

****REVISED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 13535
Docket No. 13308
00-2-97-2-86**

The Second Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

**(International Association of Machinists and
(Aerospace Workers
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri Pacific
(Railroad Company)**

STATEMENT OF CLAIM:

“DISPUTE - CLAIM OF EMPLOYEES

That the Union Pacific Railroad violated Rule 32 of the Agreement dated June 1, 1960 between the International Association of Machinists and the Missouri Pacific Railroad Company, a merged entity of the Union Pacific Railroad Company, when it unjustly escorted Machinist G. J. Morgan off its property and terminated his employment on May 12, 1997.

RELIEF REQUESTED

That the Carrier be ordered to restore the Claimant to service and compensate him for all lost wages including all lost benefits.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 due notice of hearing thereon.

In May 1997 a trial was held under the Federal Employer Liability Act (FELA) with the Claimant, G. J. Morgan, as plaintiff. Mr. Morgan had filed a legal claim against the Union Pacific Railroad and its merged entity, the former Missouri Pacific Railroad, on grounds that the work he did as a member of the Machinists' craft while working at the Carrier's North Little Rock, Arkansas machine shop caused him to develop a physical malady. The trial was held in the Circuit Court of St. Louis, Missouri. On May 3, 1997, a jury in the FELA trial issued a verdict favorable to the Claimant and the court handed down that verdict on May 5, 1997.

The Claimant had worked continuously prior to the FELA trial, had taken vacation days to attend the trial, and attempted to return to work on May 12, 1997 after the May 5, 1997 verdict was issued.¹ Upon his arrival at work on May 12, 1997 the Claimant was ushered off company premises by supervision and has not been permitted to return to work since then. Thereafter, on May 20, 1997 the Organization filed a claim on behalf of the Claimant under Rule 32 of the labor Agreement on grounds that the Claimant had been disciplined in violation of that Agreement. The claim was denied by the Carrier.

Absent settlement of their differences over the May 12, 1997 release of the Claimant from his job as machinist the parties subsequently docketed two different cases before the Second Division of the National Railroad Adjustment Board. The Carrier

¹There are some factual errors in the record with respect to the date that the Claimant tried to go back to work. In the original claim of May 20, 1997 the Organization states that this date was May 5, 1997. The correct date is May 12, 1997. The Carrier's Submission to this case continues to perpetrate this factual error, most likely, as a result of the error in the original claim. On June 3, 1997 the Claimant himself filed a notarized affidavit in Pulaski County, Arkansas wherein he gives the proper time-lines of the FELA trial and his subsequent attempt to go back to work for the Carrier. The factual errors in the record which are due, it appears, to a typo in the original claim filed, have no material bearing on the conclusions by the Board in this case. All discussion of fact-patterns related to these issues will be based, in the Board's deliberations, on the Claimant's notarized affidavit of June 3, 1997. According to the Claimant's affidavit the verdict was issued on May 5, 1997. A check of the 1997 calendar shows that May 5, 1997 was a Monday. An Exhibit in the record shows that the jury in the FELA trial reached its verdict on May 3, 1997. That was a Saturday. Apparently there was a two day delay in issuing the verdict because of the week-end.

docketed NRAB Docket No. 13301 with accompanying Notification of Intention to File Ex Parte Submission on September 8, 1997. The Organization docketed NRAB No. 13308 with accompanying Notice to File Ex Parte Submission on October 24, 1997. Both filings were done properly within the time-lines outlined in the parties' labor Agreement and both parties responded to the others' filings by submitting a Submission to the National Railroad Adjustment Board.

Rule 32 of the labor Agreement states the following, in pertinent part.

"Rule 32 - Discipline - Investigations

(a) An employee covered by this agreement who has been in service more than 30 days, or whose application has been formally approved, shall not be disciplined or dismissed without first being given a fair and impartial investigation by an officer of the railroad. He may, however, in proper cases, be held out of service pending such investigation which shall be promptly held.

(b) At a reasonable time prior to the investigation, the employee will be apprized of the precise charge against him and the time, date and place set for the investigation. The employee shall have a reasonable opportunity by this notice to secure the presence of necessary witnesses, and representation if he so desires. A copy of the notice directing the employee to report for investigation shall be furnished to the local chairman of the craft involved, but failure to furnish the local chairman with copy of the notice shall not constitute a violation of this agreement or provide any basis for a contention that the notice to the employee to report for investigation was defective.

