

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 27586
Docket No. MS-27080
88-3-85-3-736

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Randy Newland Hollifield
PARTIES TO DISPUTE: (
(Southern Railway Company

STATEMENT OF CLAIM: "This is a claim on behalf of Mr. Randy Newland Hollifield, formerly employed as an over the road driver by Norfolk and Southern Railway. This claim is for payment of \$75,000 due to accidental dismemberment of his left leg above the knee, under an agreement between the Brotherhood of Maintenance of Way Employees, and the National Railway Labor Conference, dated 10 February 1971 and amended in October of 1978."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant's statement of facts discloses the following:

"On 11 May 1984, Mr. Randy Newland Hollifield was employed as an over the road truckdriver by Norfolk and Southern Railway. On that day Mr. Hollifield prepared to leave Asheville with his tractor-trailer at approximately 4 a.m. He was to take a load to Durham, North Carolina, but discovered that a wheel on the rig that he was to drive to Durham was defective. Pursuant to orders given him by his superiors, Mr. Hollifield took the rig to the Candler Truck Service for repair. After arriving at the Candler Truck Service, Mr. Hollifield contacted Norfolk and Southern offices in Roanoke, Virginia for the purpose of obtaining a purchase order number for the repair of the damaged wheel. After receiving the purchase order number for the repair to the damaged wheel, the employees at Candler Truck service discovered the wheel was

beyond repair. As a result, Mr. Hollifield, pursuant to orders he had previously been given, attempted to contact Roanoke and obtain a new purchase order number for the purchase of a new wheel. After numerous attempts, Mr. Hollifield was unsuccessful in contacting the appropriate person in Roanoke. After waiting for some time, Mr. Hollifield's mother, who had come to pick him up at the Candler Truck Service, had to leave to go to work. At that time, Mr. Hollifield, rode back to his home with his mother for the purpose of obtaining other transportation. Mr. Hollifield immediately boarded his motorcycle and proceeded directly back to the Candler Truck Service for the purpose of obtaining the new purchase order number for the replacement of the defective wheel. It was while Mr. Hollifield was en route to the Candler Truck Service, approximately one-half mile from its location, that he was struck by a third party driving a passenger vehicle. As a result of this collision, Mr. Hollifield lost his left leg as a result of an amputation which was necessitated above the knee."

Additional facts developed in the record show that at the time of the accident, Claimant's brother-in-law was riding on the motorcycle with Claimant.

Claimant, through his attorney, initiated a series of contacts with the Carrier. Specifically, after a phone contact on June 28, 1984, Claimant's attorney notified Claim Agent W. Jones by letter of the same date that his law firm would be assisting Claimant in connection with various claims. By letter dated August 7, 1984, Jones advised Claimant's attorney where certain requested information could be obtained. By letter dated August 28, 1984, Claimant's attorney wrote the Carrier's Employee Benefits Department concerning the incident and inquired about Claimant's rights. By letter dated October 10, 1984, Claimant's attorney wrote Assistant Chief Claim Agent J. Blankenship of the Carrier's Employee Benefits Department seeking to follow up on the August 28, 1984 letter and a subsequent phone conversation. By letter dated October 17, 1984, Blankenship informed Claimant's attorney that the Carrier was in the process of making a decision. By letter dated December 6, 1984, General Claim Agent G. E. Lewis advised Claimant's attorney that the Off-Track Agreement was not applicable under the circumstances surrounding Claimant's accident. No further appeals were lodged with the Carrier. Further, no conference was held on the property. In December 1985, Claimant's attorney served General Claim Agent Lewis with a notice of intent to file an ex parte submission with this Division naming the Norfolk and Southern Railway as the Carrier.

Article V of the 1971 National Agreement and its later amendments states:

"Where employees sustain personal injuries or death under the conditions set forth in paragraph (a) below, the carrier will provide and pay such employees, or their personal representative, the applicable amounts set forth in paragraph (b) below, subject to the provisions of other paragraphs in this Article.

