

Award No. 13524

Docket No. CL-14926

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Kieran P. O'Gallagher, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

BESSEMER AND LAKE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6529) that :

(1) Carrier violated the Clerks' Agreement when on March 14, 1963 it terminated the employment relation of Edward H. Whiteside and removed **his name from** the Maintenance of Way Department **Clerical Group 2 Roster** and the Stores Department Clerical Group 2 Roster.

(2) Edward H. Whiteside shall now **be** reinstated to the service of the Carrier with seniority and all other rights unimpaired.

(3) Edward H. Whiteside shall now be *compensated* for **all** wage and other losses sustained **account** this arbitrary, capricious, unjust and discriminatory action by the Carrier.

EMPLOYEES' STATEMENT OF FACTS: Edward H. Whiteaide, age 46, **was** employed by the Bessemer and Lake Erie Railroad Company as a janitor at **Greenville**, Pennsylvania on October 16, 1945 and worked until March 28, **1958** when his position was discontinued. He then worked as a janitor at North *Bessemer* until March 20, 1960 when that position was discontinued. On March 23, 1960 he **was** transferred to the Stores Department Greenville, Pennsylvania as a laborer and was so employed on September 12, 1960 when he was injured at **10:15 AM.** that date when his right leg was struck by a falling timber being unloaded from a flat car. He was taken to Greenville Hospital where he was examined and treated for the injury by Company Surgeon Dr. J. L. Thomas. He was released from the hospital after treatment and returned to work that same day. After **approximately** one week of light duty he returned to work in his *normal* occupation and continued normal work until March 2, 1961 at **which** time he was furloughed. He was recalled to work in the same occupation on December 4, 1961 and furloughed again on September 21, 1962 because of reduced operations. During this period of time the injury continued to bother Mr. Whiteside and he was treated several **times** by Company Surgeons Dra. Thomas **and** Baker. On at least two occasions he **was hospitalized** in St. Francis Hospital, Pittsburgh, Pennsylvania where he was examined and treated by Chief Company Surgeon Dr. J. H. Wagner.

The Carrier and Mr. Whiteside were unable **to** reach an agreement for

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Without prejudice to the **carrier's position** stated above, the carrier asserts **that the** claimant received a fair **and** impartial hearing in accordance with the rules. The evidence adduced at the investigation conclusively establishes that :

(1) Both the **claimant** and his personal physician, an expert medical authority, admit that claimant is permanently disabled and unemployable **as** a common laborer.

(2) It is unsafe and hazardous for the claimant **to** perform the **regular** work of a Stores Department laborer, truck operator and stores helper and a Maintenance of Way Department janitor.

(3) The carrier's removal of the claimant's name from its two seniority rosters was justified in view of the relevant decisions of the National **Railroad** Adjustment Board and the Federal Courts.

The carrier also wishes **to** advise the **Board that** the claimant had not **stood** for work at any time since March 14, 1963 and, as of the date of this submission, there is no showing in the record that the claimant suffered any wage loss.

(Exhibits not reproduced.)

OPINION OF BOARD: For several years prior to September 12, 1960, Claimant was employed by the Carrier **first as** a janitor at Greenville, Pennsylvania and at North Bessemer when his position at that point **was discontinued**. On March 28, 1960, he was transferred to the Stores Department at Greenville, Pennsylvania as a laborer, and on September 12, 1960 his right leg was struck by a falling timber being unloaded **from** a flat car. He was examined at the hospital and returned to work the same day where he continued to work until furloughed because of reduced operations on September 21, 1962.

During this period the Carrier and the Claimant made several unsuccessful attempts to reach an agreement for lost wages and other damages caused by the injury above referred to, and on October 10, 1962, trial was had at Cleveland, Ohio, of a **F.E.L.A.** case which the Claimant brought against the Carrier. At the trial in the United States District Court he submitted proof through his personal physician, that he was permanently injured and that he would not be able in the future **to** perform work as a laborer. With this statement the Claimant concurred, whatever the probative value of said concurrence may have.

Subsequently, a formal investigation of the matter was held, at **which** investigation it was **established** the Claimant, Mr. Whiteside held seniority **in** the **Stores** Department. It developed at the investigation that Mr. Whiteside's injury precluded his employment in any **case of** the tasks available in **that** Department and as a result of the uncontroverted testimony adduced at the hearing **it** was considered that the Claimant's further employment would be unsafe and hazardous, and that his name should therefore be removed from the seniority rosters.

This claim **alleges** the Carrier violated the Clerks' Agreement when, following the investigation above referred to, it terminated the employment relation of the Claimant and removed his name from the Maintenance of Way **Department** Clerical Group 2 Roster and the Stores Department Clerical Group 2 Roster.

The Carrier contends that the Claimant is estopped from pursuing his **claim** for reinstatement, and in support of its contention cites the fact of **the** judgment and payment by the Carrier of **the** amount of the jury verdict in the United **States** District Court at **Cleveland**, Ohio, wherein the Claimant **was** compensated for **injuries** which he claimed permanently **disabled** him from **performing** his duties **as** a laborer in the Clerical **Groups above** referred to.

In the **circumstances** found we *must conclude* that when a Claimant **successfully establishes** in a suit in the United **States** District Court that he **is** permanently injured and disabled, rendering him unable in the future **to** perform **the** work of a laborer, and is compensated **for** lost wages, "past, **present** and **future**," and **the** Carrier pays the full amount of the judgment pursuant **to** the judgment rendered in that **case**, the Carrier is not bound **to** retain **the employee in** its services with back pay.

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

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in the dispute are **respectfully Carrier** and **Employees** 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 **the** Agreement was not violated.

AWARD

Claim denied,

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated **at** Chicago, Illinois, **this** 29th day of **April, 1965**.