

Award No. 480

Docket No. 442

2-Va-MA-'40

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

The Second Division consisted of the regular members and in addition Referee Frank M. Swacker when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 40, RAILWAY EMPLOYEES'

DEPARTMENT, A. F. OF L. (MACHINISTS)

THE VIRGINIAN RAILWAY COMPANY

DISPUTE: CLAIM OF EMPLOYEES: Machinist E. J. Preston should be restored to service as a machinist with his seniority unimpaired and paid for all time lost since February 2, 1939, which date is seven days after management was notified that Preston had sufficiently recovered as to be able to return to his former work.

EMPLOYEES' STATEMENT OF FACTS: Machinist E. J. Preston, being off from work to recuperate from an injury to his back, was, on June 7, 1937, requested by Shop Superintendent F. S. Tinder, to advise when he (Preston) would return to work. Preston at that time was still suffering, and being under treatment by his doctor, could not advise when he would be able to return to his former task. Subsequent thereto he suffered a relapse and not until January 26, 1939, was he sufficiently recovered to resume his former employment. Previous to this date, however, or to be exact on July 22, 1937, management had arbitrarily dropped his name from the seniority list and has since refused to permit him to return to work.

POSITION OF EMPLOYEES: That on June 7, 1937, Mr. E. J. Preston stood for and was requested by the shop superintendent to report for work. See following letter of that date, by that official, which is copied below as our Exhibit A.

"EXHIBIT A

THE VIRGINIAN RAILWAY COMPANY
Serving the New River-Pocahontas Coal Fields

Fred S. Tinder,
Shop Superintendent

Princeton, W. Va.,
June 7, 1937.

Mr. E. J. Preston,
805 Mercer St.,
Princeton, W. Va.

Dear Sir:

Our work in the Locomotive Department has increased to such an extent that we need all our machinists. It is not customary when a man is off sick to employ a man to take his place . . . and we have

"Referring to my letter of June 19th and your reply of June 21st.

You are aware that the rules of the Company provide that an employe on sick leave who engages in other employment will lose his seniority unless special provision shall have been made therefor. No special provision was made for you at the time a leave of absence was given.

I am advised that you have accepted another position and that you have been actively engaged in performing the duties of that position. For that reason you are notified that you will lose your seniority, in accordance with the rules referred to, unless you return to your work with the Railway Company on or before July 22nd, 1937."

Mr. Preston did not return to his work and he was notified by Mr. Tinder on July 30, 1937, that his name had been dropped from the seniority list as of July 22, 1937.

In connection with the employes' claim for time lost the carrier contends that it cannot be supported by Rule 1 (a) of the existing agreement, which reads:

"(a). Eight (8) hours shall constitute a day's work and eight (8) hours' work will be required for eight (8) hours' pay."

said rule requiring eight (8) hours' work for eight (8) hours' pay.

The carrier submits that the claim in this case is not supported by the schedule rules and should be denied.

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.

The parties to said dispute were given due notice of hearing thereon.

In this case the employe voluntarily laid off sick and also voluntarily submitted to an examination by company physician. The company doctor and the employes' quite disagreed as to his condition. He laid off May 22, 1937. Three weeks later, the shop superintendent began urging him to return to work or advise him when he could. The employe replied to the urging that his condition was such that he would be unable to predict when he might return; but notwithstanding the opinion of the company physician he would rely upon the advice of his own physician that he was not in condition to return. On July 19 the carrier finally served notice on him that if he did not return to work by July 22, he would lose his seniority, and on July 30, 1937, his name finally was dropped from the seniority roster. On his own contention, he was so sick that he was in no condition to work from the time he laid off up to January 26, 1939, when the management was notified that he was sufficiently recovered to be able to resume his former position and he demanded to be allowed to do so. The carrier took the position that he was no longer an employe, having been dropped as such July 30, 1937.

The case has a background which unquestionably has a bearing on what transpired. At the time he laid off, there was a bitter controversy on over representation on this carrier. This employe was an active advocate of one of the contestants and actively engaged in organizing for it. The controversy was such that it ultimately went to the United States Supreme Court for decision. Undoubtedly this employe's union activities, which undoubtedly were

distasteful to the management, contributed to the demand for such haste as to his return. During the period following his lay-off, he admittedly engaged in union activities. The record is insufficient upon which to say whether or not they constituted employment. However, at the time he was notified that he would lose his seniority if he did not return to work, the carrier ascribed as the basis of the proposed action that he was violating Rule 19 covering leaves of absence which provides that an employe on such leave who engages in other employment, will lose his seniority unless special provisions shall have been made therefor by the proper official and committee representing his craft. Employes contend that this rule has no application whatever; that the sickness referred to as a grounds for permitting leave of absence is not that of the employe himself, but of his family or others dependent upon his care. Without passing on this point, at the moment the evidence definitely indicates that no leave of absence was in fact ever granted to him. It, therefore, is not established as a fact that he did "engage in other employment," nor that he was on leave of absence. On his behalf it is asserted that he could not have complied with the requirement of making special arrangements through his committee and the company for the reason that the company was then refusing to recognize this committee. However, it appears that the Supreme Court decided the issue of representation before his name was dropped and that the company did in fact meet his committee in conference June 11, that is, several weeks before his name was actually dropped. Assuming, as contended by the employes that the leave of absence rule is not applicable to illness of the employe himself, the result is there is nothing in the schedule determinative of the status of a man off ill. The organization must then take the position that a man might be ill for years and upon recovery demand restoration to service with his original seniority. The corollary of this would be that the carrier might in any such case it saw fit so restore a man off for many years. Such a condition would play havoc with the seniority rule and certainly was never in contemplation of the parties.

We think, therefore, that the leave of absence rule does apply and that the employe was obligated, at least when he was notified his name was to be dropped from the roster, to have made an effort to obtain continuing leave of absence during his illness in order to retain his seniority status. This was not done. The conclusion is he forfeited his seniority and has no basis now for his demand for reinstatement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: J. L. Mindling
Secretary

Dated at Chicago, Illinois, this 11th day of July, 1940.