Award No. 15790
Docket No. SG-15552

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the Baltimore and Ohio Railroad Company that:

(a) The Carrier treated Mr. T. J. Rounds in an arbitrary and unfair manner by demoting him from Signal Maintainer to Signal Helper.

(b) Mr. T. J. Rounds be allowed the difference between what he earns and the Signal Maintainer's rate he received prior to demotion, for each working day commencing February 24, 1964, and continuing as long as his demotion exists.

EMPLOYES' STATEMENT OF FACTS: This is literally a case of Carrier having added insult to injury.

While working on switch circuit controller circuits on January 26, 1959, Mr. Rounds, the Claimant in this case, was struck by a train. The injuries he received restricted his ability to climb poles.

As indicated by Brotherhood's Exhibit No. 1, Carrier eventually allowed Mr. Rounds a cash settlement, with the understanding that the accident had restricted his ability to climb poles, that he was receiving some help with heavy maintenance work and pole climbing, and that so long as his work was being maintained at the then present level there was no reason why he could not continue as a signal maintainer.

Mr. Rounds continued to work as a signal maintainer until February 24, 1964, when Carrier unilaterally reduced him from Signal Maintainer to Signal Helper on the basis he could not climb poles due to his physical condition.

As shown by our Statement of Claim, we contend that Carrier acted in an arbitrary and unfair manner by demoting Mr. Rounds, and that Carrier should now be required to compensate him the difference between what he earns and the Signal Maintainer rate, commencing February 24, 1964, and

date hereof, and for all losses, damages and expenses incident thereto, and in consideration of the receipt by me of such sum I do hereby release and forever discharge the said company from all said claims or demands." The claimant resumed service on September 21, 1959. When the claimant was permitted to resume duty as a Maintainer after his injury, it was felt that even though he might be temporarily restricted in the full performance of his duties, that, nonetheless, as time went on he would recover sufficiently to enable him to perform whatever duties would be required as a Maintainer. Certainly, he was given sufficient time to determine whether or not he was physically capable. In February 1964, he was sent to the Medical Department for examination and as a result he was disqualified as a Signal Maintainer on a showing that it would be unsafe for him to climb poles. He resumed as a Signal Helper in a position that did not require pole climbing.

OPINION OF BOARD: The Claimant in January 1959, while working as a Signal Maintainer, was struck and injured by one of Carrier's trains. As a direct result of the injuries sustained, he was unable to return to work for several months. When he did return to his job, he was advised by a Doctor not to climb poles, because to do so would only aggravate his condition. It is indisputable that climbing poles is an integral part of the job as Signal Maintainer.

There is no question of liability raised in the record relative to the accident. An Agreement was made in which a substantial cash settlement was given to the Claimant by the Carrier. The record indicates that a conference was held to discuss the terms of this agreement as evidenced by Brotherhood's Exhibit Number 1. This exhibit is a letter under date of May 19, 1960 from the General Chairman to the General Claim Agent of the Carrier. The two essential parts of the letter are (1) it was agreed at the conference that a cash settlement of $15,000 would be paid in settlement of the claim for injuries received. (2) "It was also understood that Mr. Rounds' (Claimant) accident had restricted his ability to climb. However, the performance of his work was satisfactory at this time. He is receiving some help with heavy maintenance and climbing, therefore so long as his work is being maintained at its present level, there was no reason why he could not continue as a Maintainer." The letter further states "In view of the above, please be advised in behalf of Mr. Rounds, that your offer of settlement is satisfactory."

Both sides concur that a cash settlement was made, but Carrier contends that there was no agreement restricting claimant insofar as the climbing of poles was concerned. Claimant functioned as a Signal Maintainer for four years after the accident, apparently performing his duties satisfactorily with the exception of climbing poles. He was examined by a Company Physician in early 1964, was declared disabled and demoted to a Signal Helper.

The petitioning Organization relies on Brotherhood's Exhibit Number 1 quoted infra and contends that the basic settlement was made in line with Rule 42 of their contract with Carrier. Rule 42 is quoted below:

"RULE 42.
INCAPACITATED EMPLOYES

> Employes who have given long and faithful service in the employ of the Company and have become unable to handle heavy work to advantage, will be given preference of such light work in their line as they are able to handle."

