Award No. 5797
Docket No. 5684-I
2-dm7ci '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee William H. Coburn when award was rendered.

PARTIES TO DISPUTE:

MR. WILLIAM CASS, PETITIONER

DES MOINES & CENTRAL IOWA RAILWAY COMPANY
CHICAGO AND NORTHWESTERN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYE:

The Petitioner comes before the National Railroad Adjustment Board and makes the following statements as the basis of his claim against the Des Moines & Central Iowa Railway Company and the Chicago and Northwestern Railway Company, hereinafter referred to as the "Employer", as follows:

1.) The Railway Labor Act, as amended, gives the Second Division of the Board jurisdiction over disputes involving several job classifications, including that of Car-Man. Therefore, the Second Division of the Board has jurisdiction to hear this dispute involving this Petitioner who was hired by the Des Moines & Central Iowa Railway Company and worked for said Employer in the job classification of "Carman-Welder".

2.) The Chicago and Northwestern Railway Company is joined as an "Employer" in this claim before the Board for the reason that on or about July 29, 1968 in Finance Docket No. 24471, the Interstate Commerce Commission authorized the Chicago & Northwestern Railway Company to acquire control of the Des Moines & Central Iowa Railway Company and impose the "New Orleans Conditions", 282 I.C.C. 271, for the protection of Railroad Employes adversely effected by the consummation of the authorized transaction.

3.) (a) Petitioner was hired by the D.M.&C.I., on or about March, 1955 and has worked continuously as a Carman-Welder until his wrongful discharge on or about January 1968.

(b) Petitioner's position as a Carman-Welder was abolished by the Employer without notice to him, without negotiation with or agreement by the Union (Des Moines & Central Iowa Non-Operating Employees Union of Des Moines, Iowa, of which Petitioner is the current President), for the purpose of reducing the rate of pay of the Petitioner and evading the Employer's obligations to him under the several Collective Bargaining Agreements in force between the Union and the Employer. The abolition of said position violated Rule 14 of the 1946 Agreement.

(3) The Employer denied the Petitioner the opportunity to exercise his seniority rights in violation of Rule #3 of the said Agreement.

(d) On January 2, 1968, the Employer summarily discharged the Petitioner without an investigation or hearing, in violation of Rule #2 of the said Agreement, and neither the Petitioner nor the Union was allowed to process a grievance for the Petitioner.

(e) The reason stated by the Employer for the dismissal of the Petitioner was that he was found "not physically qualified to work as a Carman-Welder", by the Company doctor. The Employer made no effort to furnish employment suited to the Petitioner's capacity in violation of Rule 10 of the said Agreement, and the Employer refused to furnish Petitioner a copy of the alleged physical examination report.

(f) The Employer refused to pay the Petitioner from and after January 2, 1968 and refused to pay him for twelve (12) additional working days as required by Rule 19 of the Agreement.

(g) The Employer has refused to pay the Petitioner a coordination allowance, as required by Section 6 of the Shop Crafts Agreement, dated September 25, 1964 which is an additional existing Collective Bargaining Agreement between the Employer and Union herein.

(h) The Employer has denied the Petitioner an opportunity to receive a separation allowance, in violation of Section 7 of the Shop Crafts Agreement.

EMPLOYES STATEMENT OF FACTS:

(1) The petition herein was hired by the DM & CI on or about March-1955 and has worked continuously as a carman-welder until his wrongful discharge on or about January 2, 1968.

(2) Petitioner was not required by the employer to take a physical examination at the time he was hired nor at anytime during the ensuing twelve and one-half (12-1/2) years of his employment until November 27, 1967 at which time he took a physical examination given by the company doctor, James B. Fraser as ordered by the company on November 21, 1967. The company doctor and the company both thereafter refused to disclose the results of that physical examination to the petitioner and have continued to so refuse to the present date. Both the company and the company doctor refuse to furnish to petitioner a copy of the physical examination report. Thereafter, the company directed a letter dated January 2, 1968 to the petitioner informing him that as the result of is physical examination he was not physically qualified to work as a carman-welder and therefore would not be permitted to work as a carman-welder after the date of this said letter. The letter further stated that petitioner would be allowed to remain on the seniority roster and would be permitted to return to work if and when he was physically qualified. However, the company continued to refuse to disclose to petitioner in what respect he allegedly was not physically qualified to perform his duties, nor would it grant him any of the benefits nor protective provisions of the 1946 agreement, including an investigation or hearing.

