NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19679

THIRD DIVISION Docket Number MW-19852

John H. Dorsey, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Akron, Canton & Youngstown Railroad Company

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

(1) The dismissal of Machine Operator C. D. Jones from service as of June 21, 1971 for allegedly violating "Rules 427 and 448 of the Operating Rules of the Akron, Canton & Youngstown Railroad Company" was improper, without just and sufficient cause, based upon unproven charges and in violation of the Agreement.

(2) Machine Operator C. D. Jones be reinstated with seniority, vacation and all other rights unimpaired and that he be compensated for all wage loss suffered in accordance with Rule 21.

OPINION OF BOARD: The facts relating to Claimant's dismissal, succinctly stated, are that he was an Operator on a 16-Tool Switch Electromatic Tamper. On May 28, 1971, during movement of the Tamper, it derailed. Tamper was rerailed and joined up with the track gang. When Tamper was called upon to commence tamping the "tamping head and tamping barn would neither go up or down!' A mechanic examined the machine and reported damage to the tamping heads and tamping bars. The record contains sufficient evidence, of probative value, that Claimant by oversight failed to secure the Tamping heads during movement of the machine and this permitted the Tamping heads to drift down catching on the guard rail and derailed the Tamper.

We find that: (1) Claimant was afforded due process; (2) there is substantial evidence that the securing of the Tamping heads was a responsibility of the Claimant. But, we find that the discipline assessed was excessive. Therefore, we will award that Claimant be reinstated with seniority, vacation and all other rights unimpaired; but as to compensation for wages lost Carrier pay to Claimant the amount of wages he would have earned from Carrier absent his dismissal from service until the date of his reinstatement less what he actually earned from other sources during that period.

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.

A W A R D

Carrier to reinstate Claimant to service with rights and compensation as prescribed in the Opinion, supra.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. L. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1973.

CORRECTED

Serial No. 270

NATIONAL RAILROAD ADJUSTMENT BOARD

TRIED DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 19679

DOCKET NO. MW-19852

NAME OF ORGANIZATION: Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: Akron, Canton and Youngstown Railroad Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the fallowing interpretation is made:

In the Award, which was issued March 23, 1973, we found: (1) Claimant was afforded due process; (2) Carrier's finding that Claimant was derelict in his duties was supported by substantial evidence; but, (3) the discipline assessed by Carrier, dismissal from service, was excessive. Having found the dismissal to be an excessive penalty we proceded to find, in the exercise of our jurisdiction and judgment, thatthe following would constitute a reasonable penalty:

> ....we till award that Claimant be reinstated with seniority, vacation and all other rights unimpaired; but as to compensation for wages lost Carrier pay to Claimant the amount of wages he would have earned from Carrier absent dismissal from service until the date of his reinstatement less what he actually earned from other sources during that period.

The Brotherhood of Maintenance of Way Employes did, under date of February 8, 1974, petition this Board to interpret the Award. The question presented:

> Doer the awardment of "compensation for wages lost" in Award 19679 contemplate that the claimant shall be made whole for any money he was required to spend for medical and hospital services or other benefits which would otherwise have been covered under Travelers' Group Policy GA-23000 during the period the claimant was with-held from service?

It is MW's position that:

> ...the abovestated question is properly answerable only in the affirmative. To hold otherwise would mean that a second deduction, not ordered by the award, would be nude from the "compensation for wages lost" by the claimant. This would be equivalent to the amount of medical and hospital payments required of the claimant while out of service but which would have been paid by The Travelers Insurance Company under Group Policy No. GA-23000 if the claimant had not been excessively disciplined by dismissal.
>
> Travelers Group Policy No. GA-23000 is a contract between the Travelers Insurance Company, this nation's railroads and this nation's National Railroad Labor Organizations which provides protection for railroad employes and their dependents against the costly expense of medical care and hospitalization, including maternity benefits. The premiums due under said policy are paid in their entirety by the Carriers. Such premium payments have been considered as payment of wages by the Carriers, the Labor Organizations, Emergency Boards and by various referees on the Second and Third Divisions. The Carrier Mashers of the Second Division expressly conceded that the insurance benefits and protection under Travelers Group Policy GA-23000 are regarded as wage equivalents (Carrier's Members Reply to the concurring and dissenting opinion filed by the *Labor Members to* Second Division Award *3883).*

