Award No. 13881
Docket No. MW-15053

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur Stark, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ST. LOUIS SAN-FRANCISCO RAILWAY COMPANY

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

(1) The dismissal of Special Equipment Operator H. A. Newell on April 10, 1963, was without just and sufficient cause; was affected on the basis of unproven and unsubstantiated charges; and was wholly disproportionate to the charges (not proven) placed against the claimant.

(2) Special Equipment Operator H. A. Newell be reinstated to service with seniority, vacation and all other rights unimpaired; the charge be stricken from his record and that he be allowed payment for the assigned working hours actually lost — all in conformance with the provisions of Rule 9(d) of the Agreement.

OPINION OF BOARD: On April 10, 1963, after fourteen years of service, Special Equipment Operator H. A. Newell was summarily dismissed from service by Roadmaster E. V. Buster, for insubordination. A hearing was requested and held (on April 23) in accordance with Rule 9 of the parties' March 1, 1951 Agreement. Carrier's Notice stated as the subject of the hearing Newell's "alleged violation of Rules 175 and 176." On April 30, Carrier notified Newell that, as a result of the hearing, the dismissal decision would not be changed. In response to a request for reasons, it responded on May 22, 1963: "You were removed from service, effective April 10, 1963, for violation of Rules 175 and 176."

A claim on Newell's behalf was properly presented and handled at all stages of appeal up to Carrier's highest appellate officer in accordance with provisions of the March 1, 1951 Agreement covering Traveling Maintenance of Equipment Mechanics, Special Machine Engineers, Operators, Foremen and Helpers. Carrier's final denial was dated March 30, 1964.

On April 6, 1964 the Organization informed the Third Division and Carrier of its intention to submit for adjudication its claims that (1) Newell's dismissal was without just and sufficient cause, was effected on the basis of unproven and unsubstantiated charges, and was wholly dispropor-

tionate to the unproven charges; and (2) Newell be reinstated, restored his seniority and other rights, and reimbursed for lost wages, "all in conformance with the provisions of Article 4, Rule 1 (c) of the Agreement." In its May 6, 1964 Ex Parte Submission, the Organization referred to an April 1, 1951 Agreement between the parties as controlling and cited Article 4, Rule 1 (c) as applicable to Newell's case.

> "If the charge against the employe is not sustained, it shall be stricken from the record. If by reason of such unsustained charge, the employe has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost, while out of the service of the railway at not less than the rate of pay of position formerly held or for the difference in rate of pay earned, if in the service, less any amount earned in other employment."

In its June 2, 1964 Ex Parte Submission (the case had been docketed as MW-14828) Carrier urged the Board to dismiss the claim because of a procedural defect. The claim in MW-14828 was not the claim processed on the property, it argued, as evidenced by the reference to an April 1, 1951 Agreement and Article 4, Rule 1 (c), which were not applicable to Newell or his claim and which had not been previously cited by the Organization.

The parties were granted until September 21, 1964 to submit Rebuttals. On August 18, however, the Organization wrote the Board:

> "Please be advised that we desire to withdraw, without prejudice, the case identified by the above-mentioned Docket Number and File Number.
>
> Please advise."

Simultaneously, the Organization advised the Board of its intention to file a claim on Newell's behalf, specifying the same charges and requests as in MW-14828, but changing the Rule reference to "9(d)."

On September 14, 1964 the Board, sitting without Referee, issued Award 12894, disposing of MW-14828 as follows:

> "Request for withdrawal without prejudice is granted."

This Award was based on the Board's Findings that "This dispute was submitted ex parte and hearing was waived. Under date of August 18, 1964, the Petitioner addressed a communication to the Secretary of the Third Division requesting withdrawal of this case, without prejudice."

On September 17, 1964 the Organization submitted its Ex Parte statement in the case at hand in which it referred to the parties' March 1, 1951 Agreement, and cited Rule 9 (d) as applicable. (The text of this provision is identical to the text of Rule 1 (c) of the April 1, 1951 Agreement cited in MW-14828.)

JURISDICTION

Carrier strongly urges that Petitioner's claim is improperly on appeal with the Third Division and should be dismissed for lack of jurisdiction. It argues, in substance, that:

1. Petitioner is barred from resubmitting the same claim it appealed to and later withdrew from the Board.

2. The Board's Award 12894 is final and binding. Therefore, the Board is without authority to accept jurisdiction in the instant case, since to do so would require another Award on the identical claim. Once an award has been rendered, and regardless of whether the claim involved was sustained, denied, dismissed, or otherwise adjudicated, that particular claim is dead, and cannot be resubmitted.

