Award No. 6215
Docket No. CL-6274

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

(1) The Carrier unjustly and without cause dismissed Mr. Clarence Graham, Stockman, at Brooklyn Store, on January 14, 1952.

(2) Mr. Clarence Graham be restored to service with seniority rights unimpaired.

(3) Mr. Graham be compensated for all loss of wages from January 28, 1952.

EMPLOYES' STATEMENT OF FACTS: Clarence N. Graham entered service of the Terminal Railroad Association of St. Louis on March 11, 1942, as a laborer, at the Madison Store. Over a period of years he advanced to position of Stockman at the Brooklyn Store of the Carrier. On March 30, 1950 while in the performance of his duties in delivering material to the Round-House on a tow car, he was struck by an engine of the Carrier, suffering injuries to his leg, foot and his entire nervous system. He was taken to Missouri Pacific Hospital immediately following the accident and on October 2, 1950, Chief Surgeon Zeinert and Dr. Joseph A. Lembeck, in charge of orthopedic surgery, made the following report on his condition:

> "X-ray examination of the left leg showed a comminuted fracture of the middle third of the shaft of the tibia, with approximately one-half inch over-riding of the fragments and slight angulation of the fragments. There was a spiral comminuted fracture of the proximal portion of the shaft of the fibula, with approximately one-half inch overriding of the fragments.
>
> No fracture or dislocation was seen in X-ray examination of the left elbow.
>
> The fracture was reduced and a plaster of paris cast applied.
>
> Mr. Graham was discharged from the hospital on May 17. He was readmitted on August 14 and discharged on September 16, 1950."

that need to be discussed as the others are entirely without merit. First is the contention that the notice given Claimant did not meet the requirements of Rule 23 of the parties' effective Agreement because it did not precisely state the charge being made against him as this rule requires Carrier shall; and Second, that action was not taken within the time limits provided by Rule 24. Carrier contends this is not a disciplinary action and that therefore the provisions of these Rules have no application thereto. While it may be true that the action taken cannot be said to be strictly speaking a disciplinary action, however, it will be noted that these rules apply to any offense which is sufficient cause for an employe, who has been in Carrier's service for more than sixty days, to be either "disciplined or dismissed" and that such shall not be done without investigation and hearing. The latter is the situation here. We find Rules 23 and 24 have application to these proceedings.

The charge informed Claimant that Carrier was claiming he had filed suit against it wherein he alleged he had suffered severe and permanent injuries which incapacitated him from further performance of his duties as stockman, offered proof to the same effect and thereby obtained a verdict of $16,500.00 which, after judgment had been entered thereon, Carrier paid. Certainly Claimant was sufficiently advised of what Carrier was charging him with. Whether or not it was sufficient cause for his dismissal we will hereinafter fully discuss.

Rule 24 provides:

> "The investigation shall be held within seven (7) calendar days of the date when charged with the offense or held from service."

This was complied with as the continuance of the date of hearing from January 2, 1952 to January 8, 1952 was by mutual agreement. Rule 24, in this respect, provides:

> "The time limits provided in this rule may be extended by mutual agreement."

Claimant began his services with the Carrier as a laborer on March 11, 1942. On March 30, 1950 he was occupying the position of stockman in Carrier's Brooklyn Stores. On that date, while in service and riding in a tow car, he was severely injured when one of the Carrier's switch engines hit it. As a result of these injuries he brought suit against Carrier alleging he had suffered certain injuries, which were permanent, and that because thereof his ability to work and earn a living had been greatly impaired. At the trial he offered evidence of himself and Dr. F. G. Pernoud to the effect that because of the injuries he had suffered, which injuries Dr. Pernoud testified were permanent, fixed and could not be relieved by medical or surgical treatment, he could not do the work of a stockman or any part thereof nor would he ever be able to do a sustained day of labor over a period of eight hours. Claimant's counsel presented the matter to the jury on that theory. The jury returned a verdict in the sum of $16,500.00. Judgment was entered on this verdict and it was paid by Carrier. Under this situation the following, from Award 6479 of the First Division, is applicable:

> "It is well settled that an employe cannot be discharged or removed from the seniority list because of a suit against his employer. This is true, even if in his suit he contends that his disability is total and permanent, for an election of remedies is completely made only by pursuing a remedy to a final conclusion. And he is, of course, entitled to sue and recover wages for loss of time from a temporary disability for which the carrier is liable and later, upon the termination of his temporary disability, to resume work according to his seniority rights. But when he has not only claimed but has collected damages for the total and permanent loss of his work-

ing ability, it is inconsistent to claim that he still has that ability and that the carrier must employ it or pay for it on a seniority basis. Having finally submitted the question to the jury and having collected judgment for the total loss of the ability to perform the services, not even disappointment in the jury's assessment of the damages can justify the claim that the carrier should employ those same services or in default pay for them again."

See also First Division Award 15543 and Second Division Award 1186. Many Federal court cases to the same effect have been cited but no good purpose would be served by referring to them here.

The basic philosophy underlying these holdings is that a person will not be permitted to assume inconsistent or mutually contradictory positions with respect to the same subject matter in the same or successive actions. That is, a person who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later, in the same or another forum, to contradict himself in an effort to establish against the same party a second claim or right inconsistent with his earlier contention. Such would be against public policy.

In view of Dr. Joseph A. Lembeck's letter of January 22, 1952, stating Claimant would be able to return to work on January 28, 1952, we have carefully examined Rules 21, 54 and 61 of the parties' Agreement but we find nothing therein which abrogates Carrier's right to assert the position it did in this proceeding. In view of what we have said in this Opinion we find the claim to be without merit.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of May, 1953.