Award No. 6297
Docket No. 6172
2-IC-MA-'72

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Joseph E. Cole when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 99, RAILWAY EMPLOYES' DEPARTMENT A. F. of L. - C. I. O. (Machinists)

ILLINOIS CENTRAL RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That the Illinois Central Railroad violated rule 39 of the Schedule "A" Agreement made between the Illinois Centarl Railroad and System Federation No. 99 AFL-CIO, when Machinist Apprentice L. E. Norton of Memphis, Tennessee was removed from service on November 18, 1970, and was discharged from service December 21, 1970, retroactive to November 18, 1970, following formal investigation held on December 9, 1970.

2. That the Illinois Central Railroad:

A. Restore the claimant to service, seniority rights unimpaired.

B. Make claimant whole for all vacation rights.

C. Pay Illinois Central Hospital dues for time held out of service.

D. Pay premiums on group Life Insurance.

E. Pay six (6) percent interest on all lost wages.

F. All lost pay from November 18, 1970, until restored to service.

EMPLOYES' STATEMENT OF FACTS: The claimant, L. E. Norton held seniority as a Machinist Apprentice at Johnson Roundhouse, I.C.R.R., Memphis, Tennessee under Rule 32 of the Section "A" Agreement, as of May 20, 1969, and was steadly employed serving a four (4) year Apprenticeship to learn to become a Machinist.

On November 18, 1970, the claimant was working as an Apprentice on locomotive 9000 under guidance and direction of Machinist C. E. Martin. Two

day that settlement of the claim is made is not supported by schedule rule or agreement and is in effect a request for a new rule which this Division has no authority to grant. Therefore, the claim for eight per cent (8%) interest on each claim must be denied.

Award 2657 (Second Division)

The claim seeks interest but there is no basis therefore in the rules and this Board is not a court of general jurisdiction, so each request must be denied.

Award 5672 (Second Division)

Claimants also seek six (6) per cent interest, insurance payments and other so-called benefits that may have been lost during the period they were improperly held out of service. The applicable provision of the Agreement restricts compensation payments to full pay for all time lost. Therefore, other remedies sought on behalf of claimants cannot be allowed within the limits of our authority (Awards 4793, 4866 and others).

See also Awards 13098 and 13099, First Division; Awards 5467 and 5810 Second Division; and Award 6962, Third Division.

Assuming without conceding that the claimant was improperly dismissed from service, he is only entitled to be restored to service with his seniority rights unimpaired and is due only the difference between his actual earnings and what he would have earned had he not been dismissed. The claim for additional compensation is not provided for in the Agreement and is without merit.

The company has shown that this was a "proper case" for suspension pending a formal investigation because of the claimant's use of abusive language and the serious consequences that occurred as a result of the use of that language. The company has also shown that the claimant received a fair and impartial hearing, a fact corroborated by both the claimant and his representative.

Moreover, the company has shown that the claimant's behavior was the direct cause of a fight which resulted in a serious injury. In addition, the company has shown that the Board should not substitute its judgment for that of the company unless it can be proved it was arbitrary, capricious or unfair, a contention that is completely repudiated by the facts of the case.

Finally, although the company has shown that the claimant was guilty of severe misconduct and deserved the discipline assessed against him, the company has shown that even if he were reinstated, he would be, at most, entitled only to net wages lost. Any monies earned during the period of dismissal should be deducted from the amount he would have earned had he remained in service. There is no provision in the agreement for interest or any of the other monetary considerations claimed.

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 th 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.

1. Referee takes notice the allegation was not the word intended from context. It should have been altercation.

2. None of the evidence in the transcript shows that claimant was the proximate cause of the altercation that took place.

3. Under Award 6240, Docket No. 6102 the referee considers to be a good statement of standards in next to last paragraph. However, in this case the record does not show any substantial showing of infractions and it follows by inference that the penalty was arbitrary.

The Illinois Central Railroad Shall:

1. Restore the claimant to service with seniority rights unimpaired.

2. Make claimant whole for all vacation rights.

3. Pay Illinois Central Hospital Dues and pay premiums on Group Life insurance.

I find that the items in Number 3 above are wages. In fact they are 100% wages as there are no taxes on either the carrier or the employe.

