Award Number 5962
Docket Number 5818
2-SP(PL)-MA-'70

# NATIONAL RAILROAD ADJUSTMENT BOARD

## SECOND DIVISION

**The Second Division consisted of the regular members and in addition Referee Harold M. Gilden when award was rendered.**

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## PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L. - C. I. O. (Machinists)**

**SOUTHERN PACIFIC COMPANY (Pacific Lines)**

DISPUTE: CLAIM OF EMPLOYES:

That under the current Agreement Machinist Kester P. Hope (hereinafter referred to as Claimant) was unjustly dismissed from service on August 9, 1968 and that accordingly the Carrier be ordered to:

1. Restore Claimant to service with seniority rights unimpaired.

2. Compensate the Claimant for all time lost.

EMPLOYES STATEMENT OF FACTS: The Carrier employed Claimant as machinist on February 6, 1948 at its Los Angeles Diesel Shop, Los Angeles, California, and his hours of assignment on August 9, 1968 were from 3:00 P.M. to 11:00 P.M.

On July 16, 1968 the Carrier charged Claimant with responsibility for being accident prone.

Formal hearing scheduled to be held on July 30, 1968 was held on July 30 and 31, 1968.

Following adjournment of formal hearing on July 31, 1968, Carrier dismissed Claimant from service on August 9, 1968.

Request for reinstatement of Claimant to service on the basis set forth above has been handled in accordance with the terms of the controlling Agreement up to and with the highest Carrier Officers designated to handle such matters, all of whom, as evidenced by the record, have declined adjustment of this dispute.

The Agreement effective April 16, 1942, as subsequently amended is controlling.

POSITION OF THE EMPLOYES: We submit that Claimant was charged with being accident prone and informed he would be dismissed from service indicates that this document is in clear conflict with, and does not meet the requirements imposed upon the Carrier, as set forth in Rule 39 of the controlling agreement, reading as follows:

given him both by his supervisors and from the implications which flow from the injuries themselves. To this observation, of course, must be added the additional weight of an otherwise unsatisfactory record the composition of which should dissuade the Board from any judgment that the carrier's decision was arbitrarily arrived at. It is urged to so concur and to deny the claim.

## ISSUE OF CLAIMANT'S

## REQUEST FOR COMPENSATION

Without prejudice to its position that the claim is lacking in merit, should the Board find to the contrary then it is requested to authorize carrier in computing the wage loss sustained by claimant to offset any monies he may have earned in other employment during the period since his separation from Carrier's service commenced.

Rule 39 of the current agreement reads in part as follows:

> "If it is found that an employe has been unjustly suspended or dismissed from the service, such employe shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The Board has previously interpreted this rule providing for compensation for "wage loss, if any" as requiring deduction of outside earnings in computing compensation due. See Second Division Awards 2523 and 2653.

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 proposition that claimant may not be properly dismissed from service for accident-proneness unless there is a specific operating rule or safety rule prohibiting said offense, has been repudiated by Award 20438, NRAB, First Division. We concur in that ruling and hold this contention to be untenable.

We also affirm, and quote with approval that part of Award 20438 reading: "If a charge of accident-proneness is made — such charge must be proved in accordance with the Investigation Rule and under the principles applied by this Division for all withholding from service".

A glaring flaw in the Carrier's presentation at the hearing is its reliance on hearsay, rather than direct evidence, in attempting to justify termination of claimant's employment. Noticeably, Carrier's Mechanical Production Planner R. A. Moore was neither an eye witness to the event nor had he become personally informed through an on-the-spot investigation at the time of occurrence. His "analysis" of the 14 injuries sustained by the claimant was not the best evidence of claimant's alleged "behavioral pattern of susceptibility to injury" and was clearly inadmissible.

The original records, i. e., claimant's reports of his accidents; Carrier's reports of accident investigations and ICC accident reports, if any, should have been put in evidence at the hearing. Had that been done, it could be determined whether claimant was at fault or whether other factors, i. e. poor supervision, hazardous conditions, unsafe equipment or negligence of fellow employees, were wholly or partly to blame. But, where, as here, these documents are not furnished, no opportunity is afforded to put responsibility for each accident where it properly belongs. It follows, therefore, that in this instance neither the number or frequency of claimant's accidents, nor the relative accident frequency standings of claimant and his fellow machinists are pertinent to the charges brought against him.

Nowhere in the Transcript of Investigation is there to be found substantial probative evidence to establish claimant's alleged tendency to be accident prone and therefore unfit to continue to serve Carrier in the capacity of a Machinist. To put it concisely, Carrier has not proved its case against claimant, and the discharge should be set aside.

Accordingly, it must be concluded that claimant was unjustly discharged on August 9, 1968, and he should be reinstated with seniority and vacation rights unimpaired, and remunerated for time lost, if any, during the period extending from August 9, 1968 up to the date of his reinstatement, with deduction for wages, if any, earned in other employment during the period for which he is awarded back pay herein.

## AWARD

Claim sustained in accordance with above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June, 1970.

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