

Award No. 6076
Docket No. 5882-I
2-GM&O-I-70

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee John J. McGovern when award was rendered.

PARTIES TO DISPUTE:

MR. WALTER O. MANN, JR., PLAINTIFF
GULF, MOBILE AND OHIO RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEE: Now comes WALTER O. MANN, JR., Plaintiff, by Costigan and Wollrab, his attorneys, complaining of the Defendant, GULF, MOBILE & OHIO RAILROAD, a Corporation and says:

1. That the Plaintiff, a resident of the City of Bloomington, County of McLean, State of Illinois, was injured on the 8th day of December, 1964, while in the employment of the Gulf, Mobile & Ohio Railroad Company.

2. That the plaintiff had for a long time prior to said date of injury been employed by said defendant railroad on the basis of his seniority was entitled to the job of stationary foreman and engineer as of May 14, 1966, which job was open with said company at Bloomington, Illinois, on the aforesaid date.

3. That the plaintiff on said date made application for said job of stationary foreman and engineer at Bloomington, Illinois, with the defendant and at said time supplied the defendant with a release by plaintiff's attending physician, releasing him medically for this job. The medical release did contain a restriction as to heavy lifting, however said job did not require heavy lifting.

4. That the Alton Railroad and System Federation No. 29 of the Railway Employees' Department of the A.F. of L. in behalf of International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers of the Railway Employees' Department, A. F. of L., entered into an agreement which became effective on the 1st day of October, 1943, establishing rules and working conditions for Power House Employees and Railway Shop Laborers, copy of which agreement is attached hereto and made a part hereof and marked Exhibit "A."

5. That the defendant herein is the successor to the aforesaid Alton Railroad and is operating under and subject to the terms of the aforesaid agreement of October 1, 1943.

6. That the plaintiff is and was an employe of the aforesaid defendant operating under and subject to the terms of the aforesaid agreement, of October 1, 1943.

7. That the plaintiff has complied with all of the terms of the aforesaid agreement of October 1, 1943.

8. That the defendant has refused to re-employ plaintiff.

9. That the plaintiff, pursuant to said agreement of October 1, 1943, is entitled to his rights of seniority and the job of stationary foreman and engineer as of May 14, 1966, and is entitled to all back pay and benefits thereunder.

WHEREFORE, Plaintiff prays judgment against the Defendant in the sum of \$50,000.00 and costs of suit.

PETITIONER'S STATEMENT OF FACTS:

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

WALTER O. MANN, JR.,)	
	Plaintiff,)
— v —)	
)	NO. 4027
GULF, MOBILE AND OHIO RAILROAD)	
COMPANY,)	
	Defendant.)

AMENDMENT TO COMPLAINT

NOW COMES the plaintiff, WALTER O. MANN, JR., by Costigan & Wollrab, his attorneys, and leave of Court being first duly had amends the complaint in the following respects:

1. That in each and every place where the words, "stationary foreman and engineer" are used in the complaint that substituted in lieu thereof are inserted "stationary fireman and engineer".

2. That the following paragraphs be added to the complaint immediately following Paragraph 9 thereof:

10. That the union referred to in Paragraph 4 of the Complaint described as "System Federation No. 29", etc., has arbitrarily refused to proceed with Plaintiff's grievance.

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF ILLINOIS

SOUTHERN DIVISION

WALTER O. MANN, JR.,

Plaintiff,

— v —

GULF, MOBILE AND OHIO RAILROAD
COMPANY,

Defendant.

NO. 4027

PETITION FOR REMOVAL

Your petitioner, GULF, MOBILE AND OHIO RAILROAD COMPANY,
a corporation, respectfully shows:

1) This suit was begun in the Circuit Court of McLean County, Illinois, on February 7, 1967, by plaintiff filing a complaint in the office of the Clerk of the Circuit Court of the Eleventh Judicial Circuit, McLean County, Illinois, and by the issuance of a writ of summons by the Clerk of said Court on February 8, 1967. Said cause is still pending and undetermined and process was served upon defendant on February 8, 1967.

2) A copy of the summons issued by the Clerk of the Circuit Court of McLean County, Illinois, and a copy of the complaint filed in said cause, which is the only pleading filed in this cause, are attached hereto, and no order has been served upon petitioner in this case.

3) The matters in dispute in said suit and the amount for which said suit is brought, and under which plaintiff seeks to recover from petitioner, exceeds the sum of Ten Thousand (\$10,000) Dollars, exclusive of interest and costs. Said suit is of a civil nature and involves a controversy between citizens of different states. Plaintiff was, at the time of the commencement of this suit, and at all times has been, and now is a citizen and resident of the State of Illinois. Your Petitioner, GULF, MOBILE AND OHIO RAILROAD COMPANY, a corporation, was at the time of the commencement of this suit, at all times since has been and now is a citizen and resident of the State of Alabama and not a citizen and resident of the State of Illinois, and did at the time of the commencement of this suit, and at all times since, has and now does have and maintain its principal place of business in the City of Mobile, Alabama, and did not and does not maintain any principal place of business in the State of Illinois.

4) Your petitioner offers herewith a bond with good and sufficient surety, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings, should it be determined that this case is not removable or was improperly removed.

