

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { Washington Terminal Company
{ Brotherhood Railway Carmen of the United States
and Canada

Dispute: Claim of Carrier:

That the current agreement particularly Rule 18 was not violated when on May 14, 1979 Carrier invoked the terms and conditions of Rule 18 and dropped Claimant Marvin A. Scroggins from the rolls and seniority roster of the Washington Terminal Company, which termination went uncontested by the Organization and Claimant Scroggins until March 2, 1981.

Findings:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

This is a Carrier-initiated claim seeking an Award by the Board in reference to its action on May 14, 1979. Such action invoked Rule 18 of the agreement between the parties and dropped Marvin Scroggins from the Carrier's rolls and seniority roster. Rule 18 reads as follows:

"RULE 18

ABSENCE FROM WORK

In case an employee is unavoidably kept from work he will not be discriminated against. An employee detained from work on account of sickness or for any other good cause shall notify his foreman as early as possible, by telephone, telegraph, messenger, or by United States mail. Employees absenting themselves for five (5) days without notifying the management shall be considered out of service and dropped from the rolls and seniority roster unless a justifiable reason can be shown as to why notice was not given, or sent in.

An employee who is absent from work for any cause and has not arranged for a definite time to resume duty, will not be permitted to work except on approval of ranking officer, unless he gives his foreman notice of his intention to report for duty at least one hour before the expiration of the regular quitting time of the shift on which he is employed, on the day previous to the day on which he intends to report for work. When unable to comply with the above provisions, the employee must give a reasonable excuse for his inability to do so, to the ranking officer before being allowed to return to work."

Before considering this claim, a brief review of previous proceedings is in order. Scroggins was dismissed from service by the Carrier on June 9, 1977. As a Claimant, and acting through the Organization, Scroggins processed a claim protesting his dismissal. Such claim reached the Board in proper order. The Board acted in this matter on March 28, 1979 through the issuance of Award No. 7876. The Award sustained the claim to the extent that penalty was changed from dismissal to a 60-day disciplinary suspension, after which the Claimant was to be "reinstated and compensated for net loss of wages".

In compliance with the Award, the Carrier initiated steps on April 4, 1979 to process the Claimant's reinstatement.

It developed (unknown to the Board at the time of rendering its Award) that the Claimant had been in jail for a portion of the time between his dismissal and the Board's direction for reinstatement. A dispute arose between the Carrier and the Organization as to whether the Award entitled the Claimant to back pay covering those periods he was in jail.

The matter was brought to the Board for an Interpretation, by action of the Carrier on April 30, 1979. On January 28, 1981 the Board issued an Interpretation in which the Board found, based on the facts presented to it, that the Claimant "is not entitled to 'net loss of wages' for periods of time he was incarcerated or otherwise unavailable for work, since no 'loss' of wages is involved". According to the Carrier, payment of lost wages was made to the Claimant for the time following the 60-day disciplinary suspension to cover such subsequent periods as Claimant was not incarcerated.

Consideration now turns to what occurred as to reinstatement under the terms of Award No. 7876. As noted above, the Carrier wrote to the Organization on April 4, 1979, asking the Organization to notify the Claimant of his reinstatement, subject to processing and a medical examination. The Carrier states without contradiction that this is the normal and accepted method of such notification.

The Claimant did not report for such reinstatement processing. On May 14, 1979 -- more than a month later -- the Carrier wrote to the Organization, noting that both the Carrier and the Organization now "have knowledge that Claimant is presently incarcerated in Baltimore, Maryland, for a parole violation". The Carrier further stated in its letter that Scroggins would be "formally terminated in accordance with Rule 18" since he had failed to report upon being offered reinstatement.

The Board notes here that a new matter has arisen. In compliance with Award No. 7876 and its Interpretation, the Carrier had made payments to the Claimant for appropriate net loss of wages and had offered him reinstatement of employment. The new matter is whether, upon the Claimant's failure to return to active employment for a period of more than a month after such was offered, the Carrier may properly terminate him from its rolls and the seniority roster, as it in fact undertook to do on May 14, 1979.

