Award No. 6614
Docket No. TD-6616

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

AMERICAN TRAIN DISPATCHERS ASSOCIATION

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Missouri Pacific Railroad Company, hereinafter referred to as the Carrier, acted contrary to the intent of the provisions of the Agreement between the parties, particularly Article 8, when on or about August 10, 1952, by unilateral action, it removed Train Dispatcher C. A. Brady who was regularly assigned in its Coffeyville, Kansas office from service, because he was wearing a hearing-aid.

(b) The Missouri Pacific Railroad Company shall now restore Train Dispatcher C. A. Brady to his position as train dispatcher with seniority rights unimpaired; and shall compensate claimant C. A. Brady for all time lost from the date he was unilaterally removed from his position until such time that he is restored to service as train dispatcher.

EMPLOYES' STATEMENT OF FACTS: In the existing agreement between the Missouri Pacific Railroad Company and the American Train Dispatchers Association, effective August 1, 1945, and revisions thereof, all of which are on file with your Honorable Board and by this reference made a part hereof, the following rules are pertinent to adjudication of this dispute:

"ARTICLE 1

"(a) SCOPE

"This agreement shall govern the hours of service and working conditions of train dispatchers. The term 'train dispatcher,' as hereinafter used, shall include Assistant Chief, trick, relief and extra train dispatchers. It is agreed that one Chief Dispatcher (now titled Division Trainmaster on this property) in each dispatching office shall be excepted from the scope and provisions of this agreement."

"ARTICLE 4

"(e) FILLING POSITIONS

"In filling positions of train dispatchers, ability being sufficient, seniority as train dispatcher shall govern."

be unilaterally imposed. (Awards 7663, 8605). As in the case of all managerial prerogatives however, exercise of the right must be reasonable."

First Division Award No. 15533:

"The responsibility of management for the safety of its property, its employes and the Public requires the use of reasonable discretion in determining the ability of employes."

First Division Award No. 15591:

"The law requires the Carrier to exercise the highest degree of care in the operation of its trains."

Your Third Division of the Board, in our opinion, has established a principle that where either the safety of the employe at work or the safety of the Public is involved, the Carrier is entitled to take precautionary measures, including physical examinations, to establish physical fitness. See Awards 362, 875, 2886, and 4649 in addition to those already mentioned.

All of the above Awards cover cases involving the question of physical disability. It is obvious that if such rigid obligation is placed upon the Carrier, it follows that appropriate action should be taken upon detection of any physical impairments that might affect the safety of train operation.

It is the position of the Carrier that the regrettable action it was necessary to take in this case was prompted by its safe operation obligation and was not in any wise a violation of the Train Dispatchers' Agreement.

(Exhibits not reproduced.)

OPINION OF BOARD: It will be noted that this claim alleges that the Carrier "acted contrary to the intent of the provisions of the Agreement" when the Carrier allegedly disqualified claimant from service as trick train dispatcher because he was using a hearing aid while on duty contrary to the instructions of the Carrier.

The provision relied upon by claimant is that part of the Rule, 8 (b), reading: "A train dispatcher * * * who may consider himself unjustly treated, shall be granted a fair and impartial investigation by the Superintendent or his representative within ten (10) days after notice by either party * * *."

The language "who may consider himself unjustly treated," need not be so literally construed as to deprive this Board of part of its duty to construe the language of an agreement, even though as appears here the claimant would seem to be alone in his right to determine whether he has been unjustly treated. Suffice to say, the fact the claimant lost his job would seem to leave no doubt that he was "unjustly treated" and consequently has a right to invoke the rule.

In our recent Award No. 6539, we had occasion to consider a somewhat similar situation and particularly to study Award No. 2144 in distinguishing it from the case then in hand.

Award No. 2144 becomes even more important in the present case, because that Award was a "hearing aid" case, and we think it fits the present case as nearly as possible in similarity of dockets.

