Award No. 1254
Docket No. 1192
2-L&N-CM-'48

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Adolph E. Wenke when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. (Carmen)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: 1—That the carrier's dismissal of Carman E. E. Braxton, effective March 10, 1947, is not authorized by the current agreement.

2—That accordingly the carrier be ordered to reinstate this employe to his full seniority rights with pay for all time lost retroactive to the aforesaid date.

EMPLOYES' STATEMENT OF FACTS: E. E. Braxton, hereinafter referred to as the claimant, was regularly employed by the carrier at Birmingham, Alabama, as a carman, with a seniority dating on the carmen's seniority roster of September 8, 1936. On February 3, 1947, the claimant was charged with filing suit against the carrier and was summoned to appear for a hearing at 1:30 P. M. on February 14, 1947. The date of the hearing was subsequently changed and held at 1:30 P. M., February 17, 1947, at Boyles, Alabama. This is affirmed by the submitted copy of letters identified as Exhibit A, dated February 3, 1947, and Exhibit A-1, dated February 7, 1947, respectively, addressed to the claimant and the local chairman of the carmen by Mr. T. H. Cremer, master mechanic.

The hearing was held as scheduled, and copy of the transcript record is submitted, identified as Exhibit B, and on the basis of that record the claimant was discharged on March 10, 1947. This is verified by copy of the submitted letter, bearing the same date, addressed to the claimant by Mr. T. H. Cremer, master mechanic, identified as Exhibit C.

The agreement effective September 1, 1943, is controlling.

POSITION OF EMPLOYES: It is submitted that "filing suit against the Louisville and Nashville Railroad Company", with which this claimant was charged, Exhibit A, constitutes no infraction of any provision of the collective bargaining agreement, nor did the carrier allege in the hearing proceedings, Exhibit B, that the claimant violated any rule or part thereof embraced in the aforesaid agreement. Consequently, the claimant was not properly subject to be put on trial as was done by the carrier on February 17, 1947, under the terms of the controlling agreement, made in pursuance of the Amended Railway Labor Act, between the carrier and System Federation No. 91.

Moreover, if this carrier believed that filing of this suit by the claimant was not warranted, then the proper procedure for redress of its grievance

(j) Do you feel like and do you think that you are able to discharge and perfom the duties of the job which you had at the time you claim to have been injured?"

The interrogatories propounded by the defendant (the carrier) were answered by the plaintiff on February 25, 1948. The list of answers to the interrogatories is submitted as Exhibit CC. It will be seen that plaintiff's answers to interrogatories 24(e) to (j) were:

"(e) This is a matter for the doctors' consideration, but in my opinion I am not physically able to go to work.

(f) Immaterial.

(g) I do not now feel able to return to work.

(h) I do not think that I am.

(i) I am perfectly willing to go back to work, and wish that I were able to go back to work.

(j) No."

It will be seen from the foregoing that Mr. Braxton claimed at the time of his injury, at the time his suit was filed against the carrier (January 8, 1947) and now claims that he is not physically able to resume service as carman.

"His failure to work since the accident is not result of his wrongful discharge but the result of the accident." (Award No. 3323, First Division, Referee Frank M. Swacker)."

"His failure to work in this case is definitely shown not to be a consequent of his dismissal but the result of his injuries. He elected a forum, as was his right, to recover compensation for the damages including the deprivation of work and has recovered judgment thereon. This is a binding election against a claim here for pay for time lost, at least up to such time as he can demonstrate himself to be available for work. (Award No. 3321, First Division, Referee Frank M. Swacker)."

The carrier also invites the attention of this Board to its Award No. 1186, rendered May 14, 1947, with Mr. George A. Cook acting as Referee.

The action taken against Braxton in this case was not inconsistent with action taken against other employes in similar cases, nor was such action discriminatory. In handling the case on the property the organization referred to certain other cases of employes filing suits against the carrier and being retained in the service, mentioning specifically the cases of T. Violette, engineer; C. W. Cowling, carman, and case of O. V. Wright, et al. Violette and Cowling were dismissed from the service at the time suits were filed by them against the carrier. The case of O. V. Wright, et al., was not a similar case.

The carrier insists that there is no justification for the claim now before this Board and requests that it be denied in toto.

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 System Federation contends that Carman E. E. Braxton has been unjustly dismissed from the service or, in other words, that he has been dis-

missed without cause. The basis for his dismissal was the fact that he had brought suit against the carrier to recover damages which he alleged arose out of injuries which he claimed he had suffered in an accident which had happened on January 9, 1946, while he was working for the carrier.

The carrier has, under Rule 33, the right to dismiss employes for cause, but the bringing of a legal action against it by an employe, based on an alleged right which arose out of his employment, is not cause within the meaning of the rule, for to so hold would be against public policy. Courts are created by virtue of the constitution and inhere in our body politic as a necessary part of our system of government and it is not competent for any one, by contract or otherwise, to seek to deprive another of their protection. This right to appeal to the courts for the redress of wrongs is one of those rights which are in their nature and under our constitution inalienable.

Ordinarily, when the Board finds a wrongful dismissal it automatically grants pay for time lost. This is done upon the assumption that the employe would have worked but for the wrongful dismissal. No such assumption can be indulged in in the instant case, for claimant admits he was, and is, unable to work because of the injuries received in the accident and for which he has brought suit to recover damages. There is no showing of any recovery subsequent to the time he so stated. Claimant is entitled to have his seniority rights but not his pay for time lost. We do not undertake to pass on his present ability to return to work. Therefore the claim should be sustained in so far as claimant's seniority is concerned, but denied as to pay lost.

AWARD

Claim sustained as to restoration of seniority rights, but denied as to pay lost.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1948.