Award Number 17766
Docket Number CL-178887

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert C. McCandless, Referee

PARTIES TO DISPUTE:
BORTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

PACIFIC FRUIT EXPRESS COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6250) that:

(a) The Pacific Fruit Express Company violated the current Clerks' Agreement between the parties when on June 12, 1967, it summarily removed Mr. Jose M. Gomez from service without any explanation whatsoever; and,

(b) The Pacific Fruit Express Company violated the Agreement when it failed to hold an investigation under Rule 38 (a) of the Agreement within ten (10) days of June 12, 1967; and,

(c) The Pacific Fruit Express Company violated the Agreement when it failed to grant a hearing under Rule 38 (f) of the Agreement within ten (10) days of June 21, 1967; and,

(d) The Pacific Fruit Express Company violated the Agreement when it failed to restore Mr. Gomez to service with all rights unimpaired and compensation for all time lost immediately following investigation held on November 29, 1967, at which it was positively proved that he was unjustly removed from service on June 12, 1967; and,

(e) The Pacific Fruit Express Company shall now be required to allow Mr. Gomez compensation for all time lost from June 12, 1967, to May 21, 1968, the date he was restored to service with all rights unimpaired, but without compensation for all time lost.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date June 1, 1965, including subsequent revisions, (hereinafter referred to as the Agreement) between the Pacific Fruit Express Company (hereinafter referred to as the Company,) and its employes represented by the Brotherhood of Railway Airline and Steamship Clerks' Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes, which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

At 3:00 P.M. on June 12, 1967, Mr. Jose M. Gomez, Shift Foreman, hereinafter referred to as the Claimant, was removed from service by Agent H. E. Fox who gave no explanation therefor. Claimant contacted Division

By copy of this letter, am requesting our people to handle in line with the above in matter of putting claimant back to work. This should enable both parties to close their file in the matter."

Notwithstanding the foregoing favorable decision, the Organization has now submitted the case to this Board demanding that the claimant additionally be paid wages during the time he was being paid both the $600.00 Award, sick benefits, etc., i.e., while he was off-duty based on the findings of his own doctor and another competent physician.

(Exhibits Not Reproduced)

OPINION OF BOARD: Claimant, who had sustained a compensable injury award, was "taken out of service" on June 12, 1967. On June 21, Claimant wrote his Superintendent asking for a hearing under Rule 38 (f) of the Agreement, which reads as follows:

> "Rule 38(f). An employe who considers himself unjustly treated shall have the same right of investigation and appeal if written request is made to his supervisor within ten (10) days of the cause of complaint or date of supervisor's decision on matters brought to his attention in writing."

The Superintendent responded, in part, as follows: "This written request for Rule 38(f) hearing was not received in this office until June 22, more than ten (10) days after the alleged cause of complaint. Accordingly, it is improperly before me and hearing requested would not be in order." The letter further informed Claimant that his request lacked merit because he was out of service due to his physical health.

Although the record is replete with motion, if not action, on behalf of both Carrier and Employes on the property — considerable correspondence as well as a conference, until an investigation was held on November 21, we think the gravamen of the claim lies in the above quoted Rule and the response thereto from the Superintendent.

Carrier's major defenses against this claim are as follows: That the request for hearing was improperly filed and that by custom and usage Claimant should have requested a hearing under Rule 13(g) of the Agreement, which reads as follows:

> "Rule 13(g). 1. Persons recalled under provisions of paragraph (d) above who have performed no service for a period of six (6) months or more will be required to submit to a physical examination.
>
> 2. In the event that within thirty (30) days the findings or conclusion of the Company's examining physician are challenged by another reputable physician (selected and paid for by the employe), the employe's case, may, if conditions warrant, be referred back to the examining physician for recheck. If the report of such recheck indicates the employe is physically qualified to be returned to service safetly, he will be returned to service. If the report of recheck is to the contrary it may, within fifteen (15) days, be challenged by the employ or Local Chairman and request made for special handling wherein the Company physician and employe's physician will confer, and if these two physicians do not agree on the physical condition of the employe, they shall select a third or neutral reputable physician to examine him, which selection

shall be made within ten (10) days of request for special handling. The decision of the majority of the three (3) examining physicians on the physical fitness of the employe to perform unrestricted service shall be final and binding as disposition of the case. This does not, however, preclude a rexamination at a subsequent time should the physical condition of the employe change.

3. The Company and the employe will each pay for the fee and personal expense, if any, of the respective physician selected by them, and will each pay half the fee and personal expense, if any, of the jointly selected neutral physician, as well as half of all additional expenses incurred in connection with the examination."

Carrier further quotes from Referee Coburn's **Award 11909** in support of its position that Employes claim under Rule 38(a) was misdirected and inapplicable. Carrier cites Referee Johnson's **Award 9633** in support of its position that by practice, which it alleges was admitted because it was not denied—Rule 13 (g) was the exclusive means of challenging a medical disqualification.

