

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 10636
Docket No. 10666
2-SP-CM-'85

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

(Brotherhood Railway Carmen of the United States
(and Canada

Parties to Dispute: (Southern Pacific Transportation Company (Eastern Lines)

Dispute: Claim of Employees:

1. That the Southern Pacific Transportation Company (Eastern Lines) violated the controlling agreement, particularly Rule 34, when they arbitrarily dismissed Carman B. S. Fisher from service on May 25, 1983, without providing him his right to an investigation as provided for under the rule, Englewood Yard, Houston, Texas.

2. That accordingly, the Southern Pacific Transportation Company (Eastern Lines) be ordered to compensate Carman Fisher as follows and beginning May 25, 1983 until returned to service:

- a) Reimbursed for all monetary losses;
- b) Vacation rights and seniority rights unimpaired;
- c) Health and Welfare benefits;
- d) Compensated at six percent (6%) interest on all monies due him.

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, B. S. Fisher, a Carman for the Carrier, was dismissed from service on May 25, 1983. The Claimant had been dismissed from service previously, and pursuant to a Public Law Board 2876 Award #3, issued on April 26, 1982, the Claimant was returned to service on a last chance basis. That Award stated in part,

"The Board finds that there are circumstances which serve to mitigate the discipline as assessed. In view of Claimant's record and Second Division Award No. 7522, involving Claimant, Claimant will be conditionally reinstated to service with all rights unimpaired but without

pay, subject to the following: He will be placed in a probationary status for a one-year period. Claimant before resuming duty shall meet with his Local Chairman and the Carrier's designated representative for the purposes of reviewing his work record, to have a clear understanding of his obligation to protect his assignment, that Claimant clearly understands that he now has had a last-chance opportunity and that despite his long years of service, he also understands that if he fails to protect his assignment that he will be in violation of this Award as well as his probationary status and Rule 810. If it is determined that these conditions are not satisfactory to the Claimant within thirty days of his knowledge of this Award, the claim shall be denied as of that time. Award - Claim disposed of as per findings. Order - Carrier is directed to make this Award within thirty (30) days of date of issuance shown below."

Pursuant to the above Award, the Claimant was returned to service on June 30, 1982. Between June 30, 1982 and May 25, 1983 the Claimant was absent from duty on seventeen occasions and on several occasions, he was late for duty. The Carrier took the position that the Claimant had not properly protected his assignment, and had not complied with the provisions of the above Public Law Board Award and dismissed the Claimant from service without benefit of an investigation. It was the Carrier's position that because of his probationary status, resulting from Public Law Board 2876 Award #3, the Claimant was not entitled to an investigation. Rule 34, the controlling Rule in this matter involving discipline-investigations, states in part,

"An employee covered by this agreement who has been in service more than sixty days, or whose application has been formally accepted, shall not be disciplined or dismissed without first being given a fair and impartial investigation by an officer of the railroad."

The Carrier asked the original referee, Arthur T. Van Wart, to interpret Public Law Board 2876 Award #3. Mr. Van Wart stated that in his opinion, the Board had the right to establish conditions under which the Claimant is to be returned to service, even if those conditions would be contrary to the contract. It should be noted that this would not have been this Board's interpretation of the original Award #3 but the Referee did interpret his original decision in such a way as to allow the Carrier to abrogate the contract. Mr. Van Wart further stated that in almost all instances when placing an employee on probationary status, he would add the words, "Such status does not deny the Claimant due process rights under the applicable disciplinary rule." He noted

that he did not do so in this case and cannot recall the reason why he did not state that in this case. The Referee went on to decide the additional absences and tardy occurrences of this case, even though he was not asked by the Organization to decide this matter. He recommended that the Claimant be reinstated to work without pay under the same conditions as Public Law Board 2876 Award #3 and stated that if further violations occurred, that a hearing be held. As a result of this, the Carrier reinstated the Claimant as of December 21, 1983.

This Board is charged with reviewing the dismissal and subsequent reinstatement some seven months later of this Claimant. It has been argued by the Carrier that this Board has no authority to enter into a case which a previous Public Law Board has already decided. We do not find this argument persuasive. The alleged infractions by this Claimant occurred subsequent to the Public Law Board decision and it is our responsibility to decide whether or not the discipline imposed was appropriate.

The language in Rule 34 is exceedingly clear. There is no question that anyone who has more than sixty days service is entitled to an investigation. The Claimant in this case was not afforded his rights under that Rule. Because no investigation was held, this Board, and indeed, the Carrier, has no basis to determine whether or not the absences and tardiness were of a legitimate or illegitimate nature. A critical element has been removed, and our ability to review this case is seriously impaired. This Board believes that it does have jurisdiction in this matter, a disciplinary action was taken that was not under the jurisdiction of the previous Public Law Board and we do have the right to review the Carrier and the Organization's actions.

Due process is a critical element in the disciplinary process. Many Awards have issued stating that employees should not be disciplined without a hearing. The language in the Rule is clear, notwithstanding the Carrier's contention that the issues of this case have been litigated and having once been litigated, are precluded from being relitigated. The Board finds the original Public Law Board had jurisdiction to interpret their Award, but they certainly did not have any jurisdiction to rule in this case. That is properly before this Board. What is lost in all the arguments regarding jurisdiction is the fact that this Board was denied the opportunity to properly review the merits of this case because no investigation was held. We believe the Carrier acted in good faith when it followed Referee Van Wart's Award and subsequent interpretation. However, we cannot assume the Claimant

to be guilty as no evidence was presented to allow us to make a determination. Upon careful review of all the evidence presented, the Board finds that this Claimant was denied due process considerations as called for in Rule 34 which would allow this Board to make a reasoned judgement as to the merits of this case, and we will order the Claim sustained with the exception of 2(d), the request for 6% interest on all monies due the Claimant.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1985.

