Award No. 5425
Docket No. 5386-I
2-K&IT-I-'68

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

PARTIES TO DISPUTE:

EZRA STEWART, PETITIONER

KENTUCKY & INDIANA TERMINAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. The Question: Whether or not Ezra Stewart is entitled to the benefits of the Washington Job Protection Agreement of May, 1936, by virtue of Article I, Section 2, of the Mediation Agreement in force between the Kentucky and Indiana Terminal Railroad Company (hereafter called the Company) and its employes (hereafter called the Union.)

2. WHEREFORE, Ezra Stewart asks that the Kentucky and Indiana Terminal Railroad Company be ordered to pay him the sum of $6,231.68 for his separation pay.

EMPLOYE'S POSITION: The Question: Whether or not Ezra Stewart is entitled to the benefits of the Washington Job Protection Agreement of May, 1936, by virtue of Article I, Section 2 of the Mediation Agreement in force between the Kentucky and Indiana Terminal Railroad Company (hereafter called the Company) and its employes (hereafter called the Union).

EMPLOYE'S STATEMENT OF FACTS: On March 26, 1964, Ezra Stewart, an employe of over twenty years service, received notice that his position as Boiler Welder in the Locomotive Department would be abolished, effective 7:00 A. M. March 31, 1964, and that he would be furloughed as of that date. (The furlough date was later amended to April 1, 1964, to meet the notice requirements of the Agreement in force between the Union and the Company). The reason given was a force reduction. Stewart, although a member of the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, was protected by the Collective Agreement in force between the Company and the Union representing most of its employes (System Federation No. 91 Railway Employes Department A. F. of L.) and was given special and separate seniority privileges by the Agreement, a photostatic copy of the pertinent parts of said Agreement is attached hereto and marked Exhibit A. He protested that the Company's action contravened the Agreement, and sought reinstatement. Receiving no satisfaction, and being advised on March 30, 1965, that his claim for severance pay (in lieu of reinstatement) had been denied, he served notice that he was availing himself of the services of this Board within the nine months limitation period provided for in the Agreement between the parties.

the information from that federal agency that Claimant was compensated $1,978.60 for sick and unemployment benefits in the period April 3, 1964 (the date of furlough) through March 31, 1965, the time of his retirement. An employe cannot collect sick benefits from the Railroad Retirement Board if he is physically able to work.

In addition to Claimant's letter of resignation addressed to the Company, Attachment R, he also signed for an agency of the United States Government, Railroad Retirement Board Form No. 88 a 1, Employe's Relinquishment of Rights, Attachment U-2, in which he certifies:

> "I have filed an application for an annuity under the Railroad Retirement Act and I certify that I have given up, or hereby voluntarily give up, any employe rights that I have to return to the service of the employer named in Section 4 above."

In Section 4, Claimant named the Kentucky & Indiana Terminal Railroad Company.

As a result of Claimant's selecting pension benefits, which were retroactive to the date of furlough, the Retirement Board compensated claimant on April 28, 1965, in the amount of $374.65 which represented monthly pension accrual of $2,353.25 starting the month of furlough, less $1,978.60, the amount of sick and unemployment benefits already paid to claimant by that agency. Claimant's wife began receiving annuity due her under the same law in the amount of $66.40 per month. Mrs. Stewart's annuity was increased to $71.10 per month beginning on October 1, 1965, making at the present total annuities to claimant and wife of $268.30 per month, see Attachment U. The latter amount has been increased since October 1, 1965.

In summary, claimant alleges that he was physically disabled during the period covered by the claim before your Board, and based on his representations, he collected valuable benefits. He cannot now claim he was physically able to work during this period, thereby collecting wages.

Claimant voluntarily severed his employment relationship retroactive to date of furlough and received compensation therefor. He cannot now be permitted to unilaterally reinstate his employment relationship.

In view of the foregoing, there is no basis for a monetary award by your board.

(Exhibits not reproduced.)

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 invoved 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 claim arose account of claimant being furloughed from service effective April 2, 1964. The claim was progressed on the property up to and including the carrier's Director of Labor Relations, Mr. Raymond R. Hawkins, the highest designated officer to receive such claims and grievances, and declined by Mr. Hawkins by letter dated July 30, 1964.

The claim was filed by claimant's attorney, John E. Wise, with the Second Division of the National Railroad Adjustment Board on November 4, 1966, approximately twenty-seven (27) months subsequent to the date of carrier's declination letter of July 30, 1964. Rule 124, paragraph (c) of the current agreement reads in pertinent part as follows: "* * * All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board * * *."

The record is abundantly clear that the carrier's highest officer's decision was not appealed to the appropriate Division of the National Railroad Adjustment Board within the nine (9) month period following the highest officer's declination of the claim as required by Rule 124, paragraph (c), the pertinent portion of which is quoted above. Therefore, the Board is estopped from considering the claim on its merits and must render a dismissal award.

AWARD

Claim dismissed per findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1968.

Keenan Printing Co., Chicago, Ill. Printed in U. S. A.