

Award No. 3545

Docket No. 3163

2-UP-MA-'60

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Lloyd H. Bailer when award was rendered.

PARTIES TO DISPUTE.

**SYSTEM FEDERATION NO. 105, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L. - C. I. O. (Machinists)**

UNION PACIFIC RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the controlling agreement Machinist Earl Hurley was unjustly dismissed from the service of the Union Pacific Railroad Company August 11, 1957.

2. That accordingly the Carrier be ordered to restore Machinist Earl Hurley in its service with all his earned rights intact and fully compensate him for all time he has lost since August 11, 1957.

EMPLOYEES' STATEMENT OF FACTS: Machinist Earl Hurley, hereinafter referred to as the claimant, was employed by the carrier at Albina Shops, Portland, Oregon, on November 23, 1953, transferring to Salt Lake City, Utah, on January 9, 1956, and has been in continuous service with the carrier until his dismissal on August 11, 1957. The claimant was notified to appear for a hearing on August 14, 1957, for being in violation of company Rule 702 in that he was not performing his duties in conformance with that rule.

The hearing was held August 14, 1957. It developed in the hearing the charges had been expanded and postponement was requested until August 28, 1957, which the carrier granted, and the hearing was resumed at 10:00 A.M. on that date.

The grievance of this claimant has been handled with each carrier official including the highest designated officer, without securing a satisfactory settlement.

The agreement of September 1, 1949, as amended, is controlling in this dispute.

POSITION OF EMPLOYEES: It is submitted that this claimant was unjustly deprived of his service rights with the carrier on August 11, 1957, when the carrier failed in the hearings of August 14 and 28, 1957, to establish irrefragable evidence of proof that the charges were true that he, the claimant, was:

- (a) failing to perform the duties assigned him by his foreman

for the engine house formen. Upon the return of these officers to the locker room, they were informed that Claimant Hurley had left the shop premises while the two officers were in the shop bay area.

Claimant was on the 4:00 P.M. to 12:00 midnight shift. This departure from company property about 5:00 P.M., with seven hours of work remaining on the shift, was unauthorized and without permission of anyone authorized to grant permission.

Failure to attend to duties during prescribed hours and to comply with instructions of proper authority, is a direct violation of Rule 702. Likewise, departure from company property without permission is to absent oneself from duty which is specifically prohibited by the same rule.

Failure to be at the appointed place of duty, and to perform assigned duties during prescribed hours, has always been viewed as a serious offense by the National Railroad Adjustment Board. Such conduct cannot be condoned under any circumstances.

It is indisputable that a complete and unbiased hearing was granted the claimant; the record contains sufficient evidence to support the finding; and the serious rules violation involved fully justified the discipline assessed. Under such circumstances, the various Divisions of the National Railroad Adjustment Board have consistently refused to disturb the discipline.

Accordingly, this claim has no merit and must 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 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 were given due notice of hearing thereon.

This case arises out of the dismissal of claimant machinist Hurley. The record discloses no fatal defect in the handling of the claims on the property. Carrier nevertheless contends we are without jurisdiction to consider the merits of the dispute because the Organization failed to institute proceedings before this Division "within 9 months from the date" of the denial of the claim by Carrier's highest designated officer, as required by Article V, Section (c) of the National Agreement of August 21, 1954.

The highest officer designated by the Carrier declined the claim by letter dated September 30, 1957. The Organization's letter appealing the claim to this Division is dated June 30, 1958. The Carrier contends the 9 month limit expired on June 29, 1958. In support of this method of computing time Carrier cites certain awards of the First Division in which, although the precise point was not directly in issue, statements identical with the present Carrier's position were made.

In interpreting agreement language of general application we think the several Divisions of the Board should strive for consistency, and that prior

interpretations should not be departed from unless palpably in error. We think the interpretation relied on by the Carrier is erroneous to such degree, however.

"The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last, that is, the day on which the act is to be done * * *" 86 Corpus Juris Secundum 13(1). "The words 'from' and 'after' are frequently employed as adverbs of time, and when used with reference to time are generally treated as having the same meaning." Ibid, 13(3). "Thus, if something is to be done 'within' a specified time 'from' or 'after' a given date or a certain day, the generally recognized rule is that the period of time is computed by excluding the given date or the certain day and including the last day of the period, and similarly, if something is to be done 'within' a specified time 'from' or 'after' a preceding event, or the day an act was done, the day of the preceding event or on which the act was done must be excluded from the count." Ibid, 13(7).

We think the foregoing method of computing time is the only reasonable application of the agreement language in question. If the agreement required that timely appeal from the Carrier's decision must be made within one day from the date of said decision, it would be illogical to hold the appeal must be taken on the same day as the denial. If the Carrier's decision were presented by mail, such an interpretation would deprive the Organization of any effective right of appeal. If the prescribed appeal period were 5 days, this interpretation would in fact afford only 4 days for appeal.

We therefore hold that the 9 month period in question in the subject case began on October 1, 1957 and expired at midnight on June 30, 1958. Since it took appeal action on the latter date, the Organization properly invoked the jurisdiction of the Board over the instant claim.

There is evidence in the record to support the Carrier's finding that on August 11, 1957 claimant violated shop rule 702 in that he was not occupied with his assigned duties in conformance with that rule. (Carrier Exhibit B). Claimant thereby became subject to disciplinary action. Under the circumstances, however, we think that the penalty of dismissal was excessive. The time already lost is sufficient punishment for claimant's improper conduct. He should be reinstated with seniority unimpaired but without back pay.

AWARD

Claim sustained to the extent indicated in the above findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1960.