

The Second Division consisted of the regular members and in addition Referee James F. Searce when award was rendered.

Parties to Dispute: ( System Federation No. 99, Railway Employees'  
( Department, A. F. of L. - C. I. O.  
( (Electrical Workers)  
(  
( Illinois Central Gulf Railroad Company

Dispute: Claim of Employee:

1. That the Illinois Central Gulf Railroad violated the current agreements, particularly rule 39 on July 15, 1975 when electrician, J. D. James, III was dismissed from service at Memphis, Tennessee.
2. That Master Mechanic, W. H. Weber, violated rule 37 when he failed to notify the claimant or his representative within 60 days from the date claim was filed, that the claim was disallowed.
3. That Electrician, J. D. James, III be reinstated to service with seniority rights unimpaired, all vacation, insurance and other rights restored and be compensated for all wage loss beginning on July 15, 1975, to provide for payments and credits with the Railroad Retirement Board for the full time electrician James is unjustly removed from service.

Findings:

The Second 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 employee 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 waived right of appearance at hearing thereon.

In May of 1975, the Claimant requested a leave of absence to work at a Post Office; his request was marked "non approved" under date of May 19, 1975. The Claimant was examined by Carrier physician on June 13, 1975, the results of which were reported to the Carrier as follows:

"Examination of Jimmy James, Electrician, Rt. 1, Box 83A, Walls, Mississippi, 6-13-75 shows that he is not able to carry on his regular work.

I recommend 30 days leave of absence, from 6-13-75."

A "Request for Leave of Absence" (Form No. 1542) was executed approving his absence from June 19, 1975 to July 18, 1975. The Carrier asserts that by letter, thereafter, the Carrier informed the Claimant as follows:

"Dear Mr. James:

The Illinois Central Gulf Railroad is giving you a 30-day leave of absence, starting June 19, 1975, and ending July 18, 1975, account of being recommended by Dr. Shelton on June 13, 1975.

We are quoting Rule 22 of the Schedule of Rules for Electricians, reproduced by System Federation No. 99, as follows:

'When the requirements of the service will permit, employees on written request, will be granted leave of absence for a limited time, with privilege of renewal. An employee absent on leave who engages in other employment will lose his seniority unless special provisions shall have been made in writing therefor with the proper official and committee representing his craft.'

(It is noted, however, that the letter was undated and the record does not reflect when the Carrier claims to have sent it or if the Claimant admits to receiving it.)

The Carrier contacted the Post Office at Walls, Mississippi, on July 8, 1975, to verify earlier advice that the Claimant was working as a rural letter carrier. By letter of July 11, 1975, the Postmaster at Walls advised the following:

"Records at this office show that above named employee was on leave during this period but was called back in service on July 1, 1975 due to emergency for service on rural route and has worked each day from July 1, 1975 until to date."

By letter dated July 15, 1975, the Carrier advised the Claimant:

"It has been brought to our attention that while on a Leave of Absence from the Illinois Central Gulf Railroad, starting June 19, 1975 and ending July 18, 1975, that you

"were employed and worked as a rural mail carrier out of Walls, Mississippi from July 1, 1975 through July 11, 1975.

Unless you can prove otherwise, this is to inform you you have lost your seniority with the Illinois Central Gulf Railroad. Therefore, your services with the Illinois Central Gulf Railroad are terminated, in accordance with Rule 22."

Lack of response from the Claimant to the contrary, the Claimant's seniority was terminated effective July 15, 1975. In the ensuing months the Organization processed a grievance according to Rule 27 of the Agreement, which establishes, inter alia, 60 day response periods for appeals. By letter dated November 18, 1975, the Organization appealed an earlier denial by the Carrier to Master Mechanic Weber. By letter dated February 3, 1976, the Organization (via Local Chairman Gonzales) advised the Carrier (in part) as follows:

"Please refer to my letter dated November 18, 1975, which you received by Certified Mail. To this date I have received no response to my appeal of Mr. Buell's letter dated Sept. 25, 1975, which I received Sept. 27, 1975.

In accord with Rule # 37 of the agreement, pertinent part reading: (a) 'Should any such claim or grievance be disallowed, the carrier shall within 60 days from the date same is filed, notify whoever filed the claim or grievance, in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented'. (c) 'The requirements outlined in paragraph (a) and (b) pertaining to appeal by the employee and decision by the carrier, shall govern in appeals taken to each succeeding officer'."

