

Award No. 2582
Docket No. 2413
2-DS-TWUofA-'57

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Curtis G. Shake when the award was rendered.

PARTIES TO DISPUTE:

**TRANSPORT WORKERS UNION OF AMERICA,
AFL-CIO (Railroad Division)**

DONORA SOUTHERN RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES: Mr. Ernest Desimone had been injured on the property of the Carrier. He sued the carrier on account of his injury. From the time he was injured until his case was settled he was off duty. Sometime after the settlement, Mr. Desimone wanted to return to work and was notified by the carrier that his name was removed from the carrier's carmen roster.

Claim or grievance is being filed under Articles 21 (A), 28 and 20 of the current agreement.

EMPLOYES' STATEMENT OF FACTS: That Mr. Ernest Desimone is an employe of the Maintenance of Equipment Department.

That the Railroad Division, Transport Workers Union of America, AFL-CIO does have a collective bargaining agreement, effective August 29, 1949 and revised to September 1, 1955, with the Donora Southern Railroad Company covering the Maintenance of Equipment Department, copies of which are on file with the Board, and is by reference hereto made a part of this statement of facts.

POSITION OF EMPLOYES: It is respectfully submitted that Mr. Ernest Desimone is an employe of the Maintenance of Equipment Department and that the carrier according to the agreement had no right to dismiss said employe as the carrier did according to Article 21 (a) and 28.

The carrier claims it has terminated Mr. Desimone's employment relations due to an allegation of a permanent injury contained in his complaint filed in Federal Court and the testimony of Mr. Desimone's doctors, but the organization feels this is wrong according to the agreement between the carrier and the organization.

In processing this claim, the organization relied on Articles 21 (a) and 28 of the schedule agreement between the parties. Article 21 (a) requires a hearing before an employe can be "disciplined" upon a "charge." Article 28 reiterates the requirement of a hearing before an employe can be "disciplined" or "discharged" after he has been in the service of the railroad for a period of sixty days. This rule (Article 28) in reality only provides an exception to Article 21, the discipline rule, by permitting dismissals for incompetency without a hearing during the first sixty days of service. Neither rule has any application to the instant claim. This Division, in its Award No. 1672 with Referee Edward F. Carter, held:

"The contention that this claim was one involving discipline has no merit. Award 15,765, First Division: Alcorn V. Missouri-Kansas-Texas R. Co., 88 Fed. Supp. 471. No basis for an affirmative award exists."

Eight different referees have held in the following First Division awards that since the claimant was not accused of wrong doing there was no basis or reason for holding an investigation: Award Nos. 17191, 17018, 16819, 16820, 16821, 16410, 15765, 13632, 8300 and 8366.

In First Division Award No. 16819, Referee Loring stated the controlling principle as follows:

"This Division is not in accord with those awards which liken to a discharge a refusal to restore to work an employe who has obtained a judgment or settlement for permanent injuries. Such is not the situation in these cases. The rules with reference to discharges do not apply. Claimant has not been discharged or subjected to discipline, but has been adjudicated to be no longer fit for duty. And that adjudication is good against positive testimony that he is physically fit because, by that adjudication, he has been paid for that disability and is estopped to show otherwise. * * *"

It is, therefore, respectfully submitted that this claim must be denied.

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 the dispute were given due notice of hearing thereon.

The claimant sued the carrier for damages for personal injuries and recovered a judgment for \$25,000. The judgment was paid on April 12, 1956, at which time the claimant gave the carrier a general release of all claims and demands. Four (4) days later claimant demanded his job back, which was refused.

On May 1, 1956, the claimant asserted the following claim against the carrier: "It is requested that I be paid forty (40) hours at the time and one-half rate for work performed by a junior employe from April 16, 1956, to April 20, 1956, inclusive." This demand was progressed through channels

to carrier's director of labor relations who finally rejected it on June 15, 1956. The notice of intention to bring a claim to this Board bears date of September 5, 1956.

From the above it will be noted that the claim which the organization has brought to this Board is different from the one originally asserted on the property.

The carrier urges that the attempt to change the claim when it was advanced to this Board is contrary to the Railway Labor Act, as amended, and that the claim as now constituted is barred by Article 20 of the current agreement.

We find that the carrier's contentions are valid. The Railway Labor Act contemplates that before a grievance can be brought to this Board it "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." This was not done with respect to the claim that is pending before this Board.

The claimant has said that his claim originated on April 16, 1956, but the pending claim was not asserted until September 5, 1956. Article 20 of the agreement provides that, "All claims or grievances must be made in writing within sixty (60) days from the date of the occurrence on which the claim or grievance is based, and if not so presented, are barred."

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 30th day of July, 1957.