(a) Covered Conditions -

This Article is intended to cover accidents involving employees covered by this agreement while such employees are riding in, boarding, or alighting from off-track vehicles authorized by the carrier and are

- (1) deadheading under orders or
- (2) being transported at carrier expense.

(b) Payments to be Made -

* * *

Loss of ... One Foot ... \$75,000"

Initially, we lack jurisdiction to consider the Claim. In accord with Section 3, First (1) of the Railway Labor Act, before we can consider a claim, the particular dispute "... shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes" Moreover, Section 2, Second of the Act requires that all "...disputes between a carrier and its ... employees shall be considered ... in conference between representatives designated and authorized so to confer ... by the carrier ... and ... the employees" Circular No. 1 of this Board reiterates these jurisdictional requirements by stating "No petition shall be considered ... unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act" It is undisputed that appropriate appeals to the Carrier's chief operating officer designated to handle disputes or required conference on the property were not held prior to the submission of the instant matter to this Board. It is well-established that we therefore lack jurisdiction to consider the Claim. See Third Division Award 25298 ("... this Board is pointedly precluded from reviewing and deciding Employee claims that were not fully handled on the Employer's property). See also Third Division Awards 25676, 25709, 25514, 19751, 18951, 19709.

Claimant's arguments do not change the result. The statute and the above precedent require that appeals must be processed and conference held with the appropriate Carrier officers. The Carrier's General Claim Agent is not the individual in the statutory scheme making the final determination.

For purposes of this case, the General Claim Agent merely stands in the shoes of a lower level supervisor or department head who initially declines a claim. It is statutorily incumbent upon Claimant to appeal therefrom as provided in the Schedule Agreement and have the required conference prior to submitting the dispute to this Board. Putting aside the fact that our experience shows that claims are resolved in the on-property appeal process set forth in the Act, since such a procedure is required by the Act, as a matter of law, such does not constitute a futile or superfluous act as Claimant now argues.

However, notwithstanding the above fatal jurisdictional defects, even if we could consider the merits of the Claim, we would deny the same. By Claimant's own statement of facts, Claimant left Candler Truck Service, rode home with his mother and returned on his motorcycle. According to Claimant's statement of facts, Claimant's mother "had to leave to go to work" and Claimant "rode back to his home with his mother for the purpose of obtaining other transportation." Under the 1971 Agreement, "[t]he burden of proof is the claimant's to show authorization and this record does not so show. A naked allegation of an instruction is not enough." Third Division Award 21527. Claimant's arguments are made under general principles of agency law, i.e., that at the time of the accident, Claimant was on his master's business. However, basic concepts of agency relationships also require that Claimant not act outside the authority given to him and he must refrain from engaging in a frolic on his own. Therefore, to meet his burden, Claimant must show that he had authorization to leave Candler Truck Service, go home and return due to his mother's need to go to work. Claimant has not shown such authorization beyond the mere allegation of having such authority. See Public Law Board No. 519, Award No. 18 where an employee was killed in an accident.

"The record is clear and shows that the claimant elected to use his own auto to deadhead between the two points mentioned above. While the carrier does not prohibit such election by employees, it does not extend its liability to situations which stem from such elections. The carrier did not authorize the claimant to use his automobile in either direction. The claimant chose to do so as a matter of personal convenience. Based on the facts of this case, the Board may not sustain this claim."

Therefore, the issues concerning the propriety of Claimant's driving a motorcycle at the time of the accident and having his brother-in-law as a passenger need not be addressed. Here, Claimant has not made the threshold showing that he had authorization to leave and return under the given circumstances. Claimant's arguments are tantamount only to a "naked allegation of an instruction," which, without more, "is not enough." Third Division Award 21527.

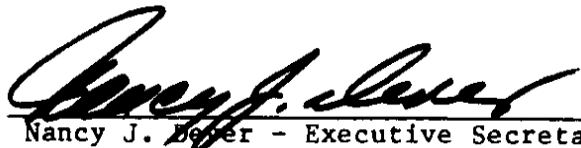
In light of the above, we find it unnecessary to address the Carrier's argument that Claimant failed to serve or name the proper party.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 27th day of October 1988.