NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22598
Docket Number MS-22361

THIRD DIVISION

James F. Scearce, Referee

PARTIES TO DISPUTE: (Howard L. Wallace
(
(Delaware and Hudson Railway Company

STATEMENT OF CLAIM: "1. Whether the Railroad acted properly in discharging Mr. Wallace as Supervisor and Signal Foreman and as an employee in September, 1972.

2. Whether, even assuming that such discharge was proper, the Railroad should have reinstated Mr. Wallace because it did not respond to his grievance which was properly filed with the Railroad, and therefore the grievance was automatically allowed pursuant to Rule 75 of the Agreement between the Railroad and the Brotherhood of Railroad Signalmen dated January 18, 1963.

3. Whether Mr. Wallace, because of the Railroad's failure to reinstate him, is entitled to back pay and the fringe benefits for the period from September 19, 1972 to the present."

OPINION OF BOARD: Based upon our review of the record in this case and from the oral presentations made by the parties, we find a series of clearly defined circumstances, to wit:

In September, 1972, Claimant Wallace occupied a non-agreement Supervisor's position.

Claimant Wallace, while occupying the non-agreement Supervisor's position, retained seniority in the Signalman's craft.

Effective September 19, 1972, Claimant was notified that he was "dismissed from all services of the Delaware and Hudson Railway Company."

Claimant attempted to exercise his craft seniority under the provisions of Rule 48 of the Signalmen's Agreement but was denied such right.

By letter dated October 11, 1972, Claimant's counsel wrote to Carrier, in pertinent part:

"* * * this letter is forwarded to advise that Mr. Wallace shoud be immediately returned to service either in his former position as Supervisor or as Signal Forman (sic), as his chose in his letter of September 19, 1972.

"This is to advise that I am going to diary this file until October 17, 1972, to await some reply from you. In the event of your failure to take any affirmative action, there will be no alternative but to commence an action to compel compliance with the terms of the agreement between the railroad and the union."

On July 17, 1973, Claimant entered suit in the United States District Court for the Northern District of New York in connection with an alleged injury sustained on or about January 28, 1972. This suit was settled on September 7, 1976 by payment to Claimant of $190,000.00 on the basis of permanent disability which prevented the performance of any gainful occupation.

Under date of August 8, 1973, Carrier received advice from the United States Railroad Retirement Board that Claimant Wallace had been granted a disability annuity by the Railroad Retirement Board effective October 1, 1972.

By notice dated November 16, 1977, Claimant's counsel informed this Board of their intention to file an ex parte submission with the Third Division, National Railroad Adjustment Board.

The jurisdiction and authority of this Board is derived from Section 3, First of the Railway Labor Act, as amended.

Section 3, First (i) of that statue provides:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the

> "parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

This Board is not a court of equity. Its function is to interpret rules and agreements as made by and between the various Carriers and employes through their representative organizations.

From the record in this case, it is obvious that at the time that Claimant Wallace was dismissed from Carrier's service he was assigned to an official position for which there was no agreement "concerning rates of pay, rules or working conditions" as those terms are used in Section 3, First (i) of the Railway Labor Act.

A review of the record before our Board clearly indicates that the letter dated October 11, 1972 from Claimant's counsel does not rise to the stature of a claim. It is a request that one of two actions be pursued by Carrier. It clearly indicates that if no "affirmative action" was taken by Carrier, then steps would be initiated "to commence an action to compel compliance, etc.".

The only subsequent action in regard to this request which is reflected in the record of this case consists of a second letter from Claimant's counsel dated January 15, 1973.

Section 2, Second of the Railway Labor Act, as amended, contains the following:

> "Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

As previously noted, Section 3, First (i) of the Railway Labor Act requires that all disputes must be "handled in the usual manner" on the property before such dispute may be submitted to this Board.

These requirements of the Law require a minimum of handling which the parties cannot waive. In an earlier Award of this Division (Award No. 10852 with Referee McGrath) we said:

"Section 2, Second is definitely mandatory when it says that all disputes between a Carrier and its Employes shall be considered and if possible decided in conference * * *.

