

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
BOSTON AND MAINE RAILROAD**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

- 1—That the suspension of Wm. J. Furey, B&B Carpenter, on May 19, 1944 and dismissal from service of Wm. J. Furey on June 20, 1944 following investigation held on May 23, 1944 was unwarranted and improper;
- 2—That Wm. J. Furey shall be reinstated to his former position with seniority rights unimpaired;
- 3—That Wm. J. Furey shall be reimbursed for time lost at the rate of pay applicable to a B&B Carpenter, retroactive from the date of his suspension, May 19, 1944, and until he is restored into the service.

EMPLOYEES' STATEMENT OF FACTS: Wm. J. Furey has been in the service of the Boston and Maine Railroad since 1920, during which time he has worked almost entirely in the capacity of a B&B Carpenter. On August 22, 1940 while working with his crew in connection with driving piles at Pier 44, Hoosac Tunnel Docks, Charlestown, he suffered serious injury to his left hand. As a result of that injury his left hand is maimed and he has partially lost the use of it. In November 1940, after hospitalization and subsequent convalescence, Furey returned to his regular position as carpenter in the B&B crew in which he worked at the time of his injury.

At the close of the work day on May 11, 1944, Furey was discharged from the service on the charge that he was physically incapacitated to do the work required of the crew. Upon representation that the Carrier violated the Agreement in effect by discharging Furey without first giving him a hearing, Furey was reinstated into the service on May 19, 1944 and reimbursed for time lost. On the same date, May 19, 1944, Furey was suspended from the service pending hearing. A hearing was granted on May 23, 1944, conducted by B&B Supervisor F. R. Spofford. Under date of June 20, 1944, Division Engineer H. S. Ashley rendered his decision to the effect that Wm. J. Furey was dismissed without prejudice "account of physical incapacity to perform the work required of the crew".

The Agreement in effect between the Carrier and the Brotherhood is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYEES: The claimant, William J. Furey, entered the service of the Boston and Maine Railroad as a bridge man in October,

there was little or no possibility of her returning to her work she was dropped from the roster account of incapacity. Her claim for restoration was denied, the Board saying—

“Under the circumstances and from the evidence submitted, the Board finds no basis for any attempt to interfere with the action of the Carrier.”

In Award 676, Docket CL-700, this Division said—

“The Carrier, when it became convinced she was permanently incapacitated to perform the type of work that she was entitled to claim, permanently removed the claimant's name from the seniority roster. . . . The Division is of the opinion that, in view of the medical evidence of record, the carrier did not act arbitrarily, but, on the contrary, acted generously in dealing with the situation in dispute.”

While the dismissal of Furey did not involve discipline, the Committee has urged only the discipline rule in support of its position. Furey was not disciplined or punished. Strictly speaking, the Carrier did not dismiss him. His physical condition made it impossible for him to perform the type of work he was entitled to claim. Nevertheless, he was given a full and impartial hearing in which the testimony clearly shows that he was unable to perform the work of his position. No rule of the agreement was violated; no arbitrary or capricious action was taken by the Carrier. The claim should be denied.

Exhibits not reproduced.

OPINION OF BOARD: The claimant first entered the employment of the Carrier in October, 1920. On August 22, 1940, while working as a B&B carpenter, his left hand was crushed in an accident. The distal phalanx of the left thumb was amputated and there was scarring in the palm of the hand and inability to fully extend or fully flex his fingers, which condition on January 7, 1941, was described as being “more or less permanent” by the Company doctors.

In November, 1940, claimant was returned to service in the crew in which he was employed when injured, with the understanding that he would do such light work as he could perform. The claimant testified that when he went back to work it was on the understanding that he would be given light work to give his hand a chance to improve so that he could do full carpenter work.

In June, 1941, the Carrier made a cash settlement with claimant in consideration of which claimant signed a written release fully releasing the Carrier from all liability concerning the injury to claimant's hand. That release expressly provided, “It is clearly understood that future employment is not part of the consideration of this settlement.”

The claimant's hand did not improve sufficiently to enable him to do other than light work on his crew.

May 19, 1944, claimant was suspended on account of his physical inability to perform his work and hearing therefor was set and held on May 23, 1944. On June 20, 1944, he was dismissed on account of said disability.

The claim for restoration to service and compensation for time lost was not presented to this Board until March 26, 1947, almost three years later.

It is agreed by the parties that after the accident there was no legal obligation on the Carrier to place this claimant back in service as a carpenter. It seems clear that he was placed back in service to do light work in the hope and expectation that his hand would so improve that he would later be able to again do his regular work. While the Organization contends that the Carrier was fully acquainted with the condition of the hand at the time he was restored to service in November, 1940, the record does not sustain this con-

tention. The doctors' reports to the effect that the condition of the hand was "more or less" permanent were not made until in January, 1941.

