

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31396  
Docket No. TD-31662  
96-3-93-3-17

The Third Division consisted of the regular members and in addition Referee Jacob Seidenberg when the award was rendered.

PARTIES TO DISPUTE: (American Train Dispatcher Association  
(Terminal Railroad Association of St. Louis

STATEMENT OF CLAIM:

"(a) The Terminal Railroad Association of St. Louis violated its Train Dispatchers' April 30, 1991 National Agreement (NMB Case Nos. A-11546, A-12217, A-12282), including Article 1, Section 1 thereof, as modified by item 1 of the December 16, 1991 Letter of Understanding between National Railway Labor Conference Chairman C.I. Hopkins, Jr. and ATDA President R.J. Irvin, when it refused to allow Claimant retired Train Dispatcher H.F. Montine a lump sum pay as provided in said Article A, Section 1 as modified, based on his qualifications for a vacation in 1991 before his retirement date of November 15, 1990.

(b) Because of said violation, carrier shall now allow Claimant retired Train Dispatcher H.F. Montine a lump sum payment as provided in the agreement and December 16, 1991 Letter of Understanding cited in paragraph (a) above."

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The following relevant Agreement states in part:

April 30, 1991 National Agreement:

"Article 1 - Wages

Section 1 - Lump Sum Payment

Each employee subject to this Agreement with 2,000 or more straight time hours paid for (not including any such hours reported to the Interstate Commission as constructive allowances in protective agreements or arrangements) during the period April 1, 1990 through March 31, 1991 who has an employment relationship as of the date of this Agreement or who has retired or died subsequent to April 1, 1990 will be paid \$2,000.00 within 60 days of the date of this Agreement. Those employees with fewer straight time hours (including vacations, holidays, paid sick leave and guarantees in protective agreements or arrangements, as described above) paid for during that period divided by 2000. . . ."

The December 16, 1991 Letter of Understanding states in part:

- "1. Eligibility for the lump sum payment in Article 1, Section 1 shall include any ATDA represented employee who qualified for a vacation in 1991 based on service in calendar year 1990. Other eligibility requirements and conditions continue to apply."

The Claimant had 38 years of seniority with the carrier, 16 years of which were as a Dispatcher. The core issue is whether the Claimant was contractually entitled to receive the \$2,000.00 lump sum payment under the April 30, 1991 Agreement. The eligibility requirements to receive this sum were:

1. Have 2,000 or more straight time hours during April 1, 1990 through March 31, 1991;
2. Have an employment relationship with carrier as of date of Agreement;
3. or have retired or died subsequent to April 1, 1990.

On November 15, 1990, the Claimant applied to Railroad Retirement Board for an occupational disability, the RRB granted the Claimant's application for retirement on May 1, 1991.

On January 24, 1991, the Carrier terminated the employment of the Claimant. The Organization appealed the dismissal through the appropriate channels culminating with this Board. On December 17, 1993, this Board upheld the Carrier disciplinary discharge of the Claimant in Third Division Award 29967.

The Carrier introduced its payroll records to show that the Claimant was still employed on January 2, 1991, his last day of employment.

The Organization concedes that the Claimant did not have an employment relationship with the Carrier on the effective date of the Mediation Agreement, but maintains that he did retire subsequent to April 1, 1990. The Organization stressed the Agreement made no distinction between a retirement due to employee's age or a retirement due to a physical disability, and therefore the Board lacks the authority to make such a distinction.

The Organization asserts the Claimant applied for and was granted a Railroad Retirement disability annuity effective November 15, 1990. The Organization adds the regulations of the RRB requires a five month waiting period between the Claimant's effective date of a disability retirement and the time when the actual payments begin. The Organization asserts that under the RRB regulations, the Carrier failed to recognize that the Claimant's disability payments were based on the effective date of the disability which in this case was November 15, 1990, rather than the date on which the Claimant started to receive the retirement benefit payments.

The Organization noted that the Carrier questioned the Claimant's physical fitness prior to dismissing him. The record shows that on December 26, 1990, the Carrier directed the Claimant to report to a hospital in St. Louis for a complete physical examination (Org.'s Ex. 17). On January 3, 1991, because of the excessive sick leave that the Claimant had taken in the last 30 days, he was withheld from service pending the results of the January 3, 1991, physical examination. On January 21, 1991, the Carrier informed the Claimant that he was disqualified from service with it because of the severe sight disadvantage discovered in his January 3, 1991, physical examination.

The Organization stated it was inconsistent for the Carrier with its knowledge of the Claimant's disabilities and its action to get him disqualified from service because of his disabilities, to now seek to disallow his claim which is based on a retroactive date of November 15, 1990.

The Organization stated there is no merit to the Carrier's defense that the Claimant was paid one day's pay on January 2, 1991. The fact remains that the Claimant had a five month waiting period under RRB regulations between the effective date of a disability retirement and when the stated annuity payments commenced. The RRB treated the Claimant as being occupationally disabled on November 15, 1990. The Organization stressed that the Claimant's retroactive retirement date of November 15, 1990, made him eligible to receive the \$2,000.00 lump sum payment under the April 30, 1991 Agreement.

The Carrier stressed that the Claimant had not retired as of November 15, 1990. It asserts that the Claimant performed work for the Carrier until January 3, 1991, which was his last compensable day. The Claimant was dismissed by the Carrier on January 24, 1991.

The Carrier stated the RRB rated the Claimant as being disabled after his dismissal from service on January 24, 1991, and awarded him a disability annuity effective May 1, 1991. The Carrier maintains that determinations and rulings of the RRB have no standing in deciding a case under the Railway Labor Act.

The Carrier emphasizes that RRB's determination that the Claimant was "rated occupationally disabled" is not relevant in the instant claim in as much as the Claimant performed services for its on January 2, 1991, and was dismissed from service on January 24, 1991. The Carrier adds the relevant Agreement does not mention "occupationally disabled" employees as being entitled to a lump sum payment.

The Carrier urges the Board to deny the claim because the Claimant was a dismissed employee and had no employment relationship with it during the requisite contract period, and he was also not a retired employee during the period in issue, and accordingly the Board should deny the claim.

Upon consideration of the entire record, the Board finds the Carrier's evidence more persuasive than the Organization's. There is no dispute that the Claimant no longer had an employment relationship with the Carrier during the requisite contractual time period. The Board also finds that the Claimant was not retired during the critical time interval. The Board finds that the Claimant had not retired on November 15, 1990 for the purpose of this dispute. The records show that the Claimant performed compensable service as of January 2, 1991 and therefore could not validly be considered retired as of November 15, 1990.

The Board finds that the administrative rules and regulations of the RRB as to when potential retirees will receive their annuity checks are not definitive in determining an employee's rights and limitation under labor Agreements negotiated pursuant to the Railway Labor Act.

For purposes of determining employer-employee relationships the contracts and the overt evidence of an employee rendering compensable service cannot transmute such a working relationship into a retiree relationship because of the time when an annuitant begins to receive an annuity check.

The Board finds on the record before it, for the purposes of this dispute, the Claimant was not a retired employee of the Carrier on November 15, 1990.

AWARD

Claim denied.

ORDER

The Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 1996.