Carrier's position can be adequately summed up by quoting its letter to the General Chairman, dated October 18, 1973:

> This has reference to our telephone conversation on October 17, 1973, regarding health and welfare benefits to reinstated employee Carlos Jones.
>
> As explained to you, it would not be possible to provide medical care benefits in such a case under Group Policy *Contract GA 23000.* If an employee is dismissed, his employment relationship terminates and his insurance accordingly terminates immediately, see Article VI, Part A, l.C. and Article VI, Part B, l.C(b). Moreover, premiums are payable to Travelers in reiatioa to only those months when an employee renders compensated service (or, if he does not render compensated service, receives vacation pay), No back premium

can be paid for an employee who has been dismissed and is reinstated after the lapse of a calender month or more in which he does not work. And, aside from these premiums of the policy contract, from a practical standpoint, the policy contract cannot be administered on any such basis as would make an employee's insured status in a past month depend on whether he is reinstated at some time in the future. (Emphasis supplied.)

The labor organizations have recognized these considerations and have provided a means for employees whose dismissal appeals are pending to preserve their insured status. The Order of Railway Conductors and Brakemen and the Brotherhood of Railroad Trainmen expressly recognized them when, in 1964, they took out Travelers Group-Policy GA 696543, covering certain furloughed and retired employees, certain dependents and others who were not covered by Group Policy Contract GA 871234. Their leaflet describing the policy stated in part:

> 'An employee whose insurance under Group Policy Contract GA 871234 is terminated due to termination of his employment, but whose status is being considered in proceedings, under the Railway Labor Act may enroll for the benefits described herein for himself and/or his dependents, provided he enrolls and makes remittance direct to The Travelers Insurance Company within fifteen days of the date of termination of his employment.'

Although leaflet9 describing Travelers Group Policy GA 23111 in its earlier years did not contain such a statement, I understand the privilege of insuring under that group policy was extended discharged non-operating employees. And, in 1968, when the several railroad health and welfare plans were consolidated, and on the organization's put Group Policy GA 696543 and the corresponding policies which the other operating employee organizations became parties to GA 23111, it was revised to contain language substantially identical to that quoted above.

Inasmuch as Group Policy GA 23111 is available to discharged employee9 as a means of maintaining their insurance pending appeal, an employee would not be on good grounds in asking for retroactive payments.

Attached is copy of list of awards rendered by the National Railroad Adjustment Board covering this subject.

Upon consideration of the record es a whole; the Awards and other authorities cited by the parties; end, the Submission of each of them addressed to the question presented, we find and hold:

I. If an employe is dismissed for just cause, his employment relationship terminates and his insurance accordingly terminates.

II. If an employe is dismissed by Carrier and (1) the employe timely files claim, alleging wrongful dismissal, which is properly processed on the property and after which this Board's jurisdiction is invoked (Section 3 First (i) of the Railway Labor Act); and (2) this Board sustains the claim and orders Carrier to reinstate the employe, the employment relationship is not severed during the period from the date of his wrongful dismissal to the date of his reinstatement; then, (3) a wrongfully dismissed employe is entitled to the Agreement benefits which would accrue to him during the period he was wrongfully held out of service.

III. This Board in its Award found that the Claimant therein was wrongfully dismissed by Carrier end found that a reasonable measure of discipline was the application of the "make whole" doctrine instead of the "payment allowed for the assigned working hours actually lost" as provided for in Rule 21 and as preyed for in paragraph (2) of the Claim. Other than that measure of discipline all other rights which Claimant would have enjoyed es an employee during the period he was wrongfully held out of service did, under our Award, *stood* and stands unimpaired -- this includes his *insurance* coverage under Rule 65 - HEALTH AND WELFARE PLAN.