(c) An employee under investigation may be represented at the investigation by the duly authorized local committee who may be assisted by an officer and/or officers of the System Federation or International Organization. (Attorneys for the Federation excluded.) If the employee does not desire the duly authorized local committee to represent him, the employee may act as representative and will be permitted to examine witnesses. In event the employee elects to represent himself, the local committee will be permitted to be present at the investigation and be

present at any conferences in connection with an appeal by the employee to the officer administering discipline if discipline is assessed. Copy of each statement made a matter of record at the investigation will be furnished to the employee and the local committee.

(d) If it is found that the charges against the employee are not sustained, the record of the employee shall be cleared of the discipline; if suspended or dismissed, the employee shall be reinstated to his former position, unless otherwise mutually agreed, and shall be compensated for the wage loss, if any suffered.

(e) Nothing herein shall abridge the right of the Carrier to reinstate, with original seniority status, an employee who may have been dismissed for reason other than prescribed in the Union Shop Agreement dated January 12, 1953. No employee will be reinstated under this paragraph (e) who has been out of service for more than one year without the concurrence of the General Chairman."

The Organization also cites an August 12, 1996 Special Agreement which amends Rule 32 of the June 1, 1960 Agreement. That Agreement states the following in pertinent part:

"This has reference to . . . the parties' desire to expedite the appeal and handling process of discipline grievances. The parties believe an expedited process will benefit all the affected parties concerned. Therefore, it is agreed that for the progression of discipline claims only, the provisions of this Agreement shall apply to their handling instead of the current two (2) step appeal as stipulated in the following rules of the individual Collective Bargaining Agreements (on this property):

.....

Missouri Pacific: Rule 32 of the Agreement effective June 1, 1960

.....

IT IS AGREED:

(A) If the company's decision to discipline an employee is to be appealed by the General Chairman or the employee involved, the General Chairman or the employee will submit written appeal within sixty (60) days from the date the discipline is issued. The written appeal will contain a full statement of the Organization's or employee's objections to the discipline issued and a request to discuss the Carrier's decision in conference with the Carrier's highest designated officer to handle such disputes.

(B) If the discipline issued by the Carrier is appealed and a conference is requested in writing to discuss claim or grievance, the parties shall meet in conference within sixty (60) days from receipt of such request at a mutually agreeable time and place. Within sixty (60) days from the date of the conference, the Company shall notify the representative (or the employee in cases where the employee had filed the claim or grievance) of the results of the conference. If not so notified, the appeal shall be allowed as presented, but his shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances. It is understood, however, that the parties may, by agreement, extend the sixty (60) day periods established herein at any stage of the handling of the claim or grievance.

(C) All discipline claims or grievances shall be barred unless within nine (9) months from the date of the Company's officer's decision proceedings are instituted by the employee or the duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group, or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3, Second, of the Railway Labor Act. It is understood, however, that the parties may agree in any particular case to extend the nine (9) month period herein referred to.

(D) This provision shall not apply to requests for leniency and acceptance of discipline by waiving investigation.

(E) This Agreement shall become effective on September 15, 1996 and shall remain in effect until such time that either party serves a thirty (30) days notice on the other party indicating its desire to cancel the Agreement."

The Carrier argues that the instant case under NRAB Docket No. 13308, which was filed by the Organization, is improperly before the Board since the case had already been docketed before the National Railroad Adjustment Board by the Carrier as NRAB Docket No. 13301 and that “. . . all issues pertaining to this matter “. . . involving Claimant G. J. Morgan’s removal from service on May 12, 1997 . . . ” were adjudicated in that proceeding. The Board dismisses this objection. Docket 13301 dealt with the propriety of the Claimant’s case being before the Board. The instant Docket deals with the merits of the case.

After reviewing the full record on this case, however, the Board is constrained to conclude that the instant claim has no viability on its merits in view of a Release Agreement signed by the Claimant, who was represented by legal counsel, with the Carrier. Proviso of that Agreement signed by this Claimant with this Carrier released the Carrier from “. . . any and all . . . personal injury claims or grievances of any nature whatsoever, including but not limited to, labor disputes . . . ” in return for the sum of money as outlined in that Agreement.

The Board has ruled on many occasions that a claim under a labor Agreement becomes moot in the face of such a waiver. See Third Division Awards 20832, 26470, 26694, 32571 and 32572. Also, First Division Award 24045 and Second Division Award 13034.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 27th day of July, 2000.