

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

(D. A. Nelson

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

1. That the Soo Line Railroad did unjustly and in violation of the agreement, suspended Carman D. A. Nelson from service from October 24, 1986 through November 14, 1987.

2. That the Soo Line Railroad be ordered to compensate Carman D. A. Nelson for all lost time as result of suspension including 15 days vacation and 2 personal days, along with all other benefits unimpaired.

3. That the Soo Line Railroad be ordered to pay Carman D. A. Nelson interest at the current rate per annum for any payment he may receive as result of this claim.

4. Rule 19, bulletining of vacancies.

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.

On September 27, 1986, Claimant in the performance of his duties was operating a Kutobo Tractor when he was involved in a collision with a moving freight car. Carrier subsequently held an Investigation on the matter of Claimant's failure to safely perform his duties, and, as a result, his employment was terminated effective October 24, 1986.

The Brotherhood of Railway Carmen initiated a claim and appeal on Claimant's behalf which resulted in the matter being submitted to PLB 3618 for resolution. The claim submitted to PLB 3618 reads as follows:

"1. That Carman D. A. Nelson was unjustly dismissed from service of the Company on October 24, 1986.

2. That the Soo Line Railroad Company be ordered to restore Carman D. A. Nelson to service and make him whole for all rights and benefits that are a condition of employment such as, but not limited to, seniority, vacation, holidays, medical, dental and all group insurance benefits.

3. That the Soo Line Railroad Company Be Ordered To Compensate Carman D. A. Nelson for all lost time as a result of his unjust dismissal from the service of the Carrier.

4. That the Soo Line Railroad Company be ordered to reimburse Carman D. A. Nelson for all losses sustained account loss of coverage under health, medical, welfare and life insurance benefits during such time he is held out of service.

5. That the Soo Line Railroad Company be ordered to award interest at the 12% per annum to Carman D. A. Nelson for any and all payments he may receive as result of this claim."

Pursuant to an interim disposition made by PLB 3618, Claimant was returned to service in November, 1987. Award No. 15 of PLB 3618 was issued on April 15, 1988 finding that Claimant had, in fact, failed to perform his assigned duties but that the discipline of dismissal was too severe. In the normal course of grievance handling in this industry, such would have ended the matter.

However, two months prior to the adoption of PLB 3618, Award 15, Claimant filed suit in the U.S. District Court, District of Minnesota, Fourth Division, on the basis that:

"...plaintiff was subjected to discipline proceedings and ultimately wrongfully discharged from his employment on or about October 24, 1986, on the unlawfully manufactured pretext of having violated defendant's work and safety rules during the above described incident when, in fact, the motivation underlying both his job demotion and consequent termination was retaliatory for his having spoken with reporters on matters of public safety and concern." (Emphasis added)

The Court, on August 11, 1989, dismissed the suit with prejudice. However, by the agreement of counsel, the Court stipulated that Claimant could file a grievance pursuant to the terms and conditions of the existing collective bargaining agreement, "...with respect to the issues arising in this litigation, more particularly the allegation that defendant retaliated against plaintiff as alleged in Plaintiff's complaint." The Court also stipulated that the Carrier would not raise a time-limit defense concerning such a claim. The anomaly, self-evident in the Court's action, is that it apparently was not made aware of the issuance of PLB 3618, Award 15 more than a year prior to its order. PLB 3618 resolved the ONLY discipline proceeding that involved Claimant's "discharge from his employment on ... October 24, 1986."

Claimant, on October 8, 1989, did file a claim and it is the subsequent progression of that matter that is now before this Board.

Our review of the record before us requires that this matter be dismissed for the following reasons.

First, the Statement of Claim filed with this Board on November 25, 1990, listed above, and the Claim submitted to PLB 3618, quoted above, involve the same action - Claimant's removal from service on October 24, 1986 - and seeks the same reparations. Since Award 15 of PLB 3618 disposed of the matter, this Board has no jurisdiction to re-try the same matter. See Second Division Awards 11394, 11427, 11708, 11999. Nor may this Board be used as a vehicle in which to challenge the decision of PLB 3618 (Third Division Awards 20455, 22736; Second Division Award 7859).

Second, even if it was the Court's equitable desire that Claimant have a second opportunity to progress a claim, pursuant to the requirements of the agreement between the parties, concerning his contention of retaliation for talking to reporters such is not covered in the claim submitted to this Board. We cannot go beyond the claim that has been submitted to us.

Third, even if we were able to go beyond the claim submitted and consider the events of June, 1986, it seems that that matter was resolved, with the Organization's assistance, in the statement made by the Assistant General Manager on July 29, 1986 that Claimant "was to remain in the Yard to inspect trains as per bulletin." There is no evidence, beyond Claimant's continued assertions, of any connection between the events of June and September, 1986.

Finally, on the record before us, we do not find evidence sufficient to warrant a finding of violation of the 1988 amendment to the Federal Rail Safety Act, 45 U.S.C. Section 441 (a) (First Division Award 24059; Third Division Award 28725). Of the two events Claimant has joined in his assertion of discrimination, one was resolved on the property and the second was disposed of in the decision of PLB 3618 leaving no matter for this Board to decide.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of September 1991.