Iv. Since this Board found that Claimant was wrongfully dismissed from service, ipso facto, *Carrier's* termination of his insurance under Rule 65 was wrongful and Carrier must bear the liability attached to its action.

For the foregoing reasons the question presented is answered in the affirmative.

Referee John A. Dorsey, who set with the Division, as a neutral *member,* when Award No. 19679 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September 1974.

CORRECTED

Serial No. 270

NATIONAL RAILROAD ADJUSTMENT BOAW

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 19679

DOCKET NC. MW-19852

NAME OF ORGANIZATION: Brotherhood of Maintenance of Wey Employes

NAME OF CARRIER: Akron, Canton end Youngstown Railroad Company

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Attached is copy of list of awards rendered by the National Railroad Adjustment Board covering this subject.

Upon consideration of the record as a whole: the Awards and other authorities cited by the parties; and, the Submission of each of them addressed to the question presented, we find and hold:

I . If an employe is dismissed for just cause, his employment relationship terminates and his insurance accordingly terminates.

II. If an employe is dismissed by Carrier and (1) the employe timely files claim, alleging wrongful dismissal, which is properly processed on the property and after which this Board's jurisdiction is invoked (Section 3 First (i) of the Railway Labor Act); and (2) this Board sustains the claim end orders Carrier to reinstate the employe, the employment relationship is not severed during the period from the date of his wrongful dismissal to the date of his reinstatement; then, (3) a wrongfully dismissed employe is entitled to the Agreement benefits which would accrue to him during the period he was wrongfully held out of service.

III. This Board in its Award found that the Claimant therein was wrongfully dismissed by Carrier and found that a reasonable measure of discipline was the application of the "make whole" doctrine instead of the "payment allowed for the assigned working hours actually lost" es provided for in Rule 21 and es preyed for in paregreph (2) of the Claim. Other then that measure of discipline all other rights which Claimant would have enjoyed as an employee during the period he was wrongfully held out of service did, under our Award, stood and stands unimpaired -- this includes his insurance coverage under Rule 65 - HEALTH AND WELFARE PLAN.

IV. Since this Board found that Claimant was wrongfully dismissed from service, ipso facto, Carrier's termination of his insurance under Rule 65 was wrongful and Carrier must beer the liability attached to its action.

For the foregoing reasons the question presented is answered in the affirmative.

Referee John H. Dorsey, who set with the Division, as a neutral member, when Award No. 19679 wes adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 6th day of September 1974.

CARRIER MEMBERS' DISSENT TO INTERPRETATION NO. 1 TO
AWARD NO. 19679 - DOCKET NO. MW-19852 - REFEREE DORSEY

The organization petitioned the Board for an interpretation of the following question:

> "Does the awardment of 'compensation for wages lost' in Award 19679 contemplate that the claimant shall be made whole for any money he was required to spend for medical and hospital services or other benefits which would otherwise have been covered under Travelers' Group Policy GA-23000 during the period the claimant was with-held from service?"

For the reasons set forth in the Interpretation, which go beyond the question raised, the question was answered in the affirmative by the Neutral..

There is no provision in the Agreement which supports such an allowance.

The Opinion of Board in Award No. 19679 stated:

> "* * * but as to compensation for wages lost Carrier pay to Claimant the amount of wages he would have earned from Carrier absent his dismissal from service until the date of his reinstatement less what he actually earned from other sources during that period."

Numerous prior Awards of this Board, which adhere to the principle that medical and hospital expenses are not embraced within the term "wages lost", were cited by the Carrier.

This erroneous interpretation is contrary to the well-established precedent of this Board and is not supported by the contract. As was so aptly stated in a prior Award:

> "Where, as here, the Board is confronted with a long line of precedents which first postulate and then maintain a consistent interpretation of contract language we should refrain from disturbing what ought to be a settled matter."

We dissent.

H. F. M. Braidwood

H. F. M. Braidwood

P. C. Carter

P. C. Carter

W. B. Jones

W. B. Jones

G. L. Naylor

G. L. Naylor

G. M. Youhn

G. M. Youhn