CARRIER MEMBERS' DISSENT
TO
AWARD 10636, DOCKET 10666
(Referee McAlpin)

The decision of the Majority is the second Award resolving the same dispute. To make matters even more unfortunate, while the Majority here directs that Claimant be reinstated with backpay, the prior Award directed that Claimant be reinstated without backpay. The Board was without jurisdiction to rehear and redetermine this claim and thus the necessity for this Dissent.

The initial determination of the dispute was rendered on December 2, 1983, approximately 22 months prior to this Award, in Interpretation No. 1 to Award No. 3 of Public Law Board 2876. The Interpretation directed the Carrier to reinstate the Claimant without backpay on a probationary basis. The Interpretation directed that the Claimant meet with the Carrier representative to discuss the terms of reinstatement. Such meeting took place on December 21, 1983, and included the Organization's representative as well. Following the meeting, the Claimant was reinstated. The Organization set forth its rationale for pursuing the instant claim notwithstanding the Interpretation in a letter to the Carrier dated February 8, 1984. It stated:

"...this is to advise that it is the Organization's position that the agreement establishing Public Law Board 2876 and the Railway Labor Act limits the power and the authority of the Board and the neutral exceeded such powers in his Interpretation of Award No. 3. The Board has jurisdiction to decide disputes involving the interpretation and/or application of existing agreements between the parties, but do not have authority to change or amend rules or to write new rules. The Neutral, in this instance, changed the agreement rules when he denied the claimant due process."

It is clear that the Board committed two fatal errors in resolving this dispute. First, the Board should have dismissed the claim on the basis that it had already been determined. This Board has consistently held that it cannot, and will not, rehear claims that have been resolved by this Board or by Public Law Boards. Second Division Awards: 9149, 8464, 7859, 6692. Third Division Awards: 20455, 18315, 17058.

Second, to the extent the Majority here concluded that it was not bound by the prior Award rendered by the Interpretation because that Award was invalid on jurisdictional grounds, it is clear that such conclusion is erroneous as a matter of law. The only forum vested by Congress with jurisdiction to review and set aside Awards of this Board, or Public Law Boards, is the federal district court. This Board does not have jurisdiction, under the Railway Labor Act, to set aside another Award. Thus, in Murray v. Consolidated Rail Corporation, 736 F.2d 322 (6th Cir. 1984), the issue framed by the Court of Appeals was,

"...whether Murray may collaterally attack the PLB award before the NRAB, or whether he must first pursue judicial review of the PLB's decision under Section 153 First(q). We believe that Congress has indicated that such challenge be appealed directly to the district court.

The Court concluded:

"We decline the opportunity to frustrate Congress' primary goal by conferring upon employees the right to challenge the award of one board before the other." (Emphasis in original).

As shown above, the basis of the Organization's progressing the claim in this dispute was its belief that the Public Law Board determination was invalid for jurisdictional reasons. Rather than seeking to have the Public Law Board Award reviewed in the federal district court, however, it opted to continue to prosecute the identical claim to this Board. The Majority recognized that the Interpretation decided the identical issue in stating,

"The Referee (in the P. L. Board) went on to decide the additional absences and tardy occurrences of this case, even though he was not asked by the Organization to decide this matter."

It went on to conclude:


"The Board finds the original Public Law Board had jurisdiction to interpret their Award, but they certainly did not have jurisdiction to rule in this case."


(Parenthetically, we cannot refrain from pointing out that the Majority's statement that the Organization did not request the Public Law Board to decide the matter is totally irrelevant. While the Organization did not request an Interpretation, the Carrier did in accordance with the agreement setting up the Public Law Board.)

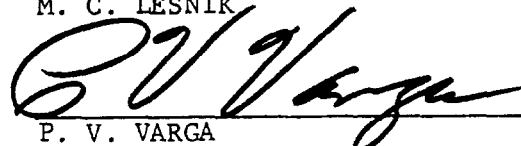
In any event, it is clear that the Majority's assertion of jurisdiction was predicated on its agreement with the Organization that the Public Law Board did not have jurisdiction to render the Award it did. It is no less clear that the Board did not have the power to make such decision and its Award here, therefore, is invalid and unenforceable.

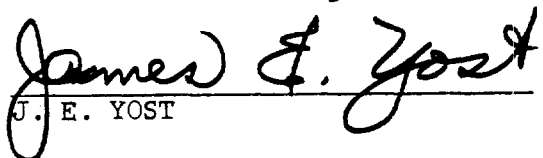
Finally, we note that the Majority here sustained the claim with respect to "health and welfare benefits." Other than merely asking for the relief, the Organization did not expand at all with respect to the specifics of the relief sought or the provisions of the Agreement relied upon in requesting such relief. The Majority decision throws no light on the subject. While it is obscure as to what is intended to be encompassed within the phrase "health and welfare benefits", it is obvious that there is no Agreement support for its imposition.

For all the foregoing reasons, we Dissent:


M. W. FINGERHUT


M. C. LESNIK


P. V. VARGA


J. E. YOST