There is also the contention by the Organization that the man was kept in service until after the statute of limitations had run on his claim against the Carrier. The cash settlement was made by the Carrier with this claimant and the full and complete release of the claimant taken in June, 1941. There can, therefore, be no valid contention that the Carrier kept this man working until 1944 to secure the defense of the statute of limitations on a claim on which they had made a complete settlement in June, 1941.

The transcript of the evidence of the hearing which the Carrier held on this matter on May 23, 1944, is clearly sufficient to sustain the Carrier in the dismissal of the claimant.

In the original submission by the parties the Organization failed to mention the fact that the rule called for a decision on the hearing within twenty (20) days after the hearing and that the decision was not given until twenty-eight (28) days after the hearing. It is, therefore, evident that this question was not discussed between the parties on the property.

The Organization now insists that since the decision was not made until twenty-eight (28) days after the hearing the decision is void and of no effect and the claimant must be restored to service as of May 19, 1944, and be given compensation for all wages lost between that date and the present time. As supporting this contention we are cited to Award No. 3502 of this Board in which this Board held that a decision, in a discipline case, was void where a written decision was not rendered for twenty-eight (28) days after the hearing was completed when the rule there involved required a decision within fifteen (15) days after the hearing.

In that Award this Board attempted to distinguish the case then before it from the factual situations involved in Awards Nos. 1497 and 1513 of this Board.

Award No. 1497 was distinguished on the ground that the rule there called for a decision within fifteen (15) days after completion of the investigation and it was claimed the investigation was not completed until the date the decision was rendered; and that that claim was one of the disputed issues in that case. In that Award this Board indicated no doubt as to the fact that the decision was rendered after the limit fixed by the rule but based its opinion that the decision, even though late, was valid for the reason that discipline for negligence presents a question which affects the traveling public and for the further reason that no rights of the employee were prejudiced by the delay.

Award No. 1513 was distinguished on the ground that it was influenced by the conclusion reached in Award No. 1497 and relied on and adopted the reasoning of Award No. 1497. The rule considered in Award No. 1513 required that a decision in writing should be returned within ten (10) days to the employee. In that Award it was pointed out by this Board that "Had the Carrier's non-compliance with its agreed undertakings violated Claimant's right to a full, fair and impartial trial and a fair and impartial decision, support for Petitioner's proposition could be found in prior awards. But no such or other injury to claimant is shown or claimed, so that there is nothing for which a compensating is due claimant." In Award No. 1513 the Board recognized the fact that in that case the discipline did not involve negligence directly endangering the public but still held that the decision in Award No. 1497 should be considered controlling.

We are also cited to Award No. 3697 in which this Board apparently again held that a claimant was entitled to the full restitution there claimed where a decision had not been returned within the specified time. The award fails to set out any reason supporting it and apparently simply held that such a technical violation justified the Board in ordering the full restitution there claimed. That award is, therefore, not helpful in this case.

In Award 3502, Referee Douglas also called attention to the fact that the question of the decision of the Carrier not being within the specified

time was raised for the first time in the argument before the Referee and apparently held that since the fact of the violation was apparent on the face of the record and the question presented no disputed issue of fact, there was no reason or rule to prevent the Board from then considering the Carrier's violation. In the present case we have a different situation and very good reasons for holding that the fact that Carrier failed to return a decision within twenty (20) days should not be held to make that decision null and void. The Carrier first discharged this man without a hearing. When its attention was called to that fact it promptly gave him a hearing at which hearing sufficient reason was shown to justify its action in discharging him.

If the Carrier's attention had been called to the fact that the decision was returned eight (8) days after the limit prescribed by the contract it could have then held another hearing which on the same evidence would have resulted in claimant's discharge. In that case the Carrier, at most, would have been penalized only a few days for its technical violation of the rule. Instead the Organization permitted this question to lie dormant for almost three years, first raising the question in its reply to the Carrier's submission before this Board and then demanding reinstatement as of May 19, 1944, and compensation for loss of earnings.

Under the circumstances disclosed here the claimant was given a fair and impartial hearing. There was sufficient evidence to sustain the Carrier's decision that claimant should be dismissed on account of his physical incapacity to perform the work required of the crew. While the failure to render a decision within a certain time might in some cases so prejudice the rights of a claimant as to justify this Board in saying that so withholding the decision amounted to such unjust treatment of claimant as to justify setting such decision aside, that was not true in this case. Here the failure of Carrier to render its decision within twenty days after the hearing in no way prejudiced the rights of the claimant. The failure of the claimant, for a period of almost three years, to question the validity of the Carrier's decision on the ground that it was not rendered within twenty days did prejudice the rights of the Carrier if we are to hold at this late date that Carrier's decision dismissing claimant was void.

It would be most inequitable under the facts of this case to now require the Carrier to reinstate claimant and to pay him for loss of earnings May 19, 1944.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived hearing thereon;

That the carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That the dispute was certified to the Third Division of the Adjustment Board jointly by complainant parties; and

That the claimant was not unjustly treated by being dismissed on account of his physical incapacity to do the work of his crew.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of February, 1948.