5) Petitioner has, simultaneously with the filing of this petition, given written notice of the filing of this petition and bond above described to Plaintiff, WALTER O. MANN, JR., who is the only party to this suit, and

2. This Board cannot properly decide the duties of the position of stationary engineer-fireman.

3. The duties of the position of stationary engineer-fireman require heavy lifting and extensive physical effort.

4. The Agreement of October 1, 1943 providing for the handling of claims or grievances was not complied with.

5. The Agreement effective January 1, 1955 was not complied with.

6. 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 employees 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.

Claimant was employed in Carrier's power plant at Bloomington, Illinois, where on December 8, 1964, he reported an injury while on duty. He was unable to work on December 9 and 10. December 11 and 12 were rest days. He reported for work December 13, 14 and 15. He was again unable to work until February 3, 1965 continuing on the job until April 13, 1965, when he again was unable to assume the duties and responsibilities of his position. He was under the care of Dr. Gordon Shultz. On October 10, 1965, Claimant informed his supervisor that Dr. Shultz had advised him that he could only be given a qualified release to perform work of medium security, that he had an extra veterbra in his back and would never be able to perform work where lifting or pulling was involved. He was advised by the Carrier that the only position available required heavy lifting and hence the railroad could not allow him to return to work.

Claimant holds seniority on the Firemen and Oilers' roster as of April 27, 1959. The position of Stationary Engineer—Fireman is covered by an agreement the Alton Railroad (Now North Region of the Gulf, Mobile and Ohio Railroad) and System Federation No. 29 of the Railway Employees' Department of the A.F. of L. in behalf of the International Brotherhood of Firemen, Oilers, Helpers, Roundhouse, and Railway Shop Laborers dated October 1, 1943. It is clear from the record that the Claimant's Organization has never submitted a claim demanding that he be returned to his position of stationary engineer—fireman.

Rules 11, 12, 13, 14 and 15 of the controlling agreement providing for the handling of claims or grievances, read in pertinent parts as follows:

Rule 11. Hearing

"Should any employe subject to this Agreement believe he has been unjustly dealt with or any of the provisions of this agreement

have been violated, the case shall be taken to the Foreman, General Foreman, Master Mechanic, or Shop Superintendent, each in their respective order by the employee or his duly authorized local Committee or their representative, and if conference is desired it will be granted within ten (10) days by local officer in charge."

Rule 12. Transcript

"If stenographic report of investigation is taken, the employee or his representative will be furnished copy. Employees involved in the investigation shall sign transcribed copies of stenographic report of their statements."

Rule 13. Appeal

"If the result still be unsatisfactory, the employee or his duly authorized General Committee or their representative shall have the right to appeal, preferable in writing, to the higher official designated to handle such matters in their respective order. An acknowledgment of receipt of appeal shall be made within ten (10) days and decision rendered as promptly as possible."

Rule 14. Pending Decision

"Should the case fail of satisfactory settlement after handled as above it may be further appealed in accordance with legislative ruling. Prior to the assertion of grievance herein provided and while questions of grievances are pending there will neither be a shut down by employer nor a suspension of work by the employees."

Rule 15. Exoneration

"If it has been found that an employee has been unjustly discharged or held out of service pending an investigation, such employee shall be reinstated with full pay for all time lost minus amount earned elsewhere while out of service."

Carrier's Master Mechanic received a letter dated January 4, 1967 from Claimants' Attorneys requesting that their client be returned to work based on an accompanying release from a Doctor Shultz. On January 13, 1967, Carrier replied to the Attorneys advising that they were unable to return the claimant to work based on the Doctor's "conditional" release.

On February 7th, 1967, Claimant, through his Attorneys, filed suit in the Circuit Court of the Eleventh Judicial Circuit County of McLean, State of Illinois demanding \$50,000 for damages based on the contention that the Carrier had failed to allow the Plaintiff to return to work. Carrier subsequently filed a Petition for removal in the United States District Court Southern District of Illinois, Southern Division based on diversity of citizenship. An order was rendered in the United States District Court, dated February 23, 1968 granting Carrier's motion to dismiss both the original and amended complaints "for the jurisdiction of the Board to adjust grievances and disputes of the type here involved as exclusive." *Slocum v Delaware, Lackawanna and Western Railroad Company* 339 U.S. 239 (1950).

Considering this recitation of the factual situation, it is clear that Claimant did not adhere to the grievance procedures outlined within, contained in the basic agreement. Furthermore, it is equally clear that this matter had not been handled on the property in accordance with Section 3, First (i) of the Railway Labor Act. (See Second Division Award 5783 and Third Division Awards 16016 and 17025).

Additionally, the basic Agreement of October 1, 1943, applicable to employees represented by the Firemen and Oilers Organization was further amended January 1, 1955 by Article V of the Agreement of August 21, 1954. Pertinent parts of Article V read:

"If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within 60 days from receipt of notice of disallowance.

All claims or grievances involving 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 employee or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board"

Neither the sixty day provision nor the nine month provision have been met by the claimant. The only decision rendered in this case was that by Master Mechanic Kenney in his letter of January 13, 1967 in reply to the Attorney's letter of January 4th, 1967 declining the request for return to duty based on the medical release of Dr. Shultz. Carrier received nothing further on this claim for approximately sixteen months. By letter dated January 15, 1970, Carrier was informed by this Board that it had received a letter from Claimant's Attorney dated May 22, 1968 advising them that he was enclosing 18 copies of a submission to the 2nd Division.

In failing to adhere to the grievance procedures of the basic Agreement and in consideration of the provisions of Section 3, First (i) of the Railway Labor Act, the sixty and ninety day provisions of Article V, quoted within, we have no alternative except to deny the claim.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 15th day of December 1970.