

Award No. 4732

Docket No. 4670

2-SP-MA-'65

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. 162, RAILWAY EMPLOYEES'
DEPARTMENT, A. F. of L.-C. I. O. (Machinists)**

**SOUTHERN PACIFIC COMPANY — TEXAS AND
LOUISIANA LINES**

DISPUTE: CLAIM OF EMPLOYEES: 1. That the Carrier's dismissal of Machinist J. L. Nix from service on March 31, 1963, was not authorized by the current agreement.

2. That accordingly the Carrier be ordered to restore him to service with all seniority, vacation, free transportation and employment rights unimpaired and with pay for all time lost retroactive to the aforesaid date.

EMPLOYEES STATEMENT OF FACTS: Machinist J. L. Nix, hereinafter referred to as the claimant, with seniority date of October, 1952, held a first shift assignment, 8:00 A. M. to 4:00 P. M., rest days Tuesday and Wednesday, at the Houston, Texas facilities of the Southern Pacific—Texas and Louisiana Lines, hereinafter referred to as the carrier.

On December 14, 1962, claimant requested a ninety day leave of absence to start December 27, 1962. Under date of December 21 this leave was approved by superintendent of shops, P. L. Scott. Under date of March 6, 1963, request for a thirty day extension was made, and it will be noted that notation on this request shows request for approval by claimant's immediate supervisor. Foreman T. P. Howard. However this request for an extension was denied by superintendent of shops, Mr. Scott, under date of March 20, 1963. Claimant's wife sent telegram on March 26, to the Foreman Howard advising that claimant would be unable to return to work for a few days, and requested that they bear with him. However, when claimant reported for work on March 31, he was withheld from service, and on April 1, 1963, was notified that he was being withheld from service pending a hearing of the charge of being absent from duty without proper authority since December 27, 1962, and ordered to appear for formal hearing on April 4, 1963, 10:00 A. M. Hearing was subsequently postponed until April 9, 1963, following which claimant was notified under date of April 10, 1963 of his dismissal from service.

This grievance has been handled with the highest designated officer of the

"Claimant is therefore entitled to recover the amount he would have received as wages had the contract been performed from July 12, 1950 to December 19, 1950, less what he earned in other employment during that period, or what he might by reasonable diligence have earned in other employment during such period."

This position is also sustained by First Division Award 15258, with Referee Curtis W. Roll, rendered on January 26, 1954, wherein it was ruled that outside earnings would be deducted when payment is made for wage loss. In this connection also see First Division Award 16558.

The carrier therefore asserts that in the event the Board considers the matter of compensation to the claimant for time lost, it is incumbent upon the board to follow the logical and established principle set forth above and require that any and all earnings by the claimant during the period for which compensation is claimed be deducted.

CONCLUSION: There was substantial evidence offered in the hearing for Machinist J. L. Nix that clearly indicates that he had secured a leave of absence on a false premise. The leave of absence said that it was granted for the purpose of Mr. Nix being with his family because of illness. It is most evident that Mr. Nix obtained the leave of absence in order to have an excuse for being absent from duty should it be necessary that he serve a jail sentence. He was in jail from December 27, 1962 until March 31, 1963 and should it even be considered that his absence was protected by the leave of absence, the leave of absence expired March 26, 1963, and he would without doubt have been guilty of being absent from March 26 to March 31, 1963. Such action on his part was a violation of Rules 2 and 3 of the carrier's rules for employees of the mechanical department inasmuch as he was dishonest in securing the leave of absence for purposes other than for what it was used and he was absent without proper authority.

The carrier respectfully requests the board to in all things deny the instant claim.

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 waived right of appearance at hearing thereon.

On December 6, 1962, a jury found Claimant guilty of assaulting an officer and sentenced him to 150 days' imprisonment. He was immediately committed to jail; but when his attorney filed a motion for new trial on December 10th it was set for hearing on the 27th, and Claimant was released pending the hearing. When on December 14th he requested a leave of absence beginning on the 27th, he knew that he must return to jail on that day unless the judge might grant the motion. There undoubtedly was illness in the family, but as matters then stood that was not what would most probably require his presence.

After a proper trial of an equity proceeding a document may be adjudged null and void by a court of competent jurisdiction as having been obtained by false pretenses without which it would not have been issued; but neither the party which issued the document nor this Board has such equity powers. Consequently the Carrier cannot authoritatively declare, and this Division cannot decide, that the leave of absence was not "proper authority" for Claimant's absence.

Whether Claimant might properly have been disciplined for his misrepresentation is not before us, for the charge was "of being absent from duty without proper authority since December 27, 1962, * * *."

Having been given a leave of absence from December 27, 1962 to March 26, 1963, Claimant was not absent without proper authority during that period. But he was absent without authority thereafter until March 31st, when he reported for work. Discipline was therefore warranted.

The severity of the discipline clearly resulted from the Carrier's view that Claimant's unexcused absence extended over the entire period charged, although it did not begin until after the expiration of his leave. Under the circumstances his absolute dismissal constituted excessive discipline, imposed under that misconception, and Claimant should now be returned to service with seniority, employment and accrued vacation rights unimpaired, but without pay for time lost.

AWARD

Claim sustained to the extent indicated in the final paragraph of the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May, 1965.