Award No. 3011

Docket No. CL-3017

NATIONAL RAILROAD AJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

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

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Agreement when it refused to grant an investigation to Gwendolyn Coyle, Telephone Operator at Denver in accordance with Rule 49 of the Agreement.

(b) That the Carrier be required to reinstate Gwendolyn Coyle to position of Telephone Operator at Denver and that she be compensated for time lost due to her unjust dismissal.

OPINION OF BOARD: The Petitioner says the Claimant was denied the investigation guaranteed by Rule 49 of the effective Agreement of July 1, 1942, because: (1) the Claimant was not advised of the precise charge; and (2) she was arbitrarily denied a continuance of the hearing, from August 10 to August 16, 1944, to enable her to procure the presence of a necessary witness and the attendance of the Petitioner's General Chairman.

In support of its conduct, the Carrier asserts that the Claimant was sufficiently advised of the charge; that she was adequately represented at the hearing; that the continuance was unauthorized by the Rules, which require than an investigation shall be made within 10 days after receipt of a request therefor; and that, in any event, the Claimant is in no position to complain, because she walked out on the investigation after her request for a continuance had been denied.

The Claimant was simply charged with "insubordination." The name of the person with respect to whom she was supposed to have been insubordinate was not disclosed, nor were any supporting facts or details alleged. The charge was, therefore, nothing more than an ultimate conclusion, based upon undisclosed facts. Certainly, the Claimant was not "advised in writing of the **precise** charge" (our emphasis), as positively required by the express language of Rule 49. In Award No. 562 this Board said: "A fundamental incident of a fair and impartial trial is that the accused shall be advised definitely as to what he is charged with." See, also, Award No. 2162.

What has been said is enough to require us to sustain the claim, unless Claimant could and did waive the defect in the proceedings discussed above, when she walked out on the hearing following the denial of her request for a continuance. On that point there was cited on behalf of the Carrier Award No. 2554. That was a case where a dining car steward sought to have this Board remove a reprimand from his record and determine that he was entitled to pay for time held out of service. It was made to appear that the claimant, without

just cause, refused to participate in a hearing, in the face of an express rule that required him to attend, thereby forcing a continuance. After observing that the conduct of a hearing official may, in some cases, be so palpably unfair as to justify the employe's refusal to participate therein, this Board concluded that, under the circumstances, the failure of the claimant to attend the hearing was, of itself, an infraction of the rules warranting his suspension, and that, is a consequence, his loss of time during the period the hearing was continued was occasioned by his own misconduct. The claim was accordingly denied. Award No. 2554 does not, therefore, present a situation comparable to the one before us. This Claimant sought the investigation after she had been discharged. Until she was confronted with a charge that met the requirements of the Rule there was really nothing to be heard. We do not think she waived anything by refusing to participate in a void proceeding.

In view of the conclusion reached, it is unnecessary to consider the other propositions presented and argued by the parties.

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 violated the Agreement.

AWARD

Claim (a and b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois, this 7th day of December, 1945.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 3011

DOCKET CL-3017

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Chicago, Burlington & Quincy Railroad Company.

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

The point in controversy appears to be whether, in settlement, the carrier may deduct from the amount which the claimant would have earned from the carrier during the period that she was held out of service any sum that she actually earned in other employment.

One demand of the original claim was that the claimant "be compensated for the time lost." This demand was sustained without qualification by the award. It seems clear, however, that the claim and the award were predicated upon Rule 52 of the effective Agreement. We are constrained to hold, therefore, that the award must be read in the light of said rule and that the claimant is entitled thereunder, in the language of the rule, to be "compensated for wage loss (if any) suffered by (her)." Any other application of the award might result in a sacrifice of substance to a matter of form.