"* * *

"To hold that a conference is not mandatory would not only change the intent of the law but also nullify some of its mandatory provisions. This of course this Board has no power to do." (Emphasis in original)

Again, in Third Division Award No. 17166 (Jones) we said:

"The Railway Labor Act requires that before a dispute should be appealed to the Board for a decision, the parties to the dispute should hold a conference on the property to try to reach settlement. This concept was upheld by the United States Supreme Court in Brotherhood of Locomotive Engineers vs. Louisville and Nashville Railroad Company, 373 U.S. 33. The reasoning behind this provision is simple--to ensure that the parties meet and try to reach some agreement between themselves in as harmonious fashion as possible. It is only after such a meeting or conference is held and only after the parties cannot reach agreement on the property that this Board's jurisdiction becomes valid." (Underscore ours)

See also Third Division Award Nos.:

11896 (Hall) 137 (Spencer)
5077 (Coffey)

among others too numerous to require complete citation.

On this basis alone, i.e., the failure of the parties to meet in conference on the property and the total failure of the moving party to the dispute to even attempt to meet in conference with the respondent, is sufficient to justify dismissal of the instant case.

However, even if we were somehow able to overcome the fatal defect of non-compliance with the provisions of the Federal statute, we would still be faced with another serious problem.

The Statement of Claim as listed with this Board poses three (3) questions, namely:

> "1. Whether the Railroad acted properly in discharging Mr. Wallace as Supervisor and Signal Foreman and as an employee in September, 1972.
>
> 2. Whether, even assuming that such discharge was proper, the Railroad should have reinstated Mr. Wallace because it did not respond to his grievance which was properly filed with the Railroad, and therefore the grievance was automatically allowed pursuant to Rule 75 of the Agreement between the Railroad and the Brotherhood of Railroad Signalmen dated January 18, 1963 (hereinafter the "Agreement").
>
> 3. Whether Mr. Wallace, because of the Railroad's failure to reinstate him, is entitled to back pay and fringe benefits for the period from September 19, 1972 to the present."

For our purposes we will address these questions in reverse order starting with the issue of back pay, etc.

The record before us clearly shows that at no time on the property was the issue of "back pay and fringe benefits for the period September 19, 1972 to the present" broached. Even if we were to consider the request as made by claimant's counsel on October 11, 1972 as a claim, there was no indication contained therein relative to pay of any kind. This issue is being raised for the first time before this Board and, therefore, cannot be entertained. See Third Division Award Nos.:

22199(Roukis) 22063 (Yagoda) 21966 (Sickles)

among others.

In addition, it is apparent from the record that the personal injury action which was initiated and resolved in Claimant's favor on the basis of permanent disability which caused Claimant to sustain "a complete loss of earning power as a result of his injuries" estoppes him

from now claiming back pay and fringe benefits. What was said in Jones vs. Central Georgia Railway Company, 220 F Supp. 990 (1963) is endorsed here. There we find:

> "It seems to this Court the applicable rule of law is firmly established that one who recovers a verdict based on future earnings, the claim to which arises because of permanent injuries, estops himself thereafter from claiming the right to future re-employment, claiming that he is now physically able to return to work. Scarano vs Central RR of New Jersey, 3 Cir. 2135 2d 510, ...once he had declared in the State Court that he was permanently disabled and unable to, in the future, perform work as a switchman and offered proof in substantiation of his disability, he was no longer in position to claim with respect to any alleged future rights or privileges, further employment under his prior employment contract....."

If, for our purposes of deliberation and decision, we were to presume that Rule 48 of the Signalmen's Rules Agreement were applicable in this situation, we could only conclude that, by its very language, Rule 48 precluded Claimant from exercising displacement rights into the Signalman's craft on or about September 19, 1972, because it limits such exercise of displacement rights to situations in which the supervisory position is abolished or the supervisory employe is demoted. Neither of these situations applied to Claimant.

Therefore, inasmuch as Rule 48 precluded Claimant from returning to the Signalman's craft under the circumstances here involved, none of the provisions of the Signalman's Rules Agreement were applicable to him - including Rule 75.

Based on the state of the record before us, it is clear that the provisions of Section 3, First (i) of the Railway Labor Act have not been complied with; that mandatory conferences were not held on the property; and that the Claimant is estopped from claiming any re-employment right with this Carrier. Any one of the foregoing is sufficient to justify a dismissal of this claim. When considered in consort, we are left with no alternative but to dismiss the claim en toto.

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 there was no violation of the Signalmen's Rules Agreement.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 30th day of October 1979.