Award No. 4355
Docket No. 4236
2-SP(PL)-FO-'63

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:

SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. — C. I. O. (Firemen & Oilers)

SOUTHERN PACIFIC COMPANY (Pacific Lines)

DISPUTE: CLAIM OF EMPLOYES: That under the current agreement Laborer Ygnacio J. Higuera was unjustly treated when he was dismissed from service January 1, 1961, after 32 years with the Carrier.

2. That accordingly the Carrier be ordered to restore the aforementioned Laborer to service with seniority rights unimpaired and compensation for all time lost due to said unjust dismissal.

EMPLOYES' STATEMENT OF FACTS: Laborer Ygnacio J. Higuera hereinafter referred to as the claimant was employed by the carrier and at the time of dismissal had above 32 years of service. The claimant was injured November 28, 1960. Under date of January 1, 1961, Master Mechanic J. W. Rowan wrote the claimant advising him he was dismissed from the service of the Southern Pacific Company, hereinafter referred to as the carrier.

The claimant was hospitalized during the period 1/4/61 to 1/12/61.

Local Chairman Olague under date of January 4, 1961 appealed Master Mechanic's Ronan's letter of dismissal of January 1, 1961. Local Chairman Olague under date of January 6, 1961 appealed to J. McDonald for Master Mechanic Los Angeles, California.

The claimant under date of January 16, 1961 wrote to T. J. McDonald advising he was entitled to investigation.

T. J. McDonald replied under date of January 19, 1961.

The dispute was handled with carrier officials designated to handle such affairs who all declined to adjust the matter.

The agreement effective October 16, 1937, as subsequently amended is controlling.

1956. My service crew as well as machinists and electricians have always worked under the protection of blue flags. I have made numerous surveys of the different service points and have always found blue flags available at Subway as well as both ends of yard and at both ends of Passenger Station.

/s/ W. E. Stephey
Roundhouse Foreman
Yuma, Arizona"

Carrier here asserts that the claimant indulged in a most flagrant violation of Rule 26.

c) The claimant was unjustly treated and can, therefore, assert a claim for reinstatement and pay for time lost under Rule 32 of the current agreement covering "Grievances", without complying with Rule 33 having to do with "Discipline—Suspension—Dismissal."

The carrier here asserts that under the current agreement an employe having been dismissed must within ten (10) days after being notified of dismissal make written request for investigation, as required by Rule 33, or be forever foreclosed from contesting the dismissal. This is the only avenue available to prove his innocence, if that is his desire, and failing to perfect a request for investigation, he not only loses his right to an investigation but the opportunity to be found innocent of the charges. There can be no other interpretation to this clear and unambiguous rule, thus Rule 32 as it applies to "unjust treatment" cannot be applied to a dismissal case.

The carrier again asserts that this case is improperly before the Board and should be dismissed for lack of jurisdiction; that in event the Board should take jurisdiction, the claim should be denied for lack of merit.

CONCLUSION

Having conclusively established that the claim in this docket is without basis or merit, carrier respectfully submits that it should be dismissed or 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.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was assigned as a supply man and engaged in maintenance work on a yard Engine. While so employed another Engine coupled onto the Engine on which Claimant was working and as a result thereof he fell and was injured.

Thereafter Claimant was dismissed from service on account of his alleged violation of a company rule which required Employes servicing Engines situated on the tracks where couplings might be made to display "blue flags" at each end of such track or equipment.

The Claimant is before this Board contending that he was unjustly treated when he was dismissed from service and asking that he be restored to service with compensation for time lost.

The record discloses that in the meantime, however, the Claimant instituted a civil action for damages against the Carrier in the Superior Court of Arizona. That action was predicated on the Federal Employers' Liability Act. The complaint alleged that Claimant's injuries were caused by the negligence of the Carrier's Employes and its failure to provide him with a safe place to work. It was specifically alleged, "That Plaintiff has to date lost, and in the future will lose, considerable sums in wages, the total of which Plaintiff is unable to estimate at this time;" also, "That Plaintiff employe is informed and believes that his condition will continue indefinitely . . ."

