Award No. 2728
Docket No. MW-2611

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE PITTSBURGH & WEST VIRGINIA RAILWAY COMPANY

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

(a) That Joseph Greek, Section Foreman, Section No. 12, Kelly Pennsylvania, was unjustly taken out of service effective March 17, 1943; and

(b) That Joseph Greek be reinstated with seniority unimpaired and paid for all time lost from March 17, 1943, until he is returned to service as section foreman.

OPINION OF BOARD: The claimant, a section foreman with a record of nineteen years of unquestioned service, was specifically charged with having, during his off hours, failed to report for duty in connection with the derailment of an engine. Hearings were held and the claimant was dismissed. Although the evidence on the issue of the claimant's alleged neglect of duty is not conclusive, the carrier contends that it is sufficient to sustain the charge. It further appears from the record, however, that at the initial hearing a sharp issue of veracity developed between the claimant and the carrier's engineer maintenance of way, who there entered the original order of dismissal. This occurrence might be regarded as merely incidental, except for subsequent events. At the review hearing before the president, the carrier's representative, who prosecuted the charge, stated that the point he was particularly interested in was the insubordination of the claimant; and in concluding its original submission to this Board, the carrier asserts, over the signature of its general manager, that, "The management cannot doubt the veracity of its engineer maintenance of way in his report of . . . the insubordinate action of Joseph Greek following the occurrence."

The claimant was charged with neglect of duty—not insubordination, but we cannot escape the conviction that the latter issue was a determining factor in the carrier's disposition of the case. This, perhaps, accounts for the very severe penalty that was inflicted. In any event, we are of the opinion that the claimant was not accorded the fair and impartial hearing guaranteed by the Agreement, as interpreted and applied in numerous awards of this Board. While we have said, repeatedly, that we will not disturb a finding of fact that is supported by evidence of rational probative value, and that we will not substitute our judgment for the sound discretion of the responsible carrier officials, this does not relieve us of the obligation of setting aside a determination that appears to be tainted with prejudicial considerations.

The next question is as to what our mandate should be. We could, and the petitioner urges that we should, unconditionally sustain the claim, which would restore the claimant to his position with pay for time lost. Many precedents for such disposition of claims may be found in the reports of this Division, and we could not be understood as overruling those awards or as criticising the reasoning by which they were reached. On the other hand, cases of this general character sometimes arise in which it would be unjust and inequitable to summarily reinstate the claimant. See Award 2637. This is such a case. Here, there has been no final resolution on the property of the question we are asked to review, namely, the sufficiency of the evidence bearing exclusively upon the single issue of the claimant's alleged neglect of duty. Under these circumstances, we do not feel justified in entering an award which would have the practical effect of acquitting the claimant, although he has never been properly tried. The proceeding will, therefore, be remanded to the property for hearing upon the sole issue of neglect of duty. The matter of monetary redress may await and depend upon the ultimate disposition of the claim.

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 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 carrier did not accord the claimant a fair and impartial hearing, as required by the Agreement.

AWARD

Claim remanded to the property for rehearing upon the issue of alleged neglect of duty, and for further proceedings not inconsistent with the opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of December, 1944.