

The Second Division consisted of the regular members and in addition Referee James F. Searce when award was rendered.

Parties to Dispute: { Brotherhood Railway Carmen of the United States  
and Canada  
{ Norfolk and Western Railway Company

Dispute: Claim of Employees:

1. That the Norfolk and Western Railway Company violated the controlling Agreement when Push Car Repairman George E. Rose was unjustly dismissed from service on October 19, 1976, as a result of investigation held on October 13, 1976, at Bellevue, Ohio.
2. That the Norfolk and Western Railway Company violated Article V (a) of the August 21, 1954 National Agreement during the processing of the claim on the property.
3. That the Norfolk and Western Railway Company be ordered to reinstate Push Car Repairman George E. Rose to service, compensate him for all benefits and wages he would have received had he not been unjustly dismissed.

Findings:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

The claim of error in this dispute was sustained in AWARD NO. 8089 requiring reinstatement of the Claimant due to the Carrier's failure to comply with Article V (a) of the Agreement relative to a required response to a properly submitted grievance. This provision is unequivocal in the intent of the parties if the Carrier fails to afford such response -- "If not so notified, the claim or grievance shall be allowed as presented..." The question of how much compensation in back wages should be awarded was remanded to the parties by AWARD NO. 8089 for resolution and a time limit was placed upon them to reach such accord. Success in reaching accommodation was not possible by the parties and, thus, the Board now specifies the method by which the amount of compensation will be computed. The Carrier is entitled to a full accounting, including statements of payment, check stubs, etc. of any and all monies received by the Claimant for services or other forms of compensation during the period when he was held out of service.

The Claimant may be required to submit an affidavit attesting that such submissions represent a totality of all such monies received. A subsequent showing of a lack of disclosure by the Claimant may result in negation of this Award.

We point out that the failure to comply with the applicable provisions of the Agreement was that of the Carrier -- a fact that cannot be altered by subsequent events. Neither are we persuaded by the Carrier's argument that the period for determining compensation should commence on April 29, 1977 -- the point at which the Carrier failed to meet its obligation to respond to the grievance appeal, rather than October 19, 1976 -- when the grievance was filed. We interpret this provision literally and find no basis to alter the effective date of the grievance.

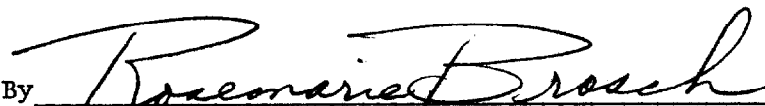
We note that the history of Awards by this Board in similar cases takes cognizance of a Claimant's prior work history and availability when it determines the amount of compensation ordered. Essentially, when it has been demonstrated that a Claimant was regularly absent from his assignment, this Board has given credence to such circumstances in assessing compensation; VIZ, even had (a claimant) been available for duty -- in lieu of in a termination status -- he/she could have been expected to have worked only a percentage of time history indicated he/she would have worked if in an active status. Applying this rationale to the instant case, it was unrefuted that the Claimant had accumulated an absence rate of 68% (1974), 57% (1975) and 75% (first 10 months of 1976). We shall herein order that the Carrier is entitled to apply a 70% absence factor for the period from October 19, 1976 to October 24, 1979 or the date of reinstatement of the Claimant, whichever is later. Such reduction factor shall be applied after the initial tolling of back pay for compensation or monies earned or received from other sources during this period.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 4th day of February, 1981.