The Organization has correctly pointed out that the court action was predicated upon a charge of negligence, while the one before this Board is for alleged wrongful discharge in violation of contractual rights. But we do not consider this distinction to be of controlling significance. In both instances the Claimant sought or seeks compensation for past and prospective earnings. The issues before the Arizona court were broad enough to admit of evidence of total and permanent disability and such of the evidence in that case as has been brought before us is calculated to lead the jury to believe that such was the fact. The verdict was a substantial one ($35,000) and we do not feel that the Claimant is in any position to contend now that his recovery was for temporary or partial impairment.

If the Claimant has, in fact, been compensated by this Carrier for total and permanent disability, the fact that he may have been unjustly discharged is immaterial. To allow the Claimant to recover double his damages would amount to his unjust enrichment and inflict an undue hardship on the Carrier.

We are not unmindful that precedents may be found that would appear to lend support to the Claimant's contentions. We believe however, that a careful consideration of these precedents will lead to the conclusion that they are distinguishable on the situations involved or that they are contrary to the weight of the better reasoned authority.

It is our conclusion that the Claimant having chosen his forum, won his case and accepted the benefits thereof, is now estopped from pursuing the pending case before this Board.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 10th day of December, 1963.

DISSENT OF LABOR MEMBERS TO AWARD NO. 4355

The claim in the above Award reads as follows:

1. That under the current agreement Laborer Ygnacio J. Higuera was unjustly treated when he was dismissed from service January 1, 1961, after 32 years with the Carrier.

2. That accordingly the Carrier be ordered to restore the aforementioned laborer to service with seniority rights unimpaired and compensation for all time lost due to said unjust dismissal.

The dispute hereinabove described in the claim was handled in accordance with Section 3, First, (i) of the Railway Labor Act, as amended[1] and grew out of the dismissal notice directed to the claimant under date of January 1, 1961, reading as follows:

"You have alleged personal injury occurring at Yuma, November 28, 1960, at approximately 4:00 P.M. stating that you were preparing to descend from Locomotive 1033 after having serviced same, at which time other locomotives were coupled against Locomotive 1033 resulting in your being thrown against guard rail.

"It has been determined that you were working without blue flag protection at the time of the alleged personal injury. Your actions in this instance constitute a violation of that portion of Rule 26 of the General Rules and Regulations reading as follows:

'When employes are working between, upon, in or under an engine or units, train, car or cars for purposes of inspection, repair or service of any of them a blue sign reading 'Men at Work' (White lettering on blue background) must be displayed at each end of track or equipment to which coupling can be made.'

"For reasons stated above you are hereby dismissed from the service of the Southern Pacific Company. Please arrange to turn in any company property or free transportation you may have in your possession.

"Please acknowledge receipt of this letter on the copy attached and return it to my office."

The majority in the Findings set forth the reason the claimant was dismissed and relate the dispute before this Division when they state the following:

"Thereafter claimant was dismissed from service on account of his alleged violation of a company rule which required Employes servicing engines situated on the tracks where employes might be made to display 'blue flags' at each end of such track or equipment.

"The claimant is before this Board contending that he was unjustly treated when he was dismissed from service and asking that he be restored to service with compensation for time lost."

and then further state the following:

[1]The dispute between an employe or group of employes and a carrier or carriers growing out of grievances or out of the interpretation 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, and 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.