Numerous awards have been called to our attention in which this Board has applied the common law rule, which is that a wrongfully discharged employe is entitled to be made whole, ordinarily accomplished by paying him the difference between what he would have earned under the contract and what he earned, or might have earned, in other available employment. See Awards 325, 326, 427, 583, 624, 633, 693, 1314, 1499, 1608, 2144, and 2217. A reading of these awards would seem to warrant the conclusion that they arose in instances where the effective agreements were silent as to the basis for determining the compensation to which the employes were entitled, or no contentions were made, either at the hearings or by subsequent applications for interpretations, that the common law rule did not apply.

The law recognizes that contracting parties may agree upon a different basis for determining their rights and liabilities than will be applied in the absence of such contractual provisions. See 17 Corpus Juris Secundum (Contracts, section 458), page 943. In harmony with the action of the courts in such instances, this Board has likewise applied specific contractual provisions, to the exclusion of the common law rule. See Award 3035.

This controversy, therefore, resolves itself into the rather narrow issue as to the meaning of Rule 52, which we here quote in its entirety:

> "If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if dis-

missed, the employe shall be reinstated and compensated for wage loss (if any) suffered by him."

Stated another way, the question is whether Rule 52 is merely declaratory of the common law rule, or whether it establishes a more liberal formula for measuring the claimant's compensation rights. The nearest approach to a precedent that has been called to our attention is the Interpretation to Award 3611 of the First Division. There, the part of the rule involved was substantially like the one here before us, the only difference being the inconsequential absence of parenthesis in the last clause. While the Interpretation leans heavily upon the fact that in its original award the First Division sustained the claim "for time lost," the conclusion reached may be said to lend support to the contention of the claimant in the case here before us. The interpretation does hold that "wage loss" means "the equivalent of what (the claimant) would have earned had he been allowed to perform the work."

Inasmuch as Rule 52 expressly embraces only a part of the common law rule, entitling the claimant to what she would have earned had she been allowed to work, without embodying therein, also, the correlative right of the carrier to deduct other earnings, we must conclude that it was not the intent of the parties to apply the common law doctrine in such cases as this. This is justified by an application of the ancient legal maxim, frequently invoked in the construction of ambiguous statutes and contracts, "Inclusio unius est exclusio alterius" (The inclusion of one is the exclusion of another.). That is to say, the inclusion only of the provision entitling the wrongfully discharged employe to be compensated for the loss of wages which she would have earned had she been allowed to work, inferentially excludes the idea that the employer may take credit for wages earned elsewhere by her. We think this must be the rationale of Rule 52, as applied to the facts of this case. To construe the rule otherwise would be to accomplish the same result as if the Agreement was silent on the subject. We cannot ascribe to the parties an idle purpose in writing and agreeing upon the rule. It seems fair to assume that had the parties to the Agreement intended to give the carrier the benefit of deductions from earnings in other employment, they would have said so, as was done in the contract disclosed by Award 3035 and in numerous other instances that might be cited.

It is our conclusion, therefore, that a proper construction of Award 3011 precludes the application urged on behalf of the carrier.

Referee Curtis G. Shake, who sat with the Divisions as a Member when Award No. 3011 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 21st day of November, 1946.

Dissent to Interpretation No. 1 to Award No. 3011, Docket CL-3017, Serial No. 61

We agree that the controversy yet remaining requiring interpretation of Award 3011, relating as it does to compensation due claimant, depends upon the meaning of Rule 52. This interpretation so diverges from the plain meaning of Rule 52 that we are compelled to express our objections.

The crucial words in Rule 52 are "compensated for wage loss (if any) suffered." The common meaning of "compensate" is "to be equivalent to or to make amends for" (see Webster's New International Dictionary). The parenthetical insertion of the words "if any" following the words "wage loss" indicates a contemplation by the parties of the possibility that no loss would be suffered. To deny to the employer credit for wages earned in other employment is to penalize the carrier and to give a windfall to the employe. No warrant for such penalty can be found in Rule 52.

The interpretation is inconsistent with numerous awards of this Division and of other Divisions of the Board, including awards referred to in the fourth paragraph of the interpretation.

/s/ C. P. DUGAN
/s/ C. C. COOK
/s/ R. H. ALLISON
/s/ A. H. JONES
/s/ R. F. RAY