The Organization was clearly put on notice in reference to such action. It responded on June 18, 1979, stating that the Claimant's termination under Rule 18 was "improper and unacceptable". The Carrier avers that it did not consider such letter as the initiation of a claim by the Organization under the established dispute resolution procedure and thus made no reply.

Nothing further developed until December 30, 1980, when the Organization again wrote to the Carrier, stating that the Claimant was "now ready to return to work" (emphasis added) and requesting "compliance" with Award No. 7876 or otherwise to "arrange a conference". On January 9, 1981, the Carrier's Manager responded, reiterating the Carrier's stance in its May 14, 1979 letter and repeating that the Claimant was "dropped from the rolls and seniority roster".

On March 17, 1981 the Carrier notified the Board of its intention to file a submission on the claim as stated at the head of this award. Such submission was made, together with a responding submission from the Organization, and the matter is now before the Board for resolution.

The claim is procedurally out of the ordinary. It is, first of all, a claim by a Carrier to seek, in effect, a declaratory judgment that its action on termination of Scroggins under Rule 18 was not in violation of the current agreement. The position of the Organization has been not to file a claim against the employee's termination, but rather to insist that Award No. 7876 has not been executed properly by the Carrier. The dispute is nevertheless a genuine one, and the Board does not find it so procedurally deviant so as to prohibit a finding on the merits. The parties have exchanged their views at the highest level and remain in disagreement. The Board will thus not dismiss the matter on procedural grounds.

The Board finds, first, that the Carrier fully complied with Award No. 7876 and its Interpretation, through its payment of wage loss and timely offer of reinstatement.

The Carrier then took a termination action based on the employee's failure to report for reinstatement within a reasonable time, given the known fact that he was then incarcerated. As noted above, for this to be disputed by the employee and the Organization is a new claim, quite separate from that resolved in Award No. 7876.

The employee's failure to report for work when called for reinstatement need be treated no differently than if an active employee failed to continue to work because of incarceration in jail. While there may be exceptional circumstances, awards of this Board have frequently held that failure to work because of being

confined to jail owing to the employee's acts is not conduct which need be excused or for which the Carrier need maintain the employment relationship. In this instance, the employee not only was unavailable for work (due to being in jail) at the time of his reinstatement, but continued to be unavailable for the next 18 months (according to the Organization's December 30, 1980 letter).

The Board finds no basis to fault the Carrier's action in terminating from its rolls an employee unavailable owing to his own acts over such an extended period.

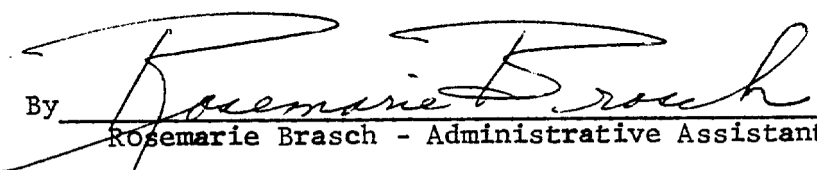
A W A R D

Claim of Carrier is upheld.

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 21st day of April, 1982.

LABOR MEMBER'S DISSENT TO

AWARD NO. 9051, DOCKET NO. 9320

(Referee Herbert L. Marx, Jr.)

The Labor Organization members of the Board hereby dissent to the decision and Award issued by the majority of the Board (Referee Herbert L. Marx, Jr.) on April 21, 1982. The principal basis for this dissent is that the dispute arising from the claim of the Carrier was not handled in the normal manner on the property of the Carrier, up to and including the Chief Operating Officer of the Carrier designated to handle such disputes. As a result, the claim should have been dismissed.

Section 3, First (i) of the Act requires that disputes regarding the interpretation or application of agreements concerning rates of pay, rules, or working conditions "...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...." The Board's Rules of

Organization and Procedure, issued as Circular No. 1, October 10, 1934, contain a similar provision which precludes the Board from considering any petition that has not been handled in accordance with the parties agreement and the customary procedures on the property of the Carrier.

