

Award No. 16632
Docket No. CL-16826

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bill Heskett, Referee

PARTIES TO DISPUTE:

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

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Eastern Lines)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6154) that:

(a) Carrier violated the provisions of the Clerks' Agreement when on May 10, 1965 it arbitrarily removed R. W. Dorman from service; and,

(b) Carrier shall now restore R. W. Dorman to his former and rightful position with all right and fringe benefits unimpaired; and,

(c) Carrier shall now pay R. W. Dorman eight (8) hours at pro rata rate of his former position for May 10, 1965 and for each work day thereafter until he is properly restored to service and violation corrected; and,

(d) In addition to the money amounts claimed herein, the Carrier shall pay Claimant an additional amount of 6% per annum compounded annually on the anniversary date of claim.

OPINION OF BOARD: Claimant was charged with mishandling of U. S. mail and an investigation was held more than twenty (20) days from the date the Carrier had factual knowledge of the incident. Said investigation was properly objected to by the Claimant's representative because it was held in violation of the time-limit, i.e., Rule 24(a). See Award 16262 (Dugan).

During that investigation Carrier, over Claimant's timely objection, called Claimant as its first witness. After testifying regarding such matters as his age, job, etc., Claimant refused to respond to the following question by Carrier's officer, to wit:

"Will you state in your own words what you know about this case?"

The next day Claimant was charged with insubordination under Rules 19 and 20 because of his failure to respond. The hearing on this latter charge was timely held and Carrier produced witnesses and the transcript of the hereinbefore mentioned investigation. However, it subsequently called Claimant and Claimant again refused to respond to a question similar to the one heretofore set out. It is unrefuted that immediately after the second investigation was closed Claimant was discharged from service.

Whether Carrier's action was based on the charge and evidence or summarily on the Claimant's conduct at the second hearing need not be decided. What is dispositive of the claim on its merits is that the hearing from which the charge grew was, because of the time-limit, void *ab initio*. It is impossible for this Board to ascertain how Claimant could "withhold information" or be "insubordinate" and thereby violate Rules 19 and 20 at an investigation where Claimant was on his own time and where the Carrier had no legal rights to ask questions or, for that matter, to hold same.

It is stipulated by the parties that Carrier reinstated Claimant 171 work days after his discharge. Therefore, we hereby sustain part (a) of the claim, rule part (b) moot, sustain (c) as to the hereinbefore mentioned 171 work days and turn our attention to part (d).

Part (d) of the claim requests that Carrier, in addition to the back pay for 171 work days, ". . . pay Claimant an additional amount of 6% per annum compounded annually on the anniversary date of the claim." Carrier argues that there is no statutory or contractual authority for such a contention.

While the facts in *United States, et al., vs. United Drill & Tool Corp.*, 183 F.2d 998 (Ct. App., D.C., 1950) are in no way analogous to the instant case, the court therein did announce the rather basic legal concept regarding the award of interest. It said:

"A statutory obligation in the nature of a debt bears interest * * * because the statutory purpose was to create a debtor-creditor relationship and in equity interest is allowed as a means of compensating a creditor for loss of use of his money.

On the other hand, if the obligation is not in the nature of an obligation to pay money, as, for example, is a statute imposing a penalty, interest is not allowed, because to do so would not be in accord with the equitable nature of interest; there is no debtor-creditor relationship and hence interest, if allowed, would serve only to increase the penalty."

Here, the back pay is a debt owed the Claimant as a result of his wrongful discharge—it is not a penalty. See also *NLRB vs Globe Products Corp.*, 322 F.2d 694 (4th Cir., 1963).

It appears that the situation facing us here is, in a degree, similar to that which has been faced by the National Labor Relations Board. Generally, it is now held that an award of interest by the NLRB on reinstatement and back pay awards lies within the Board's discretionary powers, and although its earlier rule was to the contrary, the Board has the authority to change its rule with respect to interest. See 51A C.J.S., *Labor Relations*, §639, pp. 849-850. Therefore, several court cases arising out of NLRB decisions prove to be of assistance in deciding the case now before us.

In *Marshfield Steel Company vs. NLRB*, 324 F.2d 333 (8th Cir., 1963) it was argued that if the implementation of the Act is to be changed to permit the award of interest, it should be done by Congressional action and not by the Board. In rejecting this argument, the court said:

"The failure to mention interest in statutes which create obligations has not been interpreted by this court as manifesting an unequivocal Congressional purpose that the obligation should not bear interest. There should be an appraisal of the Congressional purpose.

One for whose financial advantage an obligation was assumed or imposed, and who has suffered actual money damages by another's breach of that obligation, should be fairly compensated for the loss thereby sustained.

The Board acted within its power in providing for the payment of interest. Such awards are in no sense penalties. They were not to punish the debtor but to compensate for the loss sustained by the employees who were wrongfully discharged. To make such employees whole, the provision for payment of interest for the time pay was withheld wrongfully is only equitable. During that period, the petitioner had the use of the money wrongfully withheld and we can see no reason why it should not pay for its use."

The court in *NLRB vs. Central Illinois Public Service Company*, 324 F.2d 916 (7th Cir., 1963) held that the Board's broad discretionary powers permitted it to award interest. A like conclusion was arrived at in *Revere Copper and Brass, Inc. vs. NLRB*, 324 F.2d 132 (7th Cir., 1963) when it affirmed an award of interest, approved of two other circuit court decisions upholding interest awards and commented with respect to interest awards:

"Some things are bound to happen for the first time."

See also *Reserve Supply Corp. vs. NLRB*, 317 F.2d 785 (2nd Cir., 1963) and *International Brotherhood of Operative Potters vs. NLRB*, 320 F.2d 757 (1963). These cases clearly disclose the premise and logic of awards granting interest.

The question, as it concerns the Railway Labor Act, was met "head-on" by the court in *Raabe vs. Florida East Coast Railway Co.*, 259 F.Supp. 351 (M. Dist., Fla., 1966), when it concluded that the plaintiff should receive interest on the back pay which this Board awarded. The court said:

"Raabe argues that he should be awarded prejudgment interest in order to make him whole; this court agrees.* * *

* * * the reasoning is based on the proposition that the granting of such interest in this type of case is in conformity with general principles of law — that back pay awarded is not a fine or penalty but wages lost by the employee because of the employer's wrong; that back pay is thus in the nature of a debt and, moreover, indebtedness that arises out of a statutory obligation owed the employee by the employer. Clearly the interest is needed in order to make the employee whole. Absent any expressed policy in the RLA to the contrary, and this court finds none, this reasoning applies equally to compensation awarded employees reinstated by the National Railroad Adjustment Board."

Therefore, we have judicial precedent supporting our conclusion that the Railway Labor Act does not preclude our awarding of prejudgment interest but, on the contrary, because of its guidelines and purpose resides in us the inherent authority and power to grant same.

Carrier cites Rule 24-F of the Agreement in support of its contention that same limits its liability in the event of a violation and that interest added to the claim would be more than the parties agreed to therein. Rule 24-F reads as follows:

"If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and compensated for the actual wage loss, if any, suffered by him."

With Carrier's contention, we cannot agree. Rule 24-F neither allows or prohibits interest. It merely defines the principal sum to be paid in the event of violation. Such a provision is little different from ordinary contracts of a debtor-creditor nature — often the parties do not provide for interest but the law implies the normal or "going" rate. This is based on the sound doctrine that one should not use another's monies without paying therefor unless a specified expression of the parties discloses a contrary intent. We find no such expression here.

The interest prayed for in part (d) of the claim is hereby allowed in addition to the actual wage loss of 171 work days.

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 by the Carrier.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of October, 1968.

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