Award No. 3268
Docket No. 3109
2-L&N-MA-'59

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Roscoe G. Hornbeck when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 91, RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.—C. I. O. (Machinists)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1—That under the current agreement, particularly Rules 33 and 34, the Carrier improperly discharged Machinist L. C. Tanley on June 28, 1957 and Machinist D. T. Mangrum on July 2, 1957 from the service without a fair hearing.

2—That accordingly the Carrier be ordered to restore the aforesaid employes to service with all rights unimpaired and compensate them for all time lost due to the aforesaid violation at the applicable straight time rate of pay.

EMPLOYES' STATEMENT OF FACTS: Machinist, L. C. Tanley, hereinafter referred to as a claimant, was employed as a machinist by the Nashville, Chattanooga, St. Louis Railroad Company, now a part of the Louisville & Nashville Railroad Company, hereinafter referred to as the carrier, at the carrier's West Nashville Shops April 14, 1956 on the first shift and continued to be employed as such until June 28, 1957 when the carrier discharged him from its service.

Machinist D. T. Mangrum, also hereinafter referred to as a claimant, was employed as a machinist by the carrier at the carrier's West Nashville Shops on May 15, 1956 on the second shift and continued to be employed as such until July 2, 1957 when the carrier discharged him from its service.

After the claimant's employment with the Nashville, Chattanooga, St. Louis Railroad Company, it became public information that the Nashville, Chattanooga & St. St. Louis Railroad and the Louisville & Nashville Railroad were contemplating a merger. Thereafter, Claimant Tanley made

"In reduction of forces the ratio of apprentices remaining in service shall not exceed the ratio provided for in Rule 39." (Emphasis supplied.)

In instances when employes, who had been recalled to service failed to return to service in their seniority districts within ten (10) days after being notified, were notified by letter with copy to the local chairman, that they had forfeited their seniority rights and were considered out of the service, **without an investigation or hearing.**

Carrier submits the facts clearly show (1) that claimants unquestionably violated the provisions of Rule 15; (2) that the handling given claimants was in accordance with practice followed ever since the rule was first incorporated in the agreement June 1, 1940; (3) that the provisions of Rules 14, 15, and 21 are special rules involving circumstances not referred to or contemplated in Rules 33 and 34, which fact is substantiated by the unprotested practice followed for many years.

In conclusion the carrier reiterates:

First, this claim is definitely barred by the time limit provisions of the agreement (Rule 31½), heretofore quoted, and should be denied without further consideration.

Second, should the Board decide to hear and determine the case on its merits, carrier insists the contention of the employes is not supported by the applicable rules and the claim 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.

The employes claim that they were improperly discharged without a hearing, as provided by Rules 33 and 34 of the controlling agreement.

The carrier requests dismissal of the claim for failure of employes to conform to Rule 31½ as to notice of intention to appeal within the time therein provided. The request will be denied. In support of its action the carrier relies on Rule 15 of the agreement and especially the second sentence thereof:

"An employe absent on leave who engages in other employment will lose his seniority unless special provisions shall have been made in writing therefor by the proper official and local chairman representing his craft."

Admittedly no special provisions, written or oral, were made for other employment and both employes engaged in outside employment.

Employes in their submission say that they "had secured permission to be absent from work." No claim is made that this permission was in writing. It must then have been an oral leave of absence.

In the discussion with the committee, it is insisted that the employes were not on leave because none was granted in writing and therefore Rule 15 does not apply.

These claims are inconsistent. However, giving consideration to the latter claim, we hold that a leave of absence, i. e., leave with consent, may be express or implied, written or oral.

Some agreements have special provision that "Employes off due to sickness or injuries shall be considered as on leave of absence."

If employes leave of absence only had been involved we would have a different question. It was more than that—the engaging in outside work without special provision therefor—which caused the action to be taken against them.

These employes admit all facts which make the penal provision of Rule 15 self executing and obviated any necessity of or right to a hearing.

This award is restricted to the facts here presented.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June 1959.

DISSENT OF LABOR MEMBERS TO AWARD NO. 3268.

The claimants were employes for thirty days or more and were entitled to a hearing pursuant to Rule 34. The majority admit that the employes' claim they were improperly discharged without a hearing as provided for in said rule.

> Rule 34. "No employe who has been in service more than thirty (30) days will be discharged for incompetency or any other cause without first being given an investigation."

The claimants were not given a hearing as provided for in Rule 34. Therefore, the award is erroneous and we dissent.

R. W. Blake

Charles E. Goodlin

T. E. Losey

Edward W. Wiesner

James B. Zink