In this case, the agreement between the Carrier and the Labor Organization representing the employees details certain steps that must be followed before a petition may be entertained by this Board. Specifically, like so many other agreements in the railroad industry, this agreement provides that an investigative hearing should be conducted by the Carrier in the event an employee is subjected to discipline or adverse action. If the dispute is not satisfactorily resolved at the hearing stage, successive conferences or negotiations must be held between various Union and Carrier Officials. If the highest Carrier representative designated to handle such matters finally disagrees with the Union's position, the matter may then be submitted to the Board for review.

It is undisputed that these contractual procedures were not followed by the Carrier here. By letter dated May 14, 1979, the Carrier informed the Organization that it was relying on Rule 18 (Absence from Work) of the agreement to drop Mr. Scroggins from the seniority roster and effectively terminate his right to employment with the Carrier. On June 18, 1979, the Organization replied and pointed out that the Carrier could not properly invoke Rule 18 to eliminate Mr. Scroggins' employment rights. In addition, the Organization emphasized that under the Board's Award No. 7876, Mr. Scroggins was entitled to reinstatement because of the Carrier's wrongful discharge of him in 1977.

The Carrier did not respond to the Union's communication nor did it attempt to advance the matter through the dispute-resolution procedures. On December 30, 1980 when Mr. Scroggins had completed his drug rehabilitation program, the Union sent a letter to the Carrier indicating that Mr. Scroggins was available and ready to return to work consistent with Award No. 7876. By letter dated January 9, 1981, the Carrier reiterated its position that it had dropped Mr. Scroggins from its seniority roster and that he would not be reinstated.

On January 28, 1981, the Board issued Interpretation No. 1 to its Award No. 7876 which plainly provided that Mr. Scroggins was to be reinstated upon a showing that he was available for work after the completion of his period of incarceration. Instead of reinstating Mr. Scroggins, the Carrier notified the Board on March 17, 1981 of its intention to file an ex parte submission with the Board requesting an advisory opinion that its action under Rule 18 was proper and that it was, therefore, relieved of any obligation to Mr. Scroggins.

It is uncontested that prior to its ex parte submission on the Rule 18 question, the Carrier did not hold an investigative hearing as required by the parties' agreement. Moreover, the Carrier did not hold or participate in the successive conferences designed to reach a negotiated settlement of the dispute. Rather, when it was faced with the clear duty to reinstate Mr. Scroggins under the Board's Award No. 7876, as interpreted, it devised the scheme of directly pursuing an ex parte petition with the Board seeking approval of its action against Mr. Scroggins under Rule 18. In these circumstances, it is clear that the Carrier has failed to handle this dispute pursuant to the long-established procedures in the applicable agreement.

In the past, when the Board has been confronted with similar efforts to bypass the requisite procedures contained in the collective bargaining agreement, it has consistently dismissed such petitions for failure to satisfy Section 3, First (i) of the Act and the Board's regulations. See, Second Division Award Nos. 5246, 6073, 6293, 6992 and 7490. Indeed, in Award No. 22366, the Third Division of the Board was presented with an identical attempt by another Carrier to sidestep the mandatory procedures on the property. In dismissing the petition, the Board held:

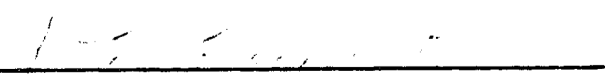
The language of Section 3, First (i), of the Railway Labor Act and the Regulations of the National Railroad Adjustment Board (Circular No. 1, October 10, 1934), require full compliance with the procedures set forth therein governing the process of disputes on the property before being submitted to the National Railroad Adjustment Board for adjudication.

The record before the Board clearly indicates that the claim involved herein was not handled on the property between the parties in the manner contemplated by the Railway Labor Act or the National Railroad Adjustment Board. Therefore, the claim is dismissed.

The Board's rationale in Award No. 22366 is fully applicable here.

In summary, in upholding the Carrier's claim in this case, the Board has contravened the requirements of the Railway Labor Act, as well as its own regulations. By accepting the Carrier's petition, the Board also exceeded its jurisdiction. Accordingly, the Labor Organization members have no alternative but to dissent.

Labor Organization Members


J. C. Clementi


M. J. Cullen


D. A. Hampton


J. A. McAteer


R. A. Westbrook