

Award No. 10561

Docket No. MSX-12265

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jerome A. Levinson, Referee

PARTIES TO DISPUTE:

AUGUSTINE J. MURPHY

RAILWAY EXPRESS AGENCY, INC.

STATEMENT OF CLAIM: It is my contention that while ill and under the care of a qualified physician, I was illegally removed from the roster of employees of the Railway Express Agency. That the Railway Express exercised a position as Judge and Jury while in the face of all the evidence in my favor, my doctor's statements, payment by the company insurance carrier and the payment of benefits by the Railway Retirement Act all point to the correctness of my position that I have been illegally removed from the roster of the Railway Express, and I hereby request reinstatement to the roster with reimbursement of back wages from the time of my initial application for re-employment on February 4, 1959.

I have been an employee of the Railway Express Agency in the capacity of Helper in the Motor Vehicle Division — New York City — since July 11, 1945, and have continued as such until informed by a Mr. Sheenan, Superintendent of Motor Vehicle Division, that I had been removed from the roster as of October 15, 1958.

It is my contention that I have been illegally removed from the roster of employees of the Railway Express, and I cite the foregoing reasons:

1. On July 31, 1958, while an employee in good standing, I became ill and unable to work. I was treated by Dr. Gregory Chvartazky, M.D., 102 Elm Street, Yonkers, N. Y., a qualified medical doctor in the State of New York, and was duly advised by him that I had arthritis in the right great toe and was not to exert any pressure on the same and under no circumstances was I to do any travelling to or from my home except when absolutely necessary.
2. The Railway Express was duly notified of my condition by myself and my Doctor. I was visited by a company investigator and also a Doctor, D. J. McAulliffe, representing the company insurance carrier — the Zurich Insurance Company of New York City, and willingly submitted to questioning and examination by both.

3. I was constantly bombarded by letters from the Company requesting me to come to New York City to be examined by a company physician and requested the company to send one to me as I had been advised by the physician under whose care I was that the trip of 18 miles with changing of trains to taxicabs and elevators would not be advisable.
4. I filed a claim of disability against the company carrier of Insurance, the Zurich Insurance Company, and had to obtain a lawyer to uphold the validity of my claim and as a result after much discussion my claim was upheld and I was paid the full amount due me.
5. I received full sick benefits under the Railway Retirement Act for the duration of my illness.

SUMMARY:

It is my contention that while ill and under the care of a qualified physician, I was illegally removed from the roster of employees of the Railway Express Agency. That the Railway Express exercised a position as Judge and Jury while in the face of all the evidence in my favor, my doctor's statements, payment by the company insurance carrier and the payment of benefits by the Railway Retirement Act all point to the correctness of my position that I have been illegally removed from the roster of the Railway Express, and I hereby request reinstatement to the roster with reimbursement of back wages from the time of my initial application for reemployment on February 4, 1959.

(Exhibits not reproduced.)

CARRIER'S STATEMENT OF FACTS: Augustine J. Murphy, herein-after referred to as claimant, was a vehicle employe of Carrier at New York, N. Y. As such, he was represented by Local Unions 459 and 808, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and was subject to the Local Agreement dated June 25, 1954, as amended, between Carrier and its employes represented by said Local Unions, covering the New York-Metropolitan District. He last worked for Carrier on July 30, 1958.

On August 5, 1958 Carrier's Superintendent Peterson wrote claimant as follows:

"Our records indicate you have been absent without permission since July 31, 1958.

It is mandatory for you to contact Supervisor Mr. C. J. Sheehan at the above address within five (5) days, or be cited for investigation for infraction of Rule #819: 'Absent Without Authorization'."

On August 7, 1958 Superintendent Peterson wrote claimant as follows:

"Within a period of five (5) days from the date of this letter, you will appear before Dr. A. Wolff, 141 E. 34th St., New York City, that he may determine that your disability is sufficiently severe to prevent you from working."

Carrier's Exhibit No. 1 is a copy of the general release which claimant signed on June 17, 1959. At the time he signed the release he had no enforceable claim against Carrier arising out of the removal of his name from the seniority roster, but even if he did, the general release released any claim which he might have had. This general release is an absolute defense to any claim asserted now by claimant which arose prior to June 17, 1959 and, standing alone, would require denial of this claim.

There is no merit to any contention claimant may advance that Carrier did not act properly in removing his name from the seniority roster. He refused to report for work as ordered and he refused to appear before Supervisor Sheehan to explain his failure to report for work. His excuse that he was physically unable to work or even to travel to the Supervisor's office was not borne out by the examination given him by Dr. D. J. McAuliffe, who reported that his physical condition was such that it did not incapacitate him from working. In addition, investigation by insurance investigators revealed that he was not incapacitated from traveling or working.

As shown in Manager Horner's letter of September 26, 1960, claimant was not paid the full amount of benefits which he claimed under the Group Insurance Plan. Rather, the matter was compromised because the time and expense of legal proceedings to dispose of the matter were unwarranted in relation to the amount of benefits claimed. This action of the Group Insurance Bureau in no way constituted an acknowledgement by Carrier that claimant was disabled.

Carrier has shown the following:

1. The Board has no jurisdiction of this claim because the Board of Adjustment provided for in the Agreement of February 3, 1948 has exclusive jurisdiction.
2. No conference, as required by the Railway Labor Act, was held.
3. Claimant did not comply with the Agreement rules covering request for hearing and appeal.
4. Claimant executed a general release which released any claim he may have had against carrier.
5. Carrier's action in removing claimant's name from the seniority roster was proper.

In view of the showing made herein the claim should be dismissed or denied.

All evidence and data set forth above have been considered in correspondence between the parties. Carrier reserves the right to supplement this presentation in the form of an Answer to Claimant's Submission when it has been furnished with a copy thereof.

(Exhibits not reproduced.)

OPINION OF BOARD: The record shows (1) that, under date of October 15, 1958, Respondent wrote Claimant is was dropping his name from the seniority roster effective October 16, 1958, for failure to conform to its

instructions; (2) that Claimant made no reply thereto, and (3) that, on June 17, 1959, Claimant executed a release, which, among others things, released Respondent from any and all claims, etc., which Claimant ever or then had against Respondent. In these circumstances, we conclude that the claim is without merit and must be denied.

In view of our conclusion as aforesaid, it is unnecessary to pass upon the procedural technicalities raised by Respondent.

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

That the Board has jurisdiction over the dispute involved herein; and

That the claim is without merit.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of April 1962.