

Award No. 5622

Docket No. 5422

2-WT-CM.'69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Francis B. Murphy when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 106, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

THE WASHINGTON TERMINAL COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current agreement, Car Repairman, R. T. Wiggington, was unjustly dealt with when he was removed from the service for a period of five (5) work days, April 3, 4, 5, 6, 7, 1966.
2. That accordingly, R. T. Wiggington, is entitled to be compensated for all time lost as the result of the five (5) days that he was held out of service.

EMPLOYEES' STATEMENT OF FACTS: Car Repairman, R. T. Wiggington, hereinafter referred to as the Claimant, is employed with the Washington Terminal Company, hereinafter referred to as the Carrier. On Sunday, April 3, 1966 when the Claimant reported for work he was notified by the Carrier's Acting Foreman that he would not be permitted to work, on orders from the Carrier's Master Mechanic. On April 4, 1966, Claimant's Attorney addressed a letter to Carrier's Master Mechanic McCabe, copy attached as Exhibit A and for ready reference reads in part: "I am writing this letter to place my client's position on record that he is ready, willing and able to perform his employment but that you are arbitrarily refusing him the opportunity to do so." On April 6, 1966 the Claimant's General Chairman filed a claim in behalf of the Claimant, requesting that the Claimant be returned to the service and be compensated for all time lost, copy attached and designated Exhibit (A-1). On April 6, 1966 the Claimant was contacted by the Carrier and instructed to report to Carrier's Medical Examiner on April 7, 1966. The Claimant reported on April 7, 1966 and was requested to see Carrier's Master Mechanic. The Claimant reported to the Master Mechanic's office in the company of his local Committeeman and at this meeting Carrier's Master Mechanic discussed Claimant's General Chairman's letter of April 6, 1966 with the Claimant and then sent him to Carrier's Medical Examiner, who issued the Claimant a return to duty form to resume duties on Sunday, April 10, 1966, the Claimant's rest days being Fridays and Saturdays, April 8 and 9, 1966.

in itself, nor reasonably foreseeable by the carrier — constituted an “efficient, independent, intervening” factor in the chain of events, which factor, in itself constituted the “proximate cause” of his loss of pay for those days. Claimant cannot properly claim pay for work which, admittedly because of his own action, he couldn't possibly have performed. Paraphrasing Third Division Award 13562, Referee Hutchins, “. . . The real basis [for rejecting the claim] is the impossibility of performance by reason of unavailability of the employe resulting from a circumstance created by an employe. The employes cannot enforce a contract [to work] they could not have performed.”

Were the petitioner's theory of the claim to prevail in this case, the claimant could have helped himself to an indefinite amount of time-off-with-pay simply because carrier improperly withheld him from service one day, April 3.

Because of the foregoing, the claim — for April 4, 5 and 6 — should be denied.

In conclusion, a notation might be added solely in response to an ancillary objection raised belatedly by the petitioning organization in the final conference held on this case on the property: While not challenging directly the carrier's repeated assertions that Car Foreman McPhearson attempted to call the claimant on all three days, April 4, 5 and 6, the petitioner suggested that the carrier should have attempted to contact him by letter (presumably, perhaps, so there would have been some evidence that the attempts were made). While the sensibleness of using the telephone under these circumstances seems self-evident, the fact remains that the claimant was just as unavailable for work these days whether one form of communication or another had been used to contact him. “. . . In the case reported in 182 Pa. Super 146, the Court said: ‘Available means capable of being made use of, at one's disposal, within one's reach’ . . . The law is well settled that a party to a contract is not obliged to perform a futile act.” Third Division Award 14208, Referee Perelson.

It is submitted that the claim lacks merit; that it should be denied.

All relevant data submitted in support of the carrier's position has been presented to the organization's representative and has been made part of the particular question in dispute.

(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 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.

Claim is for payment of 8 hours at straight time rate April 3, 4, 5, 6 and 7, 1966. Carrier, without admitting wrongful handling, has agreed to compensate

claimant for time lost April 3 and 7, 1966. There seems to be no question that claimant, of his own accord, made himself unavailable for service and not being at his place of residence, cannot successfully contend that telephone calls to his home, by his foreman, were not made.

However, we find nothing in the record to indicate the time of the day the first call was made on April 4. The claimant was assigned to the "daylight shift" and Foreman McPhearson was not told of what took place on March 31 until some time on April 4; it is extremely doubtful if the claimant could have actually worked much, if any, of his shift on that day, even if he had been available to respond to the 'phone call. In consequence, we think justice will be served and the equities be preserved, by sustaining the claim for 8 hours at the straight time rate for time lost on April 4, with the understanding that Carrier will also compensate claimant, as previously offered, for time lost on April 3 and 7, 1966.

AWARD

Claim disposed of in conformity with these findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of January, 1969.