The principal point in that case was that claimant had been dismissed under the same rule (although not identical in language) as Rule 8 (b) in this case, and the Carrier made the same argument that is made in this case, viz., that this is not a discipline case, and the claimant was not "disciplined, demoted or dismissed" and was, therefore, not entitled to an investigation.

We are not overlooking the special instructions of the Carrier that claimant was "not permitted to use a hearing aid while on duty." We think the Carrier's attempt to enforce such a rule in this case without an investigation was arbitrary.

Another point we need to mention is that in Award No. 6539 we said that it was incumbent upon claimant to prove his competency under Rule 39. In that case he had an investigation and failed in his burden of proof. In the instant case he did not have that chance.

Under the circumstances, we hold that the general allegation in the claim is sufficient in spite of absence of specific language that "Carrier violated the Agreement." The same language was missing from the claim as appears in Award No. 2144.

Finally, it may be noted that the Carrier in Award No. 2144 relied on the hazard of continuing claimant (a clerk) "because his hearing was badly impaired." We mention this only in the event someone should attempt to make a distinction between "hearing requirements" for a dispatcher rather than a clerk. There is no need to attempt to make such a distinction in this case.

It is not the function of this Board to determine whether this man is or is not physically qualified. The only question before us is whether the agreement has been violated.

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 in disqualifying claimant as it did.

AWARD

Claim sustained. Compensation to claimant be in the amount for time lost at the scheduled rate of pay of the position less such wages as he may have received from other sources during such period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 14th day of May, 1954.

DISSENT TO AWARD 6614, DOCKET TD-6616

This Award is in serious error for the reason that the referee has admittedly read something into the rule which is not there.

Rule 8 (b), relied upon by Claimant, is unambiguous and required Claimant, if **he** considered **himself** unjustly treated to request in writing a hearing. That he did not do. Also, completely ignored is the fact that the record clearly shows that Carrier had proffered Claimant a hearing (Field-Test) which he declined.

The referee and the majority then find that the Claimant was unjustly treated, not on the basis of the provisions of Rule 8 (b), but on the basis of reading into Rule 8 (b) something which is not there. This is equity, pure and simple, and it is not our function to deal in equity. Award 2622 best exemplifies this premise—"To adopt the practice of broadening or extending the terms of any instrument by a tribunal such as ours will only lead to confusion and uncertainty and ultimately to injustice and hardship to both employe and Carrier."

Award 2144 is then cited because, in the language of the referee "that Award was a 'hearing aid' case and we think it fits the present case as nearly as possible in similarity of dockets."

That award was a "hearing aid" case and there the similarity ends.

There, the employe was dismissed. Here, the employe was not dismissed but was disqualified to perform work on trick train dispatchers' positions. He still retained his seniority rights to displace on other positions covered by the Agreement.

There, Rule 27 required that an investigation be held before dismissing an employe. Here, Rule 8 (b) required Carrier to afford the employe a hearing if **he** considered **himself** unjustly treated and requested in writing such a hearing. No rule, even remotely similar to Rule 8 (b), can be found in the Agreement which was involved in the dispute which resulted in Award 2144.

Next, there appears this strangely unrelated statement: "* * * and the Carrier made the same argument that is made in this case, viz., that this is not a discipline case, and the Claimant was not 'disciplined, demoted or dismissed', and was, therefore, not entitled to an investigation."

The Carrier did here argue, and properly so, that this was not a discipline case and that the claimant was not disciplined, demoted or dismissed. That this is not a discipline case is clearly recognized in the first paragraph of the **Opinion** wherein the referee and the majority state—"* * * when the Carrier allegedly **disqualified** claimant from service as a trick train dispatcher * * *."

Here, the referee and the majority, by failing to apply sound principles of contract construction, have arrived at exactly that result predicted in Award 2622, and so aptly proscribed by Award 2132 wherein the Board stated: "* * * it is not advisable, even to reach a result which might appear equitable, to attempt to read into a rule something which is not there. * * *"

The Award is in error. We dissent.

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ W. H. Castle

/s/ C. P. Dugan

/s/ E. T. Horsley