Award No. 4334
Docket No. 3971
2-NPTCO-CM-'63

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Charles W. Anrod when the award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Carmen)

NORTHERN PACIFIC TERMINAL COMPANY OF OREGON

DISPUTE: CLAIM OF EMPLOYES:

(1) That the Carrier unjustly dealt with Carmen R. J. Hay, W. P. Reichow, W. F. Stacey, C. L. Templeton and A. F. Aiello and violated the current agreement when these employes were suspended from service on February 4, 1960.

(2) That the Carrier violated the current agreement in refusing to compensate Mr. Stacey and Templeton for continuous service after regular working hours on February 4, 1960.

(3) That the Carrier violated the current agreement in refusing to compensate Mr. Aiello at the rate of time and one-half for work performed on his rest day February 4, 1960.

(4) That accordingly the Carrier be ordered to compensate these employes in the amounts shown opposite their names:

R. J. Hay — 2½ hours at straight time rate.

W. P. Reichow — 6 hours at straight time rate.

W. F. Stacey — 6 hours at straight time rate and ½ hour at overtime rate of time and one-half.

C. L. Templeton — 6 hours at straight time rate and 1½ hours at overtime rate of time and one-half.

A. F. Aiello — 6⅔ hours at the overtime rate of time and one-half.

EMPLOYES' STATEMENT OF FACTS: R. J. Hay, W. P. Reichow, W. F. Stacey, C. L. Templeton and A. F. Aiello hereinafter referred to as the claimants, are employed as carmen by the Northern Pacific Terminal Company of

In carrier's letter of May 17, 1960, an offer of settlement was made by carrier in an effort to close out the dispute. This offer was rejected, and a counter proposal was made to us by Petitioner in his letter dated June 22, 1960. Said proposal was a "package" deal: nothing short of the whole claim would be acceptable. Carrier rejected same for that and some other reasons. A verbal offer was subsequently made by Petitioner wherein he made a slight reduction here and there in the entire claim, but settlement of same still remained on the "package-deal" basis. This was not satisfactory to the carrier, therefore, all offers were withdrawn by both parties. In view of this fact, any and all offers made by the Carrier which may seem to this Division to be inconsistent with Carrier's position herein should be considered solely as such, and should not, in the light of withdrawal of same, be considered in any degree supported by the current agreement. The only issue for you gentlemen now to decide is whether the claims are payable **under the agreement.**

CONCLUSION: It has clearly been shown herein that the instant claims are not sustainable under current agreement rules and/or Adjustment Board awards, therefore, the claims in their entirety should be denied, and the carrier respectfully so requests.

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.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimants A. F. Aiello, R. J. Hay, W. P. Reichow, W. F. Stacey, and C. L. Templeton have been employed as carmen at the Carrier's Portland (Oregon) Yards. At the time here relevant, their regularly scheduled working hours were from 7:59 A. M. to 3:59 P. M. with the exception of Hay whose working hours were from 3:59 P. M. to 11:59 P. M. They were required by the Carrier to attend an investigation hearing on Thursday, February 4, 1960, to determine their responsibility for failing to detect a defect in the brake rigging of a coach car. Thursday was a regular working day for the Claimants, except that it was a rest day for Aiello. The hearing lasted from 10:00 A. M. to approximately 5:20 P. M., including a lunch period of about one hour. The Claimants Hay and Reichow were found guilty and given a ten days' record suspension each. The three other Claimants were not found guilty and no disciplinary penalty was assessed against them. None of the Claimants received compensation for the time spent by them at the hearing.

They filed the instant grievance in which they contended that the Carrier had unjustly suspended them from the service for the period of the hearing. They requested the following compensation:

Name of Claimant	Compensation Requested
Aiello	6⅔ hours at the rate of time and one-half
Hay	2½ hours at the pro rata rate
Reichow	6 hours at the pro rata rate

Stacey	6 hours at the pro rata rate and ½ hour at the rate of time and one-half
Templeton	6 hours at the pro rata rate and 1½ hours at the rate of time and one-half

The Carrier denied the grievance.

1. During the presentation of this case before the Referee, the Carrier objected to the instant claims on the ground that they were not referred to us within the time limit of nine months from the date on which the Carrier's highest designated officer had declined them as provided in Article V (c) of the Agreement and Memorandum, dated August 21, 1954. The flaw in that argument is that the Carrier did not raise such procedural objection in its submission and rebuttal briefs. Its failure to do so can be treated only as an implied agreement to extend the nine-month time limit in accordance with the last sentence of Paragraph (c) or as a waiver of strict compliance with such limit. See: Award 1834 of the Second Division. Hence, the Carrier's objection lacks merit.

2. During the processing of the instant grievance on the property the Carrier offered to settle some of the claims in question. The Claimants rejected such offers. Nevertheless, said offers have been introduced as evidence. The law is well settled that offers of compromise made in an attempt to settle disputed claims prior to referring them to this Board generally are not permissible evidence because even the mere introduction of such evidence would tend to impair future out-of-court settlements. See: Awards 3345 and 5658 of the Third Division; Frank Elkouri and Edna A. Elkouri, **How Arbitration Works**, Rev. Ed., Washington, D. C., BNA Incorporated, 1960, pp. 195-196, 213-214 and cases cited therein. We have, therefore, disregarded the Carrier's settlement offers in adjudicating this case.

