Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 7902
SECOND DIVISION Docket No. 7904
2-ICG-MA-'79

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: (International Association of Machinists and Aerospace Workers
(Illinois Central Gulf Railroad Company

Dispute: Claim of Employes:

1. That the Illinois Central Gulf Railroad violated Rule 39 of the Schedule "A" Agreement made between the Illinois Central Gulf Railroad and the International Association of Machinists, AFL-CIO, when they discharged George Gallion Jr. from service without a hearing as provided in Rule 39 of the controlling Agreement.

2. That accordingly the carrier be ordered to reinstate Mr. Gallion to service and pay him for all wages lost in accordance with Rule 39, as a result of his dismissal, commencing with December 14, 1976, and for each and every day thereafter, that he is withheld from service.

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.

On May 7, 1973, the Carrier directed a letter via Certified Mail - Return Receipt Requested, to the Claimant. The body of the letter read as follows:

"Dear Mr. Gallion:

You are absent without permission. Your services are needed at Woodcrest Shop. Unless you report within ten (10) days from the date of his letter - or furnish medical or other justifiable reasons for your inability to do so, your services with the Illinois Central Gulf Railroad will be terminated, and your service record closed."

A copy of the letter was sent to his home address and another in care of Madison County Jail, Anderson, Indiana. Another letter was sent June 4, 1973, to the Claimant in care of the jail, terminating his seniority in light of his failure to respond within ten days of the May 7 letter.

Upon his release from prison, in December 1976, the Claimant attempted to return to service but was refused. The Carrier at that time maintained, as it has maintained throughout the handling of the claim, that the Claimant's termination was a proper result of "forfeiture" and that the discipline rules do not apply to cases of forfeiture. The Organization argues the Claimant was disciplined without a hearing. Generally we would agree with the Carrier, but not without qualification. The Board has many times held that discipline rules do not apply to situations where employees fail to comply with certain requirements of the Agreement and where the Agreement specifically provides an automatic self-executing forfeiture. Many Agreements include such forfeiture provisions for failure to return at the end of a leave of absence, engaging in outside employment, or failing to file name and address after being furloughed. The Carrier also cites three First Division cases in support of their position. A careful review indicates these Awards can be distinguished. In Award No. 16 730 (McMahon) the