Award No. 1783

Docket No. MC-1472-87

2-BC&G-I-'54

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

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

PARTIES TO DISPUTE:

WALTER J. McELROY (Carman)

THE BUFFALO CREEK & GAULEY RAILROAD

DISPUTE: CLAIM OF EMPLOYE: After returning to work from my vacation I was screened by the League of Widen Miners, of which I was not a member, since I worked on the railroad and not in the mine. I was not allowed to return to work. There was no dispute between the employes and the Railroad.

EMPLOYES' STATEMENT OF FACTS: I was working on the railroad, which is the property of the Elk River Coal & Lumber Company. A company union in the mine of this company went on strike. Some of the employes joined the U.M.W. of A., while others went back to work. The owner of this entire property apparently permitted those who returned to work and members of the company union to screen everyone who returned to work at the mine and on the railroad as well. I was not a member of the company union or the U.M.W. of A., took no part in the strike and had no interest in the dispute at the Elk River Coal & Lumber Company. I was not required to belong to the Widen League of Miners.

POSITION OF EMPLOYE: I want the reinstatement of my Seniority Rights and back pay from October 8, 1952 (which is the time I returned to go to work) up to and including present date.

I have talked to Mr. J. G. Bradley at least twice concerning this matter and can get no satisfaction from him. Mr. Bradley is President of the Elk River Coal & Lumber Company, Buffalo Creek and Gauley Railroad is owned by Elk River Coal & Lumber Co.

CARRIER'S STATEMENT OF FACTS: The Buffalo Creek & Gauley Railroad is a corporation organized and existing under the laws of the State of West Virginia with principal office and place of business located at Dundon, Clay County, West Virginia. Its principal business is that of transporting coal produced by Elk River Coal & Lumber Company, a corporation (W. Va.), at its mine at Widen, Clay County, West Virginia, to the town of Dundon, located some twenty miles south of Widen, where said carrier connects with the Baltimore & Ohio Railroad. Most of the traffic moving over

Railroad operated daily between Dundon and Widen and facilities were also provided at Widen for out of town employes to secure room and board.

Walter J. McElroy lived in the Pisgah section of Clay County near Dundon, West Virginia, and could easily have traveled from Dundon to Widen by train to report in for work had he so desired. During his long absence without leave, he was orally requested to return and go to work by M. C. Laxton, under whom he worked. M. C. Laxton also wrote Walter J. McElroy a letter requesting him to return to work during this period (Oct. 10-Nov. 10, 1953), which letter was never answered. During this period, McElroy was also seen on several occasions loafing on the picket line which had been set up by the former employes of Elk River Coal & Lumber Company while his fellow railroad workers were working at their jobs.

On November 10, 1952, Walter J. McElroy returned to Widen and requested that he be permitted to come back to work. He was not permitted to return to work due to his long unexcused absence without leave and he was subsequently replaced.

POSITION OF CARRIER: It is the position of the carrier that Walter J. McElroy's employment was terminated due to his unexcused absence without leave for the period from October 10, 1952 to November 10, 1952. There was in existence no contract, collective or otherwise, which in any way limited the right of the carrier to terminate McElroy's employment. If McElroy was in fact a member of the Employes League of the Buffalo Creek & Gauley Railroad, then he was bound by the terms of the various oral collective agreements between the carrier and the League which do not limit or purport to limit the right of the carrier to hire or fire its employes, either for cause or at will. If McElroy was not a member of said League and was not bound by its collective agreements, then his employment was still terminable at the will of the carrier. See **Beehler** v. **Chicago R. I. & P. Ry. Co.,** (CCA 10th, 1948), 169 F. 2d 557, and **Thomas** v. **New York, Chicago & St. Louis R. Co.,** (CCA 6th, 1950) 185 F. 2d 614.

Affidavits of H. W. Boggs, W. R. James, M. C. Laxton and Harry L. Gandy in support of the carrier's position are hereto attached as Carrier's Exhibit Nos. 1, 2, 3 and 4, and are asked to be read as a part of the carrier's submission in this case.

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 carrier, the Buffalo Creek and Gauley Railroad, is a railroad about twenty miles long. Its principal business is that of transporting coal produced by the Elk River Coal and Lumber Company at its mine at Widen, West Virginia, to Dundon, West Virginia, where it connects with the Baltimore and Ohio Railroad. In 1943, an unincorporated association known as the Employes League of the Buffalo Creek and Gaulev Railroad was certified by the Mediation Board as the bargaining representative of several classes of employes, including carmen, their helpers and apprentices. It is conceded by the carrier that certain agreements have been negotiated governing wages, hours and working conditions, none of which have been reduced to writing. The carrier contends, and it is not here disputed, that no agreements have been made, oral or written, which purport to limit the carrier in its right

to hire or discharge employes at will. Claimant was not a member of the Employes League and was employed as a car repairman in carrier's shops at Widen.

On September 22, 1952, a group of employes of the Elk River Coal and Lumber Company, known as the Employes League of Widen Miners, went on strike against the Elk River Coal and Lumber Company and threw up picket lines on the highway to Widen. Carrier's trains operated continuously, the strike being of no concern to the railroad company except as it was evidently affected by the loss of lading from the mine to Dundon.

On September 26, 1952, claimant took his vacation which ended on October 9, 1952. He did not report for work until November 10, 1952, claiming that he was prevented from so doing by the picket lines set up by the mining company employes and a fear of physical violence if he attempted to work. He was requested to return to work but failed to do so. Other employes of the carrier continued to work during the period of claimant's unexcused lay-off. On November 10, 1952, claimant was refused permission to return to work and was subsequently replaced. Claimant alleges that he was unjustly treated and requests reinstatement as of October 8, 1952.

It is fundamental that the rights of claimant must grow out of contract provisions. In the absence of contract, employes may be hired and discharged at will. The burden of proof is upon the claimant to show that an agreement to which he is a party has been violated. None has been shown. Claimant frankly states that he knows of no agreement provision, oral or written, which supports his claim. Under such circumstances this Board is powerless to award relief to the claimant, however meritorious his claim may be from the standpoint of justice and equity. This Board is limited by the provisions of the Railway Labor Act and has no authority to adjust grievances not founded upon contract provisions of collective agreements. The claimant having no contractual right to be reinstated under the proofs presented, this Board is compelled to hold that the claim has no validity. Claimant has simply failed to establish by proof that an agreement existed which supports his claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1954.