"The record discloses that in the meantime, however, the Claimant instituted a civil action for damages against the Carrier in the Superior Court of Arizona. That action was predicated on the Federal Employers' Liability Act. The complaint alleged that Claimant's injuries were caused by the negligence of the Carrier's Employes and its failure to provide him with a safe place to work. It was specifically alleged, "That Plaintiff has to date lost, and in the future will lose, considerable sums in wages, the total of which Plaintiff is unable to estimate at this time;" also, "That Plaintiff employe is informed and believes that his condition will continue indefinitely * * *"

"The Organization has correctly pointed out that the court action was predicated upon a charge of negligence, while the one before this Board is for alleged wrongful discharge in violation of contractual rights. But we do not consider this distinction to be of controlling significance. In both instances the Claimant sought or seeks compensation for past and prospective earnings. The issues before the Arizona court were broad enough to admit of evidence of total and permanent disability and such of the evidence in that case as has been brought before us is calculated to lead the jury to believe that such was the fact. The verdict was a substantial one ($35,000) and we do not feel that the Claimant is in any position to contend now that his recovery was for temporary or partial impairment.

"If the Claimant has, in fact, been compensated by this Carrier for total and permanent disability, the fact that he may have been unjustly discharged is immaterial. To allow the Claimant to recover double his damages would amount to his unjust enrichment and inflict an undue hardship on the Carrier.

"We are not unmindful that precedents may be found that would appear to lend support to the Claimant's contentions. We believe however, that a careful consideration of these precedents will lead to the conclusion that they are distinguishable on the situation involved or that they are contrary to the weight of the better reasoned authority.

"It is our conclusion that the Claimant having chosen his forum, won his case and accepted the benefits thereof, is now estopped from pursuing the pending case before this Board.

AWARD

"Claim dismissed."

The majority based their dismissal on evidence and argument placed in the Carrier's submission, which was not handled on the property, or made known to the Employes until the filing of their (Carrier's) submission and foreign to the issue or dispute handled on the property, under Section 3, First (i) of the Railway Labor Act, as amended, which is confirmed by the correspondence.

The notice letter filed with this Division regarding the dismissal of the claimant was dated December 12, 1961, while the settlement of the injury was not made until January 24, 1962, which is proof that the settlement or any connection therewith could not have been handled on the property as provided for in Section 3, First (i), or in accordance with Circular No. 1.

(issued October 10, 1934) by the National Railroad Adjustment Board, Second Division2

The majority, which includes Referee Curtis G. Shake, said the following in Award 4245 of this Division:

> "The Employes have attempted to bring into the record for the first time by means of their Rebuttal Submission six exhibits, calculated to show past practices on the property and an agreed settlement of a prior claim, alleged to be comparable to the one presently under consideration. Awards too numerous to list have held that Circular No. 1, adopted by the National Railroad Adjustment Board on October 10, 1934 precludes us from considering these showings. Merely for the purpose of again emphasizing the importance of strict compliance with the requirements of that directive we quote from the findings of this Division in its Award No. 2374:
>
> > '* * * each party in its original submission is required: (1) to set forth briefly all relevant facts and documentary evidence in exhibit form, (2) quote the agreement and rule provision involved, (3) set forth all data submitted in support of the party's position, and (4) affirmatively show that the same was presented to the adverse party or his representative.
> >
> > 'Procedural rules are necessary to expedite the work of the Division. Unless they are enforced, their purpose is wholly defeated and the presentation of disputes becomes chaotic and interminable . . . Such results are contrary to the expressed purpose of the Railway Labor Act.'
>
> "By resolution adopted on March 27, 1936, this Division went on record as requiring strict compliance with said Circular No. 1, 'except in extreme cases, and then only by action of the Second Division.' There is no showing that any exception was authorized in this case and the claim must therefore be denied for failure of the organization to discharge the burden of proof."

The decision of the majority, as reflected by the foregoing, is erroneous and inconsistent, and for the reasons stated above we dissent.

James B. Zink

C. E. Bagwell

Robert E. Stenzinger

T. E. Losey

E. J. McDermott

2"Position of Carrier: Under this caption the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any, and all data submitted in support of Carrier's position must affirmatively show the same to have been presented to the employes or duly authorized representative thereof and made a part of the particular question in dispute."