

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

Parties to Dispute: (Sheet Metal Workers' International Association
(Illinois Central Gulf Railroad Company (ICG)

ON REMAND FROM THE UNITED STATES
DISTRICT COURT, WESTERN DISTRICT
OF KENTUCKY ON THE PETITION OF
RICKY MEEKS IN CIVIL ACTION
NO. 79-0152-P.

Dispute: Claim of Employees:

1. That, under the current Agreement, Sheet Metal Worker, R. I. Meeks, (hereinafter referred to as Claimant), was unjustly suspended from service on November 5, 1975, and dismissed from service on December 19, 1975, pending an investigation that was held on November 17, 1975.

2. That, accordingly, the Carrier be ordered to reinstate Mr. R. I. Meeks to service, seniority rights unimpaired and pay him all wages lost as a result of his dismissal.

3. In addition, make Claimant whole for all losses.

4. Compensate the Claimant for all overtime losses.

5. Make Claimant whole for all holiday and vacation rights.

6. Pay premiums on health and welfare, Travelers' Policy GA23000.

7. Pay Illinois Central Hospital Association premium.

8. Pay all sickness premiums under Providence Insurance Policy.

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

10. Remove all charges brought against Claimant from his personal record.

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 were given proper notice of hearing thereon, pursuant to the instructions of the United States District Court.

The genesis of the present dispute is found in Award No. 7437, Docket No. 7329, of the Second Division, National Railroad Adjustment Board, dated January 6, 1978.

In its award, the Board found that the Claimant, Ricky I. Meeks had been insubordinate to General Locomotive Foreman J. S. Lockett on the night of November 5, 1975.

However, since the record indicated that this insubordination might have, at least in part, been aggravated by improper words and actions on the part of General Locomotive Foreman J. C. Lockett, and possibly by the inactions of Claimant's immediate Supervisor, J. L. Smiley, the Board reinstated Claimant with his seniority rights intact, but without any back pay or other benefits.

Nevertheless, Claimant filed a Civil Action in the U.S. District Court for the Western District of Kentucky on August 24, 1979, asking the Court to review and set aside our Order of January 6, 1978.

Claimant alleged that the Board had violated the Railway Labor Act as well as the Due Process and Equal Protection clauses of the U.S. Constitution, by failing to give notice to him to be present at the Board's hearing on September 15, 1977.

On May 16, 1983, the U.S. District Court for the Western District of Kentucky entered summary judgment for the Carrier, and denied the relief sought by the Claimant.

However, Claimant appealed the District Court's decision to the U.S. Court of Appeals for the Sixth Circuit in Cincinnati.

On July 9, 1984, the Appeals Court reversed the judgment of the District Court, and remanded the case to the District Court with instructions that Award No. 7437, Docket No. 7329, of the Second Division of the National Railroad Adjustment Board, be set aside.

The Sixth Circuit Court of Appeals as published at 116 LRRM 3237 decided as follows:

"RAILWAY LABOR ACT

1. Discharge - Notice requirement - NRAB determination - Scope of judicial review - 103.707 - 103.655 - 103.301

Fact that National Railroad Adjustment Board (NRAB) on remand from federal district court, considered issue whether discharged employee received notice of hearing as required by law, and determined that proper notice had been given in this case, does not foreclose court of appeals from considering notice issue on appeal from district court's decision affirming NRAB.

"2. Discharge - Applicability of law - 103.709 - 103.655 - 103.301

Court of appeals at Cincinnati will not apply law of court of appeals at Chicago as expressed in *O'Neill v. Public Law Board No. 550*, 581 F.2d 692, 99LRRM 2204 (7th Cir., 1978), to case in which discharged railroad employee has challenged determination of National Railroad Adjustment Board (NRAB), that employee had not been given notice of hearing as required by law, even though NRAB's Second Division sits in Chicago. Court of appeals at Cincinnati already has established conflicting precedent in *Cole v. Erie Lackawanna Railway* 541 F. 2d 528, 93LRRM 2077 (16th Cir., 1976), Cert. denied, 433 U.S. 914, 95 LRRM 2765 (1977). There are, however, no choice of law rules for intercircuit conflicts. There is, instead, the familiar rule that a panel of this court may not overrule a previous panel's decision. Only an en banc court may overrule a circuit precedent, absent an intervening Supreme Court decision.

3. Discharge - Notice requirement - NRAB decision - 103.655 - 103.707 - 103.301

Award of National Railroad Adjustment Board (NRAB) reinstating discharged railroad employee without back pay is void, where NRAB failed to comply with notice requirements of Section 3 First (j) of Railway Labor Act, even though notice was given to union representing employee before NRAB, where employee had no actual notice of proceedings before NRAB. 'Due notice' requirement of Act is satisfied if employee is given formal notice of proceedings or if employee has authorized his union to process his grievance, and he also has actual notice of proceedings. (*Meeks v. Illinois Central Gulf R.R.*, 116 LRRM 3239 (1984)."

Thereupon, the U.S. District Court for the Western District of Kentucky on September 12, 1984, ordered that Award No. 7437, Docket No. 7329 of the Second Division of the National Railroad Adjustment Board be set aside, and this matter remanded to the National Railroad Adjustment Board for a new hearing after proper notice to Claimant.

Pursuant to the District Court's instructions, written notice was sent by the Board via Certified Mail #P404 317 713 to Claimant on May 3, 1985, informing him of a new hearing to be held in Chicago on June 4, 1985.

Claimant received and signed for this certified letter on May 6, 1985.

A new hearing was held at the appointed hour on June 4, 1985, at which time the Association and the Carrier presented their respective arguments and positions to the Second Division of the Board.

Claimant did not attend the hearing, although he had been duly notified, pursuant to the instructions of the District Court.

We have considered all of the presentations made by the parties, and we conclude that our previous decision reached in Award No. 7437 was proper and correct.

The record indicates that Claimant either refused, or at least failed to carry out, a direct order or instruction, from the General Locomotive Foreman, J. C. Lockett. In addition, Claimant was involved in a verbal altercation with the General Locomotive Foreman, wherein he threatened to knock the Foreman's "damn teeth out". Both these activities constituted insubordination, for which Claimant could be properly discharged.

Nevertheless, the Board finds that the words and actions of the General Locomotive Foreman, J. C. Lockett, and the possible inactions of Claimant's immediate supervisor, J. L. Smiley, unnecessarily aggravated matters, and contributed to Claimant losing control of his temper.

Therefore, even though Claimant's offense was sufficiently serious to merit stern disciplinary action, the Board believes such offense did not merit discharge under the circumstances herein, particularly where the record showed it was a first offense and a single episode of misconduct for an employee with almost four years of service at the time of the incident.

Consequently, the Board reaffirms its earlier decision that the Claimant is to be reinstated with his seniority rights intact, but without any back pay or other benefits.

The claim is sustained only to the extent of reinstating Claimant with his seniority intact, but without any back pay or other benefits.

A W A R D

Claim sustained only to the extent indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 17th day of July 1985.