

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: (  
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

1. That the former Louisville and Nashville Railroad Company, now a part of the CSX Transportation, Inc. and hereinafter referred to as the Carrier, acted arbitrarily and capriciously in violation of the controlling agreement and in particular, Rules 29 and 18, when they unilaterally disqualified Carman R. H. Mooneyham, Jr., hereinafter referred to as the Claimant, from operating the wrecker on February 6, 1986.

2. And, that the Carrier should be ordered to restore Claimant to the position of wrecker operator and make him whole for any and all time, including overtime and benefits, that he lost as a result of their action.

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 Organization argued the Carrier removed the Claimant from operating the wrecker in violations of Rules 18, 29 and 34, which are reproduced below:

"RULE 18  
BULLETINING VACANCIES

18(a) When new jobs are created or permanent vacancies occur in the respective crafts the senior employees in point of service shall, if sufficient ability is shown by trial, be given preference in filling such jobs. All new jobs

or vacancies will be bulletined. Copy of bulletin to be given the local chairman. Bulletin must be posted 5 days before new jobs or vacancies are filled. Bulletins will be posted immediately when it is known a position is to be vacant or new job is to be created.

18(b) Employees desiring to avail themselves of this rule will make application to the officer in charge, and will furnish a copy of the application to the local chairman."

"RULE 29  
SENIORITY

29(a) Seniority of each employee covered by this agreement will begin from the date and time the employee starts to work."

"RULE 34  
DISCIPLINE

No employee shall be disciplined without a fair hearing by designated officers of the carrier. Suspension in proper cases pending a hearing, which will be prompt, shall not be deemed a violation of this rule. At a reasonable time prior to the hearing, such employee and his local chairman will be apprised to the precise charge and given reasonable opportunity to secure the presence of necessary witnesses. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

The Claimant had been operating the wrecker for approximately 5 years. This shows that he was qualified. The incident which the Carrier relied upon to disqualify the Claimant from wrecker operation was in fact the supervisor's fault. When the car was attempted to be lifted without the use of outriggers, the Claimant did respond to verbal instructions and thereby complied with the Carrier's own rules. The Organization stated the Carrier showed no proof as required in Rule 34 for discipline cases, and this was not a medical disqualification as no medical exam was performed.

The Carrier argued the Claimant has a severe, permanent and non-correctable hearing impairment. The Claimant filed an FELA suit and, prior to the disposition of that suit, the Carrier and the Claimant reached a settlement which compensated him for past and future wage losses. The Claimant

voluntarily agreed to the settlement, and the Claimant agreed never to attempt to return to work in any capacity. Therefore, the Claimant is estopped from claiming reinstatement rights to his former position. Since he was compensated as a result of the legal proceeding, any payment under this case would amount to a double recovery. The Carrier contended the Claimant was properly disqualified and for good and sufficient reason. The Carrier did not act in an arbitrary, capricious or unreasonable manner in violation of any of the rules of the controlling Agreement, and the Carrier stated the claim should be dismissed or denied in full.

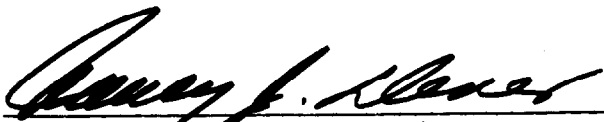
The Board is faced with the determination of whether or not the Carrier acted properly and under the rules in disqualifying the Claimant from his position as a wrecking derrick operator. Subsequent settlements as a result of an FELA case or any other litigation are really not appropriate to determine the central issue of the case because they occurred subsequent to the Carrier's decision. It is not unusual, for example, in discharge and discipline cases for the Employer to discover additional information proving the guilt of an employee or find that the employee has violated other rules of the Employer. This information is generally not taken into account by referees or arbitrators because the information was obtained after the decision was made. In this case the information contained in the record regarding the settlement of the FELA case cannot assist the Board in rendering its decision with respect to the initial disqualification of the Claimant, which is the claim before us. If it has any value at all, it can only be to the extent that the continuation of the disqualification was appropriate after further evidence was received during the litigation.

With respect to the initial determination of disqualification, the Board finds there is enough evidence in the record wherein the Carrier would have reasonable cause to be concerned for the safety of both the Claimant and others who were working with him. The Board notes that the Claimant had been removed previously from operating the wrecker under similar circumstances. There is no convincing evidence that the Carrier acted in an arbitrary and capricious manner. Regarding the continuing disqualification of the Claimant, it seems to the Board that both sides could have provided medical evidence in support of their respective positions. Since they did not and since the initial disqualification was found to be appropriate, the Board will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest:   
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1988.