

Docket No. 353

2-Va-MA-'41

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee I. L. Sharfman when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

THE VIRGINIAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYES: That C. A. Welch, machinist, formerly employed by The Virginian Railway Company at Mullens, West Virginia, be restored to service with seniority unimpaired and compensated for all time lost since and including January 14, 1935, the date on which he was held out of service, and until he is returned to service.

* * * * *

After submissions in this proceeding had been duly filed by the parties on April 6, 1939, the case was first heard by the Division May 2, 1939, with representatives of both parties present at the hearing. The proceeding was deadlocked by the Division as of July 11, 1939; and thereupon John P. Devaney was appointed referee, to sit with the Division as a member thereof and to render an award. In Award No. 362, rendered August 2, 1939, the Division, with the aid of Referee Devaney, sustained the claim.

The carrier failed and refused to carry out this award, on the ground that no opportunity had been afforded it for hearing before the Referee; and when the employees sought to have the award enforced through the courts, the United States District Court for the Eastern District of Virginia declared the award invalid and ordered it set aside, for the express reason that the said award "was issued without notice to the Defendant herein of a hearing held before the Referee designated in said proceedings." The enforcement suit was thus dismissed on July 10, 1941, "but without prejudice . . . to the rights of any parties to this controversy."

Some three weeks earlier, on June 20, 1941, the employees requested, as a means of removing this alleged procedural defect, that the case be reopened and a further hearing held before the Division and Referee Devaney. This request was granted, and after due notice to both parties such hearing was held July 30, 1941. The carrier protested this further hearing and declined to be represented.

Since the notice of this hearing specified "that argument or discussion before the referee must be confined to the record now in possession of the Division and that no new evidence of any character will be permitted," the hearing of July 30, 1941, before the Division and the Referee was continued to September 9, 1941; and the notice of this continuance to September 9, 1941, addressed to both parties, specified that "on that date you may appear

before the Second Division of the National Railroad Adjustment Board and the referee and present any evidence and argument you so desire." The carrier also protested this projected rehearing and declined to be represented.

Because of unavoidable circumstances the scheduled hearing of September 9, 1941, was postponed to a later and unspecified date, with due notice to both parties; and because of the sudden death of Referee Devaney, I. L. Sharfman was appointed in his place as referee for this proceeding. In due course the parties were notified that the postponed hearing before the Division and the referee would be held November 18, 1941. The carrier declined to be represented on the basis of its earlier protests.

The hearing was held November 18, 1941, as set, and the Division not only asserted its procedural right to reopen the case, but considered *de novo* all substantive matters going to the merits of the dispute.

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.

The evidence of record supports the conclusion that there was no adequate justification for the dismissal.

AWARD

Claim sustained, with the compensation for the specified period to consist of the difference between the net amount Machinist C. A. Welch actually earned during the time he was laid off and the amount he would have earned during this period if he had not been wrongfully dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 4th day of December, 1941.