(3) Thereafter, the petitioner, through his attorney, George G. West, directed a letter under date of July 17, 1968 to Mr. J. C. Bussey, vice president-operations of the DM & CI, informing the company that in his opinion that the petitioner had been wrongfully discharged, deprived of his employment or placed in a worse position with respect to compensation and rules governing working conditions as the result of the coordination wherein the DM & CI had been acquired by the Chicago and Northwestern Railway Company, and also of petitioner's wrongful discharge. In that said letter, the various violations of the 1964 agreement between the employer and the Des Moines &

In view of the fact that the dispute was not handled in accordance with the mandatory provisions of the Railway Labor Act prior to the submission of this dispute to the Second Division, the claim should be dismissed. In any event, if the claim is not dismissed, there is no support for the contention that there was any violation of schedule rules or agreements, and the claim should 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.

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

The record of the handling of this dispute on the property shows:

1. On November 21, 1967, the Carrier by letter directed Mr. Cass (here called Petitioner) to report to Dr. J. B. Fraser in the Des Moines, Iowa, at 1:00 P.M. on November 27 for a physical examination.

2. On January 2, 1968, the Carrier advised Petitioner in writing that as a result of the aforesaid examination he had been found not physically qualified to work as a carman-welder and that, therefore, he would ". . . not be permitted to work as a carman-welder after the date of this letter." Petitioner was further advised that he would retain his seniority and would be permitted to return to work when physically qualified.

3. On July 17, 1968, Attorney George G. West of Des Moines, wrote to the Carrier, advising it that he had been retained by Petitioner and that, in his opinion, the Petitioner had been wrongfully discharged in violation of the controlling Agreement between the Carrier and its Non-Operating Employees Union; that Petitioner's rights under the Railway Labor Act had also been violated and that Petitioner was, moreover, entitled to certain benefits under the Mediation Agreement of September 25, 1964. Mr. West's letter concluded with the following:

> "This letter will further inform your company that if I have not been contacted by you by July 24, 1968, I will take any and all appropriate action to protect my client's rights in this matter, including recourse to the National Railroad Adjustment Board and the Interstate Commerce Commission."

4. On July 23, 1968, the Carrier's Vice President-Operations, a Mr. Bussey, replied to Mr. West's letter. He denied that Petitioner had been discharged or that the Agreement had been violated. He also asserted that the September 25, 1964 Agreement was not applicable in this case. Mr. Bussey concluded with the following:

> "I will be glad to confer with you on the matter, if you so desire. Please advise your desire as to a conference so that we can mutually agree on a time and date to discuss the matter in our general office in Boone, Iowa."

5. On August 12, 1968, Petitioner filed written notice of intent to file an ex parte submission of the dispute with this Division of the National Railroad Adjustment Board.

From the foregoing, it is clear that the Carrier's offer to confer on the subject matter of the dispute was not accepted by Petitioner. He chose, instead, to submit the dispute directly to this Board. This was a procedural error barring the claim from consideration on its merits.

One of the stated general purposes of the Railway Labor Act is to provide for the prompt and orderly **settlement** of all disputes and grievances (Sec. 2.(5). It imposes upon the parties the duty to **settle** all disputes (Sec. 2. First), and specifically requires that such disputes ". . . shall be considered and, if possible, decided, with all expedition, **in conference** between representatives designated and authorized so to confer . . . ." (Sec. 2. Second) (emphasis supplied).

The statutory language used by the framers of the act clearly demonstrates their intent to encourage the settlement of all disputes and grievances by the parties themselves through **bona fide** negotiations, including conferences on the property, as an unconditional prerequisite to the submission of such disputes to final and binding arbitration by this Board. It follows that the failure of either party to satisfy these requirements renders its case fatally defective.

In the dispute at hand, the record establishes that the Carrier's offer to confer with the Petitioner's representative was ignored. Petitioner chose, instead, to submit the claim directly to the Board. We find, therefore, that the claim is barred from consideration on its merits for failure to comply with the procedural requirements of the Railway Labor Act, as amended.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 7th day of November, 1969.

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