Carrier further alleges that because of the compensation Claimant received under the award of the Industrial Accident Commission that he is estopped from seeking further damages from the Carrier, which would amount to a duplicate recovery. Three Federal court decisions are cited in support of this defense.

This Board finds that Claimant was arbitrarily and capriciously denied a contractual right to an investigation under Rule 38 (f) of the Agreement. Claimant's letter was timely before his superintendent. Carrier alleged, but did not prove, that only one avenue of request was available to Claimant, and this Board rejects the view that **Award 9633** is controlling on the matter of an employee's contractual right to have his alleged grievance heard. The Superintendent did not deny Claimant's request on the grounds of exclusivity, but rather on the false premise that the request was too late. Since this Board finds that the matter of a Rule 38 (a) investigation as requested in behalf of Claimant by Employes is not central to this claim, we see no reason to attempt to distinguish **Award 11909**. Claimant's claim, as previously stated, stands well enough on his own request and Carrier's wrongful refusal thereof.

Without going into what was proved or what was not proved at the hearing finally held on November 21, the facts are that Carrier denied Claimant's request for a timely investigation of his alleged grievances, although it very well might have proved its defense on the merits some months earlier.

Consequently, we find that as to that period from the date he was "taken out of service" (June 12, 1967) until the date of Claimant's investigation (November 21, 1967) Claimant shall be compensated for that amount over and above his $52.50 per week injury award that he would have made had he been in Carrier's employe during that time, including any wage raises or other monetary benefits to which he would have been entitled had he been in service during this time. Although Claimant was not returned to service until the last of April 1968, this Board feels there was sufficient evidence laid upon the record by Carrier to sustain the claim for damages, as awarded herein, only up to the date of the belated investigation. This Board further feels that compensating the Claimant in the above manner distinguishes this award from **Award 4954** and the three Federal cases cited by Carrier.

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 violated in accordance with the Opinion.

AWARD

Claim sustained to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1970.

CARRIER MEMBERS' DISSENT TO AWARD 17766,
DOCKET CL-17887 — McCANDLESS

For the reasons clearly stated by Carrier in the record and reviewed in the memorandum which Carrier Members furnished the Referee at the panel discussion, the entire claim should have been denied.

/s/ G. L. NAYLOR
G. L. Naylor

/s/ R. E. BLACK
R. E. Black

/s/ P. C. CARTER
P. C. Carter

/s/ W. B. JONES
W. B. Jones

/s/ G. C. WHITE
G. C. White

Central Publishing Co., Indianapolis, Ind. 46206 Printed in U.S.A.

Serial No. 237

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 17766

Docket No. CL-17887

Name of Organization:

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

Name of Carrier:

PACIFIC FRUIT EXPRESS COMPANY

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

Employes have asked for an interpretation of **Award 17766,** which awarded Claimant back compensation in such an amount "over and above his $52.50 per week injury award" which he would have been entitled to earn if he had not, as the Award so found, been wrongfully denied a hearing and kept out of service from June 12, 1967 to November 21, 1967.

Employes contend that the Award meant, or should be so interpreted, that Claimant should have been given full wages for that period plus his $52.50 weekly Workmens' Compensation award. Since Carrier deducted the $52.50 from what would have been Claimant's weekly wages during this period, Employes contend that these monies were wrongfully deducted and should now be paid Claimant in a lump sum. Carrier, who dissented from the Award, maintains that Employes' request for an interpretation is actually a request to revise or extend the Award.

In **Award 17766,** this Board rejected all of Claimant's contentions but one. The Board found that Claimant had been wrongfully denied a contractual right to a hearing on the merits of his removal from service for some twenty-two (22) weeks. And for that, the Board awarded him back pay in an amount commensurate with that which he would have been entitled to have earned had he not been wrongfully withheld from service, LESS THE $52.50 PER WEEK THAT HE HAD BEEN ALREADY AWARDED UNDER STATE WORKMENS' COMPENSATION. (Emphasis ours.)

This Board was applying the age old doctrine of making Claimant whole for that which he had wrongfully been denied. To have allowed him

full back wages plus his compensable injury award would have unjustly enriched Claimant or have allowed him a penalty, both of which we could not, nor did we intend to, do. (**Perry vs. U.S., 294 U.S. 330** and **Award 13302,** among many others.)

Consequently, Carrier fulfilled its obligation under the Order accompanying **Award 17766** when it paid Claimant his back wages, less the amount paid under Workmens' Compensation, for that period when Claimant was found to have been wrongfully denied a hearing.

Referee Robert C. McCandless, who sat with the Division as a neutral member when Award No. 17766 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1970.

Keenan Printing Co., Chicago, Ill. Printed in U. S. A.