

Award No. 1638

Docket No. 1573

2-C&NW-MA-'53

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Edward F. Carter when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 12, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. OF L. (MACHINISTS)**

CHICAGO AND NORTHWESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: That in conformity with the current agreement the Carrier be ordered to compensate Machinist A. F. Oddo for all regular time lost during the period he was unjustly dismissed from the service, namely; November 22nd, 1949 through February 15th, 1950.

EMPLOYEES' STATEMENT OF FACTS: Machinist A. F. Oddo, hereinafter referred to as the claimant, was employed by the carrier at Chicago, Illinois, on the streamline ramp, Building M-19-A, and who was summoned to stand investigation at 9:00 A. M., Monday, November 21, 1949, on the charge of failure to complete changing head, liner and piston in eight hours on a job that allegedly would not require more than three hours, which is affirmed by the copy of charge handed to the claimant, submitted herewith and identified as Exhibit 1.

The investigation of the charge against the claimant was held as scheduled and a copy thereof is submitted herewith and identified as Exhibit 2 with the result that the claimant was discharged from the service of the carrier, which is affirmed by a copy of notice dated November 21, 1949, submitted herewith and identified as Exhibit 3.

The restoration of the claimant to service with pay for all time lost was progressed to the Board and its Docket No. 1419, Award No. 1493, is by reference thereto made a part of this submission. However, the decision or Award of the Board, for ready reference, reads:

"The claimant shall be reinstated as machinist with seniority unimpaired and the question of wage loss up to but not later than February 15, 1950 is remanded for handling by and between the parties without prejudice to resubmission of this question to this Division on the basis of the record of hearing accorded the claimant preceding dismissal."

The claimant's representative, in accordance with the remanded question referred to in the above quoted award has earnestly endeavored to

pretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; 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."

While, as previously stated, it is the position of this carrier that Oddo not being an employe of this carrier the Second Division, National Railroad Adjustment Board, has no jurisdiction of the case, the carrier will, without waiving any rights as to such position, cite the facts in the case. The Board in its Award 1493 stated that the claimant (A. F. Oddo) shall be reinstated as machinist with seniority unimpaired and the question of wage loss up to but not later than February 15, 1950, is remanded for handling by and between the parties without prejudice to resubmission of this question to this Division on the basis of the record of hearing accorded the claimant preceding his dismissal; the award being dated at Chicago the 16th day of November, 1951.

A period of approximately eight months has expired since the rendition of Award No. 1493 and Mr. Oddo has declined to accept the reinstatement proffered him under the provisions of the award, and therefore is not currently an employe of the carrier nor is he a dismissed employe of the carrier.

Mr. Oddo, in declining to accept the reinstatement proffered him under the provisions of Award 1493, voluntarily became a person who had resigned from employment with the carrier and therefore ceased to be an employe subject to the provisions of the Railway Labor Act or the federated shop crafts' rules agreement.

As previously stated, Mr. Oddo, not having employment relationship with this carrier, is not subject to the provisions of federated shop craft employes' working agreement nor to the provisions of the Railway Labor Act, amended, and accordingly this Board is not authorized under the provisions of the Railway Labor Act, amended to take jurisdiction of this 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.

On November 16, 1951, this Division entered an award in a discipline case involving Machinist A. F. Oddo as follows:

"The claimant shall be reinstated as machinist with seniority unimpaired and the question of wage loss up to but not later than February 15, 1950 is remanded for handling by and between the parties without prejudice to resubmission of this question to this Division on the basis of the record of hearing accorded the claimant preceding his dismissal." Award 1493.

The decisions of this Board are final. Consequently, every issue determined in Award 1493 cannot be reviewed or redetermined here. The effect of the holding of the award is that claimant was improperly dismissed

from the service, that he should be reinstated with seniority rights unimpaired and his wage loss from November 22, 1949 through February 15, 1950 be remanded. The only question remaining for determination is the wage loss accruing within the stated period in Award 1493.

Carrier asserts that the payment of wage loss was conditioned upon the reinstatement of the claimant as a machinist and, he having elected to leave the service of the carrier, no claim exists. The award as made is not subject to any such interpretation. The loss sustained was due to a breach of agreement by the carrier and the right to recover the loss survives death, resignation, or lapse of time where no contractual or statutory limitation exists.

Claimant is entitled to be paid for all time lost from November 22, 1949 to February 15, 1950, less any amount earned in outside employment during this period. The organization insists that the agreement prohibits the offsetting of earnings from other employment. The controlling provision is:

"If it is found that charges are not sustained, such employe shall be returned to service and paid for all regular time lost."
(Rule 35. Current Agreement.)

This language does not preclude the deduction of outside earnings. Whether the rules provide for the payment of "time lost," "wages lost," "earnings lost," or any other similar statement, it makes no difference as they all can be reduced to a common denominator under the agreement. The rule applies even though the employe was paid a monthly salary. Whatever the method of calculating the compensation may be, a deduction of outside earnings is required unless there is a clear and definite intention that the adjustment is on some other basis. See Award 15765, First Division.

The foregoing is in conformity with the common law rule. It is in accord with the rulings of the state courts of the country. And, lastly, the Supreme Court of the United States recognizes the rule. See *Republic Steel Corp. v. Labor Board*, 311 U. S. 7; *National Labor Relations Board v. Seven-Up Bottling Co.*; 73 S. ct. 287. Making the employe whole simply means he shall suffer no loss. Consequently, the measure of damages for the breach of a collective employment contract is the amount an employe would have earned if he had not been wrongfully discharged, less what he did earn during the period of the breach. This conforms to the rule that the employe should be made whole and, at the same time, eliminates punitive damages which are not favored in law. It conforms to the legal holding that the purposes of the Board are remedial and not punitive; that its purpose is to enforce agreements as made and does not include the assessing of penalties in accordance with its own notions to secure what it may conceive to be adequate deterrents against future violations. The power to inflict penalties when they appear to be just carries with it the power to do so when they are unjust. The dangers of the latter are sufficient basis for denying the former.

AWARD

Claim sustained per opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January, 1953.