The Carrier by letter from Master Mechanic Weber on February 12, 1976, advised as follows:

"With reference to your letter of February 3, 1976 stating you had received no response to your letter dated November 18, 1975. Attached is a Xerox copy taken from my file of declination I wrote you on January 12, 1976 concerning Mr. James."

(The January 12, 1976 letter denied the Organization's appeal on behalf of the Claimant.)

The Organization claims that the Carrier failed to comply with Rule 37 insofar as time limits and the grievance is therefore allowed. As to the merits, it contends that the Claimant was not on a leave of absence,

but rather was off duty due to sickness. The Organization points to the language of the "Interpretation of Rule 22 (Effective 7-1-1963)" -- which is incorporated into the Agreement -- for its support of differentiation of the statuses of ABSENCE FROM WORK (title of Rule 22):

"An employee reporting for duty after leave of absence, vacation, sickness, disability, or suspension, or for any other legitimate cause..."

Thus, the Organization asserts, the proscription against other work, which relates only to leaves of absence, as such, does not apply here. The Organization also contends that the Claimant had long worked as a rural carrier while maintaining his electrician's job with the Carrier, a fact well known to the Carrier. Finally, the Organization contends that the Carrier's letter of July 15, 1975, requiring the Claimant to prove he did not work as a rural carrier and the subsequent termination of him without a hearing, violates Rule 39 (DISCIPLINE), specifically the provision which requires that "No employer shall be disciplined without a fair hearing by a designated officer of the Carrier...."

The Carrier contends its actions were in accord with Rule 22, that the Claimant was on leave of absence, that he was forewarned against holding outside employment without proper authorization as set out in Rule 22, that he violated that proscription while on leave of absence and his seniority was terminated. The Carrier denies a violation of Article 39, contending that this was not a disciplinary action, rather that it is a loss of seniority which is automatic when a violation of Rule 22 is established; thus, there was no call for a hearing as required in Rule 39 since there was no disciplinary action taken. Insofar as the Organization's assertion that the Carrier failed to meet time limits, the Carrier contends it prepared and sent a response dated January 12, 1976; it counter-claims failure to meet time limits by contending the Organization failed to meet procedural requirements to communicate its appeal to the next highest officer within 60 days after it should have received its January 12, 1976 letter. Thus, the Carrier asserts, the Organization has foregone its right to appeal.

Insofar as the claim and counter-claim on time limits is concerned, it is obvious that either part can defeat the process of communications by merely denying receipt or refusing to respond based upon such a denial. The previous exchange of replies were in order, and there is no reason to conclude that the Carrier did not duly respond by letter dated January 12, 1976; it is equally obvious the Organization did not receive such a letter. In the same vein the Organization could hardly appeal a denial not received. When it did appeal by its March 25, 1976 letter to the Carrier's Director of Labor Relations, it was well within the 60 day limitation of receipt of the January 12 letter (resubmitted as an attachment to Master Mechanic's February 12, 1976 letter.) Both parties met the requirement of notification and neither complaint is with merit.

A single question remains which is key to all other assertions and contentions in this case -- did the Carrier establish that the Claimant was

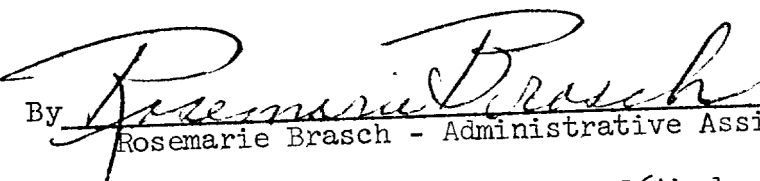
on a leave of absence? If so, the Rule 22 is clear and "self-executing" as cited in Second Division Award 6801. The Organization suggests a distinction between sickness and leave of absence, which make them mutually exclusive. It seems obvious that they are not: an employee could be absent from work due to sickness, or absent from work on leave of absence, or absent from work on leave of absence due to sickness. It would appear the third category of absence from work existed here. By the Organization's own account the Claimant's inability to work was due to a need to abstain from his work environment for a while. The doctor's statement to the Carrier cited leave of absence, as such. A reading of the record as a whole supports the Carrier's contention that the Claimant knew he was without authorization to take a leave of absence for purposes of working at the Post Office. He could not escape this proscription by pointing to such work as "emergency" as defined by the Postmaster. He was better advised to seek approval in advance of such work, if there was any doubt. The Carrier was not obliged to convene a hearing under Article 37, given the unique nature of this "self-executing" provision. While certain factors of the Carrier's documentation leave something to be desired, this Board finds it was authorized to terminate the seniority of the Claimant.

A W A R D

Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 16th day of June, 1978.