CORRECTED

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 9875
SECOND DIVISION Docket No. 8870
2-L&N-FO-'84

The Second Division consisted of the regular members and in addition Referee Steven Briggs when award was rendered.

Parties to Dispute: (International Brotherhood of Firemen and Oilers
(Louisville and Nashville Railroad Company

Dispute: Claim of Employes:

1. That under the current and controlling agreement, as amended, Service Attendant James D. Jackson, I. D. No. 422240, was unjustly suspended from the service of the Louisville and Nashville Railroad Company on June 6, 1979 through August 4, 1979, subsequently amended June 6, 1979 through July 16, 1979, inclusive, after a formal investigation was held in the office of Mr. B. R. Montgomery, Master Mechanic, and Conducting Officer, on May 9, 1979.

2. That accordingly James D. Jackson, Service Attendant, be restored to his regular assignment at Howell Shops, compensated for all lost time, vacation, health and welfare, hospital and life insurance and dental insurance be paid effective June 6, 1979 through July 16, 1979, and the payment of 6% interest rate be added thereto.

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 Employes 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 Claimant entered the Carrier's service on November 27, 1978, as a Service Attendant at its Howell Shops. On April 7, 1979, he was responsible for servicing cabooses on through trains on the 11:00 p.m. to 7:00 a.m. shift. At 3:00 a.m. he was sitting in a lunch/locker room when a call came for him to service some cabooses. He did not respond.

Locomotive Foreman B. R. Vaughn was sitting at his desk approximately fifteen feet from the Claimant. After about five minutes had elapsed Vaughn noticed that the Claimant still had not responded to the call. He shouted at the Claimant, but still he did not move. At that point Vaughn walked over to the Claimant and shouted at him again. He still did not respond. Vaughn then lifted the corner of a nearby table and dropped it twice. The Claimant looked up, whereupon Foreman Vaughn asked him if he was going to service the cabooses. The record is unclear as to the Claimant's reply.

In any event, Foreman Vaughn concluded from this brief conversation with the Claimant that he did not intend to service the cabooses. He told him to go home and assigned the work to someone else.

On April 16, 1979, the Claimant received formal notice from Master Mechanic B. R. Montgomery that he was being charged with sleeping on the job. Formal investigation was ultimately conducted on May 9, 1979. The Claimant was notified in a June 5, 1979, letter from the Master Mechanic that, as a result of the investigation, he was being assessed a 60-day actual suspension. Through the Organization the Claimant took issue with his suspension and the matter is now before this Board.

Subsequent to filing his claim through the Organization, the Claimant also filed a discrimination charge with the Evansville, Indiana, Human Relations Commission. Under date of July 12, 1979, that charge was settled among the Claimant, a Commission member, and a Carrier representative. No Organization representative was party to the Commission settlement process.

The Claimant also signed the following statement on July 12, 1979:

> "I hereby agree to return to service on a leniency basis and in consideration of this, I agree to withdraw my claim of pay for time lost as a result of me being assessed 60 days suspension from service as a result of being charged with being asleep while on duty at 3:00 a.m. on April 7, 1979."

The Carrier notified the Organization of the above settlement by means of a July 13, 1979, letter.

The Organization believes that Foreman in the Claimant's work area have condoned employe sleeping in the past and that it is therefore improper to have suspended the Claimant. Furthermore, the Organization asserts that the Carrier had no authority to settle the claim without participation of an Organization representative, and that such settlement violated Rule 45, quoted in its entirety below:

> "The rights to make agreements covering rates of pay and working conditions, and to interpret and apply them, respectively, for the Management and the employes herein covered, is retained by the parties signatory thereto. When settlement is not reached by negotiation, the matter concerned may be pursued by further handling under the provisions of the Railway Labor Act.,
>
> The Director of Personnel for the railroad, and the General Chairman for the employes, have authority to reach decision on any dispute, grievance, controversy, or difference of opinion affecting this agreement in any manner whatsoever, filed by the employe or employes, whether the case comes to them on appeal or otherwise. Decision reached on any such question by mutual agreement under this rule shall be final, and shall not be open to any question thereafter.
>
> General rulings or interpretations will not be made on this agreement, except in conference held between the Director of Personnel, for Management, and the General Chairman, for employes concerned."

The Carrier maintains that sleeping on duty is a serious offense and that the record in this matter clearly establishes the Claimant's guilt. Furthermore, the Carrier notes that in settlement of the discrimination charge with the Evansville Human Relations Commission, the Claimant agreed to return to work on a leniency basis and to withdraw his claim for compensation for work lost as a result of the suspension. Finally, the Carrier argues that the Claimant has a right to settle his own claim without the Organization's participation and that such settlement was not in violation of Rule 45.

The Procedural Issue. The Board has carefully considered the content of Rule 45, and we conclude that it was not violated by the July 12, 1979, settlement among the Carrier, the Claimant, and the Evansville Human Relations Commission. The first paragraph of that Rule (quoted previously herein) retains for the parties signatory to the Agreement the right to apply and interpret its provisions. The July 12 settlement did not interpret any provision of the Agreement between the Organization and the Carrier; rather, it addressed itself to the discrimination charge filed with the Commission.

The Board notes that part of the settlement included the Claimant's withdrawal of his claim of pay for time lost due to the suspension. We find nothing in the Agreement to persuade us that an individual employe cannot withdraw his own claim.

This Board fully recognizes and accepts the Organization's right and responsibility under its Agreement with the Carrier to serve as exclusive representative of covered employes. The Organization's concern about the possibility of its representation role being circumvented in the instant case is understandable. But the individual employe's right to represent himself is also at stake here, and "the law and weight of arbitral decisions on the subject of employee rights under the Railway Labor Act clearly sanction the right of an individual employee to prosecute his grievance or claim with or without the assistance of a union representative. Second 3, First (j) of the Act, provides that parties may be heard either in person, or by counsel, or by other representatives as they may respectively elect. And the Courts, as well as the National Railroad Adjustment Board, have consistently held that under the Act, an employee may settle his own claims and grievances" (Public Law Board No. 2986, see also Estes v Union Terminal Company, 89 F.2d. 768; Brotherhood of Locomotive Engineers v Denver and Rio Grande R. Co., 411 F.2d. 2.1115; Elgin J. and E.R. Co. v Burley, 325 US 711; First Division Awards 7473, 7166, 10145; and Third Division Awards 19527, 20247, 20832).

But while the claimant withdrew his claim for pay for time lost, nothing in the record before us persuades us that he withdrew his claim in its entirety. Thus, we conclude that its merits are properly before this Board.

The Merits of the Claim. The Claimant was charged with sleeping on the job and we are persuaded from the record that the charge was justified. Furthermore, there is not enough evidence before us to justify a conclusion that the Claimant was treated in a discriminatory fashion.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of May, 1984