3. Award 12894 cannot be construed, by inference or otherwise, as authorizing or inviting the re-submission of the claim covered thereby to the Board.

4. If the Board accepts jurisdiction, it would thereby encourage Petitioner and others to unnecessarily delay re-submission of claims which have been dismissed by prior awards; it would (if the claim is sustained) impose an unjustifiable penalty upon the Carrier by awarding penalties in a claim already finally disposed off; and, it would invite and permit Petitioner to mend its holds by presenting arguments and alleged facts not presented in the dispute closed by Award 12894.

In support of these arguments Carrier refers to numerous Board and Court decisions which have (1) interpreted Section 3, First (m) of the Railway Labor Act (". . . the awards shall be final and binding upon both parties to the dispute, except in so far as they they contain a money award. . . ."); (2) justified the policy of rejecting re-submission of claims after once submitted for decision and hearings held; (3) applied the doctrine of res judicata to Board Awards; and (4) interpreted the phrase "dismissed without prejudice."

After carefully analyzing these contentions and the many cited Court and Board decisions, it is our conclusion that Carrier's position on jurisdiction cannot be sustained.

Most of Carrier's statements with respect to principles enunciated by courts and the Board (this Division and others) are accurate. It is well settled that the Board's decisions are final and binding, and that once a dispute has been adjudicated, it cannot be resubmitted. **(Brotherhood of Railroad Trainmen v. CR&I Railroad,** 353 U. S. 30., **Reynolds v. Denver & Rio Grande Western Ry. Co.,** 174 F. 2d 673, Third Division Awards 9377, 8775, 6935, Fourth Division Award 993, Second Division Award 1586, First Division Award 13178, among numerous others.)

There are many cases which hold that the doctrine of res judicata may be applied to administrative proceedings generally, and Board proceedings in particular (73 C J S, **Sonderson v. Crucible Steel,** 66A 2d 188, Third Division Awards 8458, 8760, Fourth Division Awards 993, 990).

And there is little doubt that the Board has frequently dismissed claims without preudice, nor can it be said that the meaning of that phrase is unclear. As noted by the Second Division in Interpretation 1 of Award 1740:

". . . The dismissal of the appeal had the effect of affirming the carrier's denial of the claim made on the property. However, since the award did not determine the issue presented on its merits, the words 'without prejudice' were added to preclude any contention on the part of the carrier that an adjudication had been made on the merits of the issues in case the stipulation complained of continued after the carrier's denial thereof was made or if a similar situation developed at any time in the future. . . ."

In a word, "dismissed without prejudice" means that the ruling cannot be used as precedent for a decision on the merits of a similar issue which is properly filed and processed.

There is only one case, to our knowledge, where a claim was dismissed without prejudice and an identical claim later processed (see Second Division Award 4034 and Order of the U. S. District Court, Northern District of Illinois, Eastern Division, dated October 24, 1964, vacating that Award and directing consideration of the claim on its merits). But that case involved a "third party" issue, and is not relevant to a consideration of the matter at hand.

While Carrier has accurately described principles frequently used by the Board, none of them apply to the case at hand.

Certainly, Award 12894 is final and binding as far as it goes. It disposed of Docket MW-14828. However, the text of the Award itself must be evaluated to determine its effect on the Organization's claims. Significantly, the Award states that "Request for **withdrawal without prejudice** is granted" (Emphasis ours). This wording serves to distinguish Award 12894 from virtually all others cited by Carrier. In the other disputes the Board **dismissed** organization claims without prejudice after giving consideration to carrier arguments concerning procedure, jurisdiction and the like. While the merits were not reached in those cases, the Board held hearings on the procedural questions and, thereafter, used the word "dismiss" advisedly, adding "without prejudice" to denote that no precedent had been established with regard to the proper disposition of the substance of the claim. In this regard the definition of "dismissed" in Black's Law Dictionary (3rd Edition, 1944) is of interest: "The dismissal of an action, suit, motion, etc., is an order or judgment finally disposing of it by sending it out of court, though without a trial of the issues involved. . . ."

This Board is well acquainted with "dismissed without prejudice" actions. In Award 12894, however, it carefully used the phrase "**withdrawal** without prejudice." (Emphasis ours.) What, then, does this phrase mean?

Insofar as can be determined, there are no Board decisions interpreting this phrase as used in a Board Award. In Award 18302 the First Division found that the BLF&E could not revive a case by bringing it to that Board when, in a mediation agreement disposing of 182 grievances, the organization had consented to withdraw the case in point without prejudice. As used in that mediation agreement, "withdrawn" was equivalent to "denied", the Board held.

