Award No. 6175
Docket No. 6044-I
2-PCT-I-'71

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

JOHN W. RUFF

PENN CENTRAL TRANSPORTATION COMPANY

DISPUTE: CLAIM OF EMPLOYE:

The dispute here involves the interpretation of Rule 7A-1(d). The claimant contends that he is entitled to his salary from the Railroad for the period he was held out of service, and that his earnings from his second job with the Transit Authority should not be considered in determining the amount due him, as this other job antedated his dismissal and continued after it. The carrier contends that inasmuch as his Transit Authority earnings for the period exceeded the amount he would have earned with the Railroad, he is not entitled to compensation.

RULE 7-A-1-(d).

"When an employe is held out of service in connection with an offense and thereafter exonerated, he shall be reinstated and compensated for the difference between the amount earned while out of service or while otherwise engaged, and the amount he would have earned had he not been held out of service."

EMPLOYE'S STATEMENT OF FACTS: John Ruff worked for the Pennsylvania Railroad as a pipe fitter–welder during the day and for the New York City Transit Authority at night. As a result of an accident at Sunnyside Yards on June 1, 1967, he sustained a back injury. Unable to perform the heavy manual work required of a pipe fitter–welder, Mr. Ruff was forced to stop work at the railroad. He tried, however, to continue his work as a motorman. After a few days, he was advised by his physician to discontinue working altogether.

A trial was subsequently held on August 8, 1967, charging Mr. Ruff with having represented himself as being unavailable for work for the Pennsylvania Railroad while actually working for the Transit Authority. Ruff was dismissed from service on August 28, 1967. His appeal to the Superintendent of Personnel was denied on October 9, 1967. Further appeal to the Manager of Labor Relations was sustained on November 13, 1967 and Mr. Ruff was reinstated. Ruff was permitted to return to work in December, 1967.

ticle 12 (a) of the Vacation Agreement as authority to vary the plain meaning of said agreement."

In the subject claim it is contended that claimant's earnings on his non-railroad job should not be considered under Rule 7-A-1(d) because claimant's non-railroad job antedated his dismissal and continued after his restoration to service. This contention is wholly without agreement support. The explicit provisions of the rule are that "the amount he earned while out of service or otherwise employed" will be taken into consideration in determining whether any compensation is due. The rule does not exclude from consideration outside earnings in case the employe happened to have a non-railroad job both prior and subsequent to the period he is held out of service. This fallacious contention of the claimant amounts to an attempt to have your Board change Rule 7-A-1(d) by including therein an exception to fit Claimant's particular situation when in fact no such exception is found in the Rule. The awards cited above all recognize that the Board lacks authority to change an agreement rule or to disregard the explicit terms of the parties' agreement, and that if a rule is to be changed, it must be left to the parties to accomplish through the process of negotiation.

In conclusion, the carrier has shown that the subject claim should be dismissed by your Board for the reason the claimant's notice of intent to file an ex parte submission with your Board was not timely made in accordance with the provisions of Rule 4-C-1(c) of the Agreement. Carrier has further shown that in the application of Rule 7-A-1(d) it properly took into consideration the claimant's outside earnings during the period he was held out of service in determining whether claimant was entitled to any compensation under the rule.

Therefore, carrier respectfully submits that the claim should be dismissed, and if not dismissed, then 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.

Parties to said dispute were given due notice of hearing thereon.

Claimant, after a hearing, was on August 28, 1967, dismissed from Carrier's service for having represented himself to Carrier as being unavailable for work for Carrier due to a claimed personal injury while he was actually working for the New York City Transit Authority. His appeal to Carrier's Manager of Labor Relations was sustained on November 9, 1967 and Claimant was advised by N. P. Patterson, said Manager of Labor Relations, that:

> "* * * in accordance with Rule 7-A-1(d), the charge will be stricken from your record and you will be compensated for the difference between the amount you earned while out of service or otherwise employed and the amount you would have earned on the

basis of your assigned working hours actually lost during this period."

Claimant contends that he is entitled to compensation from Carrier for time lost during his erroneous suspension from Carrier's service on the basis that since he had worked for the Transit Authority as well as Carrier, prior to his dismissal, the opportunity to work for the Transit Authority was in no way affected by his dismissal from Carrier's service; that Rule 7-A-1 applies to a situation in which an employe obtains new employment during a period of suspension or dismissal in place of Carrier's job during said suspension period, and that said rule does not apply to a circumstance where an employe held an outside job prior to his suspension or dismissal.

Carrier raises a procedural issue alleging that the claim filed with this Board is barred for failure to comply with the specific requirements of Rule 4-O-1(c) of the Agreement, the pertinent part thereof providing as follows:

"(c) * * * All claims or grievances involved in a decision by the highest designated officer shall be barred unless within 9 months from the date of said officer's decision proceedings are instituted by the employe or his duly authorized representative before the appropriate division of the National Railroad Adjustment Board or a system, group or regional board of adjustment that has been agreed to by the parties hereto as provided in Section 3 Second of the Railway Labor Act. * * *"

The record shows that Claimant's appeal to Carrier's highest designated officer was denied by letter dated January 12, 1968, and said decision was reaffirmed by said officer of Carrier by letter dated January 31, 1968. Claimant did not institute proceedings before this Division of the National Railroad Adjustment Board until June 30, 1970, until more than two (2) years from the date of Carrier's denial of Claimant's claim by Carrier's highest designated officer, and thus clearly in violation of Rule 4-O-1(c) of the Agreement.

Claimant did not contend that there was any waiver by the Carrier in regard to enforcing the provisions of said Rule 4-O-1.

It was said by this Board in Award No. 5250:

"It is unfortunate that Claimant is not experienced in the procedures prescribed by the Railway Labor Act and is not fully aware of the time limits contained in Article V of the August 21, 1954 Agreement. Such inexperience and unawareness is no valid reason to ignore the explicit provisions of the Act and the Agreement. * * *"

For the aforesaid reasons, we are compelled to dismiss this claim.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 8th day of October, 1971.

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