3. In support of their claim, the Claimants primarily rely on Rule 37 of the applicable labor agreement which reads as far as pertinent, as follows:

> "No employe shall be disciplined without a fair hearing * * * Suspension in proper cases pending a hearing * * * shall not be deemed a violation of this rule * * * If it is found that an employe has been unjustly suspended * * * from the service, such employe shall be * * * compensated for the wage loss, if any, resulting from said suspension * * *"

The parties are in disagreement as to whether the Claimants were suspended from service within the purview of Rule 37 for the period during which they were required to attend the hearing. The term "suspension" is not defined in the labor agreement. It is neither clear nor unambiguous and plausible contentions can be made for different interpretations. Under such circumstances, the usual and ordinary meaning of the term must govern. "Suspension", when used in connection with industrial discipline, normally refers to a temporary involuntary release of an employe from service without pay because of an actual or alleged violation of the labor agreement or the working rules. It follows that an employe who is charged with such a violation and required to attend a hearing during his working hours, is in fact, suspended from service during the period of the hearing. Rule 37 plainly provides that he shall be compensated for any wage loss resulting from such suspension if it is found that he was unjustly suspended. It is self-evident that an employe, who has been exonerated of the charges filed against him,

has been unjustly suspended. Any other construction would lead to inequitable and unwarranted results because it would automatically impose a penalty in the form of a wage loss upon an employe who is contractually required to attend an investigation hearing during his working hours irrespective of whether he is found guilty or innocent. The law of labor relations is firmly established that when one interpretation of an ambiguous provision of a labor agreement would lead to harsh and unjust results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will generally prevail. See: Award 4097 of the Second Division.

Applying the above principles to this case, we have reached the following conclusions:

The Claimants Hay and Reichow were found guilty and disciplined. Accordingly, they were not unjustly suspended within the contemplation of Rule 37 and are not entitled to the compensation claimed by them under said or any other Rule of the labor agreement. Their claims are hereby denied.

The Claimants Stacey and Templeton were found not guilty and thus unjustly suspended from work for the period of the hearing. It is undisputed that they received two hours' pay for the time from 7:59 A. M. to 9:59 A.M. Each of them lost pay for six hours and is entitled to be compensated therefor at the pro rata rate.

The Claimant Aiello was on his rest day at the time of the hearing and had to forego part of his off duty time. He was found not guilty and thus unjustly deprived of his rest day during the period in which he was required to attend the hearing. The actual time (exclusive of the lunch period) consumed by the hearing amounted to about six hours and twenty minutes. Aiello is entitled to compensation for said period at the pro rata rate.

The additional claims of the Claimants Stacey, Templeton, and Aiello are unjustified and hereby denied. This applies specifically to their request for compensation at the rate of time and one-half. See: Awards 1632, 2251, and 3484 of the Second Division.

AWARD

Claim partly sustained and partly denied in accordance with the above Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 6th day of November 1963.

DISSENT of CARRIER MEMBERS TO AWARD 4334

A reading of the Findings of the Majority fails to bring this dispute into focus. The General Chairman stated in his letter of appeal, dated April 7, 1960, that, "all of these claims have been handled **individually** on the property by the

Local Chairman up to and including the Master Mechanic without satisfactory settlement being made." (emphasis added). (See Carrier's Exhibit No. 1).

Three of the five Claimants had been found not guilty at the investigation. Consequently, the Carrier's highest officer designated to handle these matters proposed to pay those Claimants, viz. Templeton, Aiello and Stacey, for the time which they spent in attending the investigation. This is revealed in his letter dated May 17, 1960, which, of course, was eleven months (less three days) before the claims were filed with this Division. Hence there was no real dispute concerning the claims for compensation on behalf of Templeton, Aiello and Stacey. Section 3 First (h) of the Railway Labor Act states that our jurisdiction is "over disputes."

We agree that the law is well settled that offers of compromise are not generally accepted into evidence for the reason that to do so would tend to discourage out-of-court settlements. But in the instant case, the citation of the Carrier's letter of May 17, 1960 was for the purpose of showing that no dispute existed as to three of the five Claimants. Incidentally, both parties included this same letter as an exhibit with their ex parte submission so that it is difficult to understand how its presence in the record could prejudice the position of either of them.

The real crux of this dispute is found in the General Chairman's letter of September 22, 1960, in the second sentence of the second paragraph thereof. (See page 1 of Carrier's Exhibit No. 5.)

The claim that was filed with the Second Division does not ask for the removal or setting aside of the discipline that was assessed against the two remaining Claimants, Hay and Reichow. This confirms the Carrier's position that the question of their guilt has never been an issue in this dispute. Hence it is clear that the handling of the "claim" from September 22, 1960 on was nothing short of an attempted intimidation by the General Chairman upon the Carrier to pay compensation to two employes whose guilt had been undisputed.

The Petitioner was not successful in carrying out this intimidation because the award gives Claimants (Templeton, Aiello and Stacey) what they were entitled to from the beginning and what they could have had three and one-half years ago, and denies the payment of any compensation to Claimants Hay and Reichow. But the record should be set straight to reflect this dispute in its true focus. It should likewise be noted that the majority's conclusion that there was an "implied agreement" by the Carrier to extend the time limit of nine months which is provided in Section (c) of Article V of the August 21, 1954 Agreement, or a waiver by the Carrier of that provision, is out of line with weight of authority on this point. (See Second Division Awards Nos. 3234, 2494 and 2211.)

Francis P. Butler

W. B. Jones

P. R. Humphreys

H. K. Hagerman

C. M. Mannogian