But the Third Division could easily have used "denied" or "dismissed" in Award 12894. Since it chose "withdrawal without prejudice" instead, Award 18302 is clearly not in point.

"Withdrawal of charges", according to Black's Law Dictionary (3rd Edition, 1944), is "a failure to prosecute by the person preferring them; — distinguished from a dismissal, which is a determination of their validity by the tribunal hearing them."

"Without prejudice", in law, is defined in Webster's New Collegiate Dictionary (1953) as "without damages to, or detraction from, one's own rights or claims."

When this Division granted Petitioner's request to withdraw MW-14828 without prejudice, then, it did not bar a re-submission of the same claim. This conclusion is buttressed not only by reference to the commonly understood meaning of the key phrases, but also by reference to the fact that the Board never actually passed on Carrier's argument that MW-14828 should be dismissed because of an alleged procedural defect. There was no hearing, in other words, on any of the parties' contentions in the earlier case. It is for this reason, incidentally, that the principle of res judicata cannot be applied to the case at hand (". . . a point or question or subject matter which was in controversy or dispute and has been authoritatively and finally settled by the decision. . . ." — Black's Law Dictionary).

Petitioner's claim in this case was timely filed under the Agreement. It contains no procedural defects. Since, as noted above, the matter was not finally adjudicated by Award 12894, this Board has jurisdiction.

MERITS

Newell was dismissed for violating Rules 175 and 176. Petitioner argues that the charges against him were unproven and, in any case, the penalty was wholly disproportionate to the alleged offense.

Rules 175 and 176 provide:

> "175. Civil, mannerly deportment is required of all employes in their dealings with the public, their subordinates, and each other. Boisterous, profane or vulgar language is forbidden. Courtesy and attention to patrons is required. Employes must not enter into altercations with any person, no matter what provocation may be given, but will make note of the facts and report to their immediate superior.
>
> 176. Employes who are negligent or indifferent to duty, insubordinate, dishonest, immoral, quarrelsome, or otherwise vicious, or who conduct themselves and handle their personal obligations in such a way that the railway will be subject to criticism and loss of good will, will not be retained in the service."

Carrier charges that on April 10, 1963, Newell was insubordinate to his supervisor, Roadmaster Buster, used profane and vulgar language, was uncivil and unmannerly, entered into an altercation with his superior, and was quarrelsome and vicious. Virtually all these charges stem from an incident which occurred in the early afternoon that day.

Testimony concerning this incident was offered at the investigation by Newell and Buster. It establishes that Newell lost his temper, got into a heated argument with Buster, and used profane and vulgar language. It does not establish that he was insubordinate (in the sense of deliberately disobeying an order) or that he was vicious or generally quarrelsome.

On April 9 Buster had instructed Newell to use a bucket to drag part of the dump yard which was not level. This was not entirely satisfactory, since the bucket was too light and narrow. On April 10, Buster instructed some other employes to bring a large frog and attach it to Newell's machine to use as a drag. At 9:00 A. M., Buster observed Newell working with the frog. At 11:00 A. M., he recalls, he told Newell to make another pass or two, then work in a weed patch east of the track, and "I would be back after lunch and we would talk things over and decide what best to do then." Newell recalls the instructions concerning dragging the yard area and the weed patch. But he says he understood that when the weed patch was completed he was to unhook from the drag and push up the remainder of the waste material, as instructed by B&B General Foreman Latimer (who had talked to him early that morning).

Newell complied with what he considered to be his total instructions. About 1 or 2 P. M. Buster returned and found the frog unhooked. There ensued a heated exchange, with accusations by Buster concerning Newell's uncooperative attitude and by Newell concerning Buster's continuous riding of him and checking on him. Buster states that Newell was shaking his fists close to the Roadmaster's face; Newell denies this. No threats were made, however, nor were any blows struck. Newell called Buster a vulgar name, but immediately said, "I will take that back."

After carefully evaluating these and other relevant facts — including the absence of any prior discipline and Claimant's fourteen years of service — it must be concluded that dismissal was an excessive penalty and, as such, should be set aside as an arbitrary exercise of Carrier's right to discipline. The claim, therefore, will be sustained. Newell's record should be cleared and he should be restored to duty and made whole in accordance with the provisions of Rule 9 (d).

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 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 the Agreement was violated.

AWARD

Claim sustained. Mr. H. A. Newell's record shall be cleared, he shall be restored to service with seniority and other rights unimpaired and shall be compensated for time lost in accordance with the provisions of Rule 9 (d).

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1965.