Award No. 4088

Docket No. 3856

2-L&N-CM-'62

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Howard A. Johnson when award was rendered.

PARTIES TO DISPUTE:

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

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYES:

1. That under the provisions of the current agreement, Carman G. F. Frazier was unjustly dismissed from the service of the L&N Railroad, effective September 24, 1959, and

2. Accordingly the Carrier should be ordered to restore the aforementioned carman to service with seniority rights unimpaired and compensate him for all time lost subsequent to and including November 13, 1959, the date he became able to return to work.

EMPLOYES' STATEMENT OF FACTS: Carman G. F. Frazier, hereinafter referred to as the claimant, was employed by the L&N Railroad at DeCoursey, Kentucky, as a carman helper on September 22, 1922. He was then promoted to a carman's position, establishing seniority as such effective November 17, 1922, and retained seniority in both classifications until his wrongful dismissal.

Under date of May 28, 1959, the claimant, who had been on a written leave of absence, with permission to engage in other employment since December 29, 1958, notified General Car Foreman J. O. Garr that due to trouble with his arm and shoulder, he was physically unable to return to work at the expiration of his leave on May 29, 1959, and therefore was reporting off from duty until further notice, in accordance with the provisions of Rule 22 of the current agreement.

On June 23, 1959 the master mechanic, at DeCoursey, addressed a letter to the claimant wherein he quoted a letter allegedly written to the claimant by the car foreman on June 1st, requesting that he (claimant) furnish a doctor's statement covering his disability. Under date of June 26, the claimant replied to the master mechanic, in effect, that the rules did not require and that it had never been the practice at DeCoursey for an employe to furnish

there anything in the rule which prohibits the carrier from using United States mail in apprising the employe involved of the charges against him.

When the accused are actively at work, it is the usual practice, because it is quicker and less expensive, to have letters of charge delivered to them by a foreman, a clerk, or a member of carrier's police department. It was not practical to do so in this case, however, because Mr. Frazier had left his place of employment in Kentucky and was residing in Florida. The carrier did all that could reasonably be expected of it when it forwarded the letter of charge to Mr. Frazier by registered United States mail. And this was by no means the first time a letter of charge had been so handled. Certainly, because the letter was handed him by a U. S. mail carrier, rather than some employe of the carrier, did not violate the discipline rule or justify Mr. Frazier's action in refusing to accept it.

Carrier further submits that the committee took an untenable position when it contended that because Mr. Frazier had declined to accept the charges, and was not present, management could not proceed with the investigation. Management was not asked to postpone the investigation so the committee could advise Mr. Frazier of the charges. Mr. Frazier had refused to furnish doctor's certificate covering his physical condition, had refused to request extension of his leave in compliance with intructions, and had refused to accept letter of charge. Management was given no reason to believe that Mr. Frazier would appear for the investigation if it were postponed. Management, of course, does not have the power of subpoena, and could not force Mr. Frazier to accept the charge or to appear at the investigation. But having complied with its obligation under the discipline rule, carrier was entirely justified in proceeding with the investigation. It is ridiculous to say that carrier could be forestalled from taking disciplinary action by Mr. Frazier simply refusing to accept letter of charge and the committee contending investigation could not be conducted until he saw fit to do so.

In conclusion, carrier submits that the dismissal of Carman Frazier was not arbitrary, unreasonable or unjust. It was not in violation of any provision of the current agreement, and should stand. A dismissal for cause terminates the employment relationship and the dismissed employe has no enforceable right to be reinstated or rehired by the carrier. Reinstatement or rehire of a former employe dismissed from service is within the discretion of the employer (First Division Award No. 14421, Referee Whiting). Also see First Division Awards Nos. 15316, 15317 and 15318, in which it was held:

> "The Board is without power to pass upon the propriety of the penalty imposed or to direct the Carrier to reinstate or rehire. The principle laid down in Awards 13052 and 14421 is in all respects reaffirmed and controlling in this case."

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.

Rule 21 authorizes the granting and renewal of leaves of absence and provides that an employe absent on leave who engages in other employment without the approval of the General Chairman as well as the Director of Personnel automatically severs his relations with the company.

Rule 22 is not an alternative to Rule 21. It does not authorize absences, either without or with leave. It merely recognizes the fact that an employe expected at work is sometimes detained because of sickness, and requires him to notify his foreman as early as possible, obviously, to permit the rearrangement of work or the calling of a substitute.

When, contrary to his prior compliances with Rule 21, Claimant repeatedly refused to request a renewal of his leave, and claimed the right of "reporting off duty until further notice per Rule No. 22," he was absent without leave; and when during that unauthorized absence he engaged in other employment without the approval of the General Chairman and the Director of Personnel, in derogation of the rights of other employes as well as of Carrier, he automatically severed his relations with the company as provided by Rule 21(b).

The investigation clearly showed that Claimant was absent without leave and was engaged in other employment without authority. It showed that he and his wife owned and operated a motel without any help, and that in addition, his wife held a regular office job elsewhere at a salary of $50.00 per week.

Carrier properly dismissed Claimant from its service for being absent without leave and engaging in outside employment without authority.

The notice of discipline hearing was sent Claimant by certified mail two weeks in advance, but was returned by the United States postal service with the notation "refused." Claimant did not appear at the hearing and his representatives objected that Claimant had not been notified and that "I see no reason why there should be an investigation," and "Mr. Frazier is off under Rule 22 and I do not think he can have a fair hearing being absent," and that "Mr. Frazier has not been notified properly, he is off sick and was not given enough time and we are not ready for an investigation." No request for postponement was made, and the basic objection remained that Claimant had not been notified, which if good would have required a new notice and not merely a postponement. A hearing void for want of notice cannot be postponed.

The objection is made that the postal notation does not show by whom the message was refused. But the postal department was under the duty to deliver the notice if possible, and under the circumstances its delivery was possible unless the addressee refused to receive it. Since there is a presumption that official duty is properly performed, the postal department's notation "refused" must be considered to mean refused by the addressee, or by his order, which amounts to the same thing.

No award or other precedent has been cited to the effect that a discipline hearing can be prevented by a refusal to accept notice of it.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Harry J. Sassaman
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November, 1962.