4. While I feel that the equities here are that interest should be paid, I believe the agreement should so state as in the case of a note.

I will not add to the agreement but will deny the payment of interest.

5. Restore all lost pay from November 18, 1970, until restored to service less any wages made on any other job during this period.

AWARD

Claim sustained subject to limitations above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June 1972.

DISSENT OF CARRIER MEMBERS
TO
AWARD NO. 6297, DOCKET NO. 6172

The initial error of the Referee in Award No. 6297 is his finding that:

> "None of the evidence in the transcript shows that claimant was the proximate cause of the altercation that took place."

The transcript of the investigation included substantial evidence, including claimant's own statement, that claimant cursed, in most emphatic fashion, a fellow employe, and that it was this use of the abusive and provocative language toward another employe that triggered the altercation. Therefore, the finding of the Referee that none of the evidence shows that claimant was the proximate cause of the altercation, is to ignore the record as made on the property, and to ignore the fact that it is not unusual that the response to such language is physical violence.

The further dictate of the Referee that the Carrier shall:

> "3. Pay Illinois Central Hospital Dues and pay premiums on Group Life insurance.
>
> 'I find that the items in Number 3 above are wages. In fact they are 100% wages as there are no taxes on either the carrier or the employe.' "

is not supported by the Agreement, by logic, and is contrary to well-established precedent of this Division. Everyone in the industry knows that all wages are subject to certain taxes. Therefore, the statement that "they are 100% wages as there are no taxes on either the Carrier or the employe" is contradictory in itself.

The referee was referred to the numerous prior awards of this Division, by eminent and experienced referees, adhering to the principal that insurance premiums are not embraced within the term "wage loss, if any" as used in Rule 39 of the applicable agreement. Among the awards cited to the referee were:

Awards 3883 — Carey
4532 — Seidenberg
4557 — Williams
4771 — Johnson
4793 — Whiting
4912 — Johnson
5223 — Weston
6047 — Harr
6136 — McPherson
6215 — Dolnick

Interpretation No. 1 to Fourth Division Award 2034.

When the proposed award was initially issued by the Referee, the Carrier Member requested further discussion with him, and again pointed out the precedent awards heretofore listed, and also the many awards adhering to the principle of precedent, among which was Third Division Award 4569 (Whiting) in which it was held:

"In the past there has been some conflict in our awards upon claims for pay for attendance at investigations as witnesses upon request of the Carrier outside the regularly assigned hours of work of the claimant. However the last award denying such a claim under rules similar to those herein was Award No. 3343 in November 1946. Since that award we have consistently held otherwise in Awards Nos. 3462, 3478, 3722, 3911, 3912, 3966 and 3968.

One of the basic purposes for which this Board was established was to secure uniformity of interpretation of the rules governing the relationships of the Carriers and the Organizations of Employes. To now add further fuel to the pre-existing conflict in our decisions upon this subject would only invite further litigation upon the subject and would be contrary to one of the basic reasons for the existence of this Board."

and Third Division Award No. 12240 (Coburn) wherein it was held:

"It is apparent that the weight of authority, in terms of numbers of Awards and under years of consistent interpretation and application of the rule, clearly sustains Petitioner's position on the issue and facts present here. This is not to say that the denial Awards were unsound, or palpably in error. What disposes of the issue, in our opinion, is the principle of stare decisis. Where, as here, the Board is confronted with a long line of precedents which first postulate and then maintain a consistent interpretation of contract language we should refrain from disturbing what ought to be a settled matter."

The Referee disposed of the contentions raised by the Carrier Members in four terse sentences reading:

"Precedent is binding on this Board only in so far as logic is sound based on facts.

By definition, wages consist of what a person receives for his work.

A person, under the existing agreement, receives fringe benefits, such as are contemplated by the proposed award, as wages.

I direct that the proposed award stand as written in its entirety."

There was no need for the Referee's apologetic approach in the award to the interest issue. A simple holding that the Agreement did not provide for the payment of interest was all that was required.

The Award is in palpable error, is not supported by the record, the applicable agreement, or precedent awards of the Division, and we are compelled to register our most vigorous dissent thereto.

P. C. Carter
W. B. Jones
H. F. M. Braidwood
E. T. Horsley
G. M. Youhn

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