

Award No. 1829
Docket No. CL-1796

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

John W. Yeager, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that Mr. J. E. McCrowell, Yard Clerk, Winston Salem, N. C., shall now be reinstated with seniority right unimpaired and be reimbursed for wage loss suffered retroactive to June 18, 1941 on which date he was dismissed for having entered suit against the carrier.

EMPLOYEES' STATEMENT OF FACTS: On July 7, 1939, while employe J. E. McCrowell was standing between tracks No. 2 and No. 3 at Salem Yards, Winston Salem, N. C., checking Train 72 then standing on track No. 3 the Yardmaster threw a switch permitting a string of cars to be shoved in on track No. 2 and Mr. McCrowell was knocked down, his right foot being run over necessitating its amputation.

On February 1, 1940 after having sufficiently recovered from his injury and having purchased an artificial limb through his own efforts Mr. McCrowell returned to work as a Yard Clerk, being so employed from on or about June 1, 1940 until dismissed from service on June 18, 1941. During this period Mr. McCrowell worked continuously as an inside Yard Clerk performing satisfactory service.

That employe McCrowell was dismissed solely because of having brought suit against the carrier is evidenced by notice received from the Superintendent reading as follows:

"Winston-Salem, N. C., June 18, 1941.

Class 3-1076. jsb-t:

Mr. J. E. McCrowell,
Yard Clerk,
Winston-Salem, N. C.

You having entered suit upon grounds of total and permanent disability, and having stated at hearing given you that you are permanently or totally disabled, you are hereby removed from further service as disqualified, effective this date.

J. S. Bergman,
Superintendent."

POSITION OF EMPLOYEES: The Carrier does not deny that Mr. McCrowell was removed from service for bringing suit against the Company for

specific offense with which he was charged is disclosed by letter of Superintendent Pistole dated Feb. 15, 1939. The record discloses that this decision was rendered in the same manner that decisions regarding discipline had always been rendered by the carrier, and that the employe did not object to the manner in which the decision was rendered until he came before this Board. Under these circumstances, the objection comes too late.

"It has been repeatedly held by this Board that where the carrier has not acted arbitrarily, without just cause, or in bad faith, the judgment of the Board as to propriety of dismissals will not be substituted for that of the carrier. The facts here presented come squarely within this rule. The carrier acted neither arbitrarily, without just cause, or in bad faith."

It is clear from these authorities that there is nothing in the Railway Labor Act or the position taken by the Third Division of the National Railroad Adjustment Board which impairs the Carrier's legal right, as an employer, to discharge McCrowell under the circumstances of this case for having instituted suit against the Carrier. As has been previously pointed out, the discharge of McCrowell for this cause was a discharge for a legal, just and reasonable cause, and the facts clearly show that the Carrier did not act arbitrarily or in bad faith in discharging him for that cause. For these reasons, it is clear that the Carrier's action is in full accord with the position which the Third Division has taken with reference to such cases.

The Carrier anticipates that the Employees will urge upon the Board the views taken in certain awards by the First Division of the National Railroad Adjustment Board to the effect that a carrier does not have the right to discharge an employe for having instituted suit against it. It is the opinion of this Carrier, however, that such view is not proper and should not be adopted by the Third Division in this case, since it would deprive the Carrier of a right given to it under the law as an employer, which right is not impaired by the Railway Labor Act. The Carrier has hereinbefore pointed out the inequitable and undesirable result which would follow if it were considered not to have the right to discharge McCrowell under the circumstances of this case for having instituted suit against it, and it has further pointed out that this right did not deprive McCrowell of his right to institute such a suit, but merely gave him an election of so doing and thereby creating a situation whereby the Carrier was given the right to discharge him on that ground, or of refraining from so doing and thereby not creating such a situation. What has been said herein in that connection is also applicable in urging that the Board not adopt the view which the Carrier anticipates that the Employees will urge upon it in this case. Therefore, the Carrier respectfully insists that the aforesaid view of the First Division of the Adjustment Board should not be adopted by the Third Division in this case.

Conclusion

Upon the facts of this case, and in view of the governing principles set forth in the foregoing argument, the Carrier respectfully submits that the claim here presented to the Board by the Employees is without merit; that the claimant's employment has been properly terminated; that he is not entitled to reinstatement or reimbursement; and that his claim should be denied in all particulars.

OPINION OF BOARD: The claim here is by the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that J. E. McCrowell was dismissed by the Southern Railway Company, the Carrier here, on June 18, 1941, in violation of existing

Agreement between this Brotherhood and the Carrier, and that McCrowell is entitled to reinstatement, restoration of seniority rights and reimbursement for loss of pay since the date of dismissal.

On and prior to July 7, 1939 McCrowell was employed in the position of car checker in the Salem Yard at Winston Salem, North Carolina, with seniority rights confined to this Division. On July 7, 1939, while he was checking cars in the yard he was struck by a cut of cars, knocked down and injured. As a result of the injuries received it became necessary to amputate his left leg at a point a short distance below the knee.

From that date to some time the following February he remained out of service, when he returned and worked as relief for four days. In June, 1940, he returned to service as yard clerk on his bid pursuant to Bulletin of the Carrier. He remained in service in the position until his dismissal on June 18, 1941.

His notice of dismissal contained the following:

"You having entered suit upon grounds of total and permanent disability, and having stated at hearing given you that you are permanently or totally disabled, you are hereby removed from further service as disqualified, effective this date."

He had on March 21, 1941, brought suit against the Carrier for \$50,000.00 damages and costs of suit on account of his injuries.

The Carrier has, under the rules, the right to dismiss employes for cause, but the bringing of legal action against it is not cause within the meaning of the rules, and if it were it could not be upheld. Such a holding would go counter to numerous decisions of this and other Divisions of the National Railroad Adjustment Board and, as pointed out in some of the decisions, thus would be against public policy.

For a determination of this claim it is necessary to ascertain whether or not McCrowell, on the record, was in fact disqualified on account of physical disability to perform the duties of the position assigned to him.

The transcripts or excerpts from transcripts of testimony taken during investigation are of little or no help in this connection. They go, for the most part, to the claim of McCrowell in his suit rather than to an inquiry into his true physical condition. It is true that McCrowell stated that he was permanently injured but this fact was known at the time the Carrier assigned him to the position occupied.

We must assume that the Carrier knew of the physical handicap of McCrowell at the time he was assigned but that with it he had sufficient fitness for the position, fitness being one of the cardinal elements under the rules for assignment, advancement and promotion.

In view of the known conditions at the time of the assignment and in the absence of a showing that McCrowell was, in fact, disqualified to perform the duties of the position assigned it would be improper to sustain the position of the Carrier in this case.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employe involved in this dispute are respectively carrier and employe 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

The claim should be sustained.

AWARD

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of May, 1942.