

**Award No. 13524**

**Docket No. CL-14926**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**Kieran P. O'Gallagher, Referee**

**PARTIES TO DISPUTE:**

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

**BESSEMER AND LAKE ERIE RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-5529) that:

(1) Carrier violated the Clerks' Agreement when on March 14, 1963 it terminated the employment relation of Edward H. Whiteside and removed his name from the Maintenance of Way Department Clerical Group 2 Roster and the Stores Department Clerical Group 2 Roster.

(2) Edward H. Whiteside shall now be reinstated to the service of the Carrier with seniority and all other rights unimpaired.

(3) Edward H. Whiteside shall now be compensated for all wage and other losses sustained account this arbitrary, capricious, unjust and discriminatory action by the Carrier.

**EMPLOYEES' STATEMENT OF FACTS:** Edward H. Whiteside, age 45, was employed by the Bessemer and Lake Erie Railroad Company as a janitor at Greenville, Pennsylvania on October 16, 1945 and worked until March 28, 1958 when his position was discontinued. He then worked as a janitor at North Bessemer until March 20, 1960 when that position was discontinued. On March 28, 1960 he was transferred to the Stores Department Greenville, Pennsylvania as a laborer and was so employed on September 12, 1960 when he was injured at 10:15 A.M. that date when his right leg was struck by a falling timber being unloaded from a flat car. He was taken to Greenville Hospital where he was examined and treated for the injury by Company Surgeon Dr. J. L. Thomas. He was released from the hospital after treatment and returned to work that same day. After approximately one week of light duty he returned to work in his normal occupation and continued normal work until March 2, 1961 at which time he was furloughed. He was recalled to work in the same occupation on December 4, 1961 and furloughed again on September 21, 1962 because of reduced operations. During this period of time the injury continued to bother Mr. Whiteside and he was treated several times by Company Surgeons Drs. Thomas and Baker. On at least two occasions he was hospitalized in St. Francis Hospital, Pittsburgh, Pennsylvania where he was examined and treated by Chief Company Surgeon Dr. J. H. Wagner.

The Carrier and Mr. Whiteside were unable to reach an agreement for

Without prejudice to the carrier's position stated above, the carrier asserts that the claimant received a fair and impartial hearing in accordance with the rules. The evidence adduced at the investigation conclusively establishes that:

(1) Both the claimant and his personal physician, an expert medical authority, admit that claimant is permanently disabled and unemployable as a common laborer.

(2) It is unsafe and hazardous for the claimant to perform the regular work of a Stores Department laborer, truck operator and stores helper and a Maintenance of Way Department janitor.

(3) The carrier's removal of the claimant's name from its two seniority rosters was justified in view of the relevant decisions of the National Railroad Adjustment Board and the Federal Courts.

The carrier also wishes to advise the Board that the claimant had not stood for work at any time since March 14, 1963 and, as of the date of this submission, there is no showing in the record that the claimant suffered any wage loss.

(Exhibits not reproduced.)

**OPINION OF BOARD:** For several years prior to September 12, 1960, Claimant was employed by the Carrier first as a janitor at Greenville, Pennsylvania and at North Bessemer when his position at that point was discontinued. On March 28, 1960, he was transferred to the Stores Department at Greenville, Pennsylvania as a laborer, and on September 12, 1960 his right leg was struck by a falling timber being unloaded from a flat car. He was examined at the hospital and returned to work the same day where he continued to work until furloughed because of reduced operations on September 21, 1962.

During this period the Carrier and the Claimant made several unsuccessful attempts to reach an agreement for lost wages and other damages caused by the injury above referred to, and on October 10, 1962, trial was had at Cleveland, Ohio, of a F.E.L.A. case which the Claimant brought against the Carrier. At the trial in the United States District Court he submitted proof through his personal physician, that he was permanently injured and that he would not be able in the future to perform work as a laborer. With this statement the Claimant concurred, whatever the probative value of said concurrence may have.

Subsequently, a formal investigation of the matter was held, at which investigation it was established the Claimant, Mr. Whiteside held seniority in the Stores Department. It developed at the investigation that Mr. Whiteside's injury precluded his employment in any case of the tasks available in that Department and as a result of the uncontroverted testimony adduced at the hearing it was considered that the Claimant's further employment would be unsafe and hazardous, and that his name should therefore be removed from the seniority rosters.

This claim alleges the Carrier violated the Clerks' Agreement when, following the investigation above referred to, it terminated the employment relation of the Claimant and removed his name from the Maintenance of Way Department Clerical Group 2 Roster and the Stores Department Clerical Group 2 Roster.

The Carrier contends that the Claimant is estopped from pursuing his claim for reinstatement, and in support of its contention cites the fact of the judgment and payment by the Carrier of the amount of the jury verdict in the United States District Court at Cleveland, Ohio, wherein the Claimant was compensated for injuries which he claimed permanently disabled him from performing his duties as a laborer in the Clerical Groups above referred to.

In the circumstances found we must conclude that when a Claimant successfully establishes in a suit in the United States District Court that he is permanently injured and disabled, rendering him unable in the future to perform the work of a laborer, and is compensated for lost wages, "past, present and future," and the Carrier pays the full amount of the judgment pursuant to the judgment rendered in that case, the Carrier is not bound to retain the employe in its services with back pay.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in the dispute are respectfully 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 Agreement was not violated.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April, 1965.