The Carrier on the other hand states that the settlement pertained only to the cash settlement and not to future conditions of employment. They aver that their action in this case is consistent with the provision of Rule 42.

The evidence before us is conflicting. Carrier asserts that the restrictive condition of employment was not part of the settlement, while the Organization contends otherwise. The only record we have pertaining to the settlement is Brotherhood's Exhibit No. 1. This, however, is not the final settlement; it is merely an offer to settle. Other than conflicting assertions, we have no evidence before us that we could consider as probative. We are at a loss to understand why, in the interest of the best evidence rule, the settlement itself was not included by either side in this record. However, the burden of proof is always on the Claimant to show by a preponderance of evidence that his claim should be sustained; he more so than the Carrier should have offered the settlement as best evidence to sustain his allegations. Moreover, Claimant is requesting this Board to make a judgment that his settlement terms have unilaterally been violated by the Carrier, without contending or alleging that by so doing, Carrier has breached a particular rule of its contract with the Organization. His claim merely states that he was treated "in an arbitrary and unfair manner." He alleges no violation of a specific rule. Additionally, we are constrained to say that this Board is not the proper forum for an alleged breach of a civil contract such as is here involved. If Claimant is convinced that Carrier has breached its settlement agreement, he should have filed a civil action in the appropriate Court. Concisely stated, there is no allegation that a rule of the contract has been violated, hence, we will deny the claim.

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 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 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 28th day of July 1967.

DISSENT TO AWARD NO. 15790, DOCKET NO. SG-15552

Award No. 15790 is in error.

The Majority states that "The evidence before us is conflicting" and cites the positions of the parties. We will show below that the conflict was between the positions of the parties (the very thing that this Board was created to bring into harmony), not the evidence before the Board.

The Majority then states that "The only record we have pertaining to the settlement is Brotherhood's Exhibit No. 1. This, however, is not the final settlement; it is merely an offer to settle." In the second paragraph of their "Opinion of Board" the Majority quotes the following from said Brotherhood's Exhibit No. 1:

> "In view of the above, please be advised in behalf of Mr. Rounds that your offer of settlement is satisfactory."

Brotherhood's Exhibit No. 1 is a letter written by the Petitioner's General Chairman to an agent of the Carrier. The Majority's quote therefrom is conclusive evidence that it was on behalf of the Carrier that an offer to settle was made and that the letter which is referred to as an offer is actually an acceptance of that offer.

The Majority also holds that the "Claimant is requesting this Board to make a judgment that his settlement terms have unilaterally been violated by the Carrier, without contending or alleging that by so doing, Carrier has breached a particular of its contract with the Organization * * * He alleges no violation of a specific rule. * * * Concisely stated, there is no allegation that a rule of the contract has been violated * * *." The contrary is the truth. Throughout the handling on the property and at this Board, the claim was progressed on the understanding set out in Brotherhood's Exhibit No. 1. That exhibit is a contract (agreement) between the parties affecting the working conditions of an employe, the interpretation and application of which is the province of this Board as expressly stated in the Railway Labor Act [Section 3, First (i)]. That there is a contract is evident by the Carrier's offer to settle, the Organization's acceptance of that offer, and the application of its terms (The claimant was paid a sum of money in line with the offer and acceptance and he was continued in the Carrier's employment in his then capacity and under the conditions set out for a period of approximately 4½ years). Hence, there existed before the Majority all the elements of an enforceable contract.

Brotherhood's Exhibit No. 1 states in part that the claimant (on May 19, 1960) "is receiving some help with heavy maintenance and climbing, therefore long as his work is being maintained at its present level, there was no reason why he could not continue as a maintainer." There is no showing in the record that the level of the claimant's work had in any way declined; he should have been continued as a Maintainer, and the claim should have been sustained.

Award No. 15790 is in error; therefore, I dissent.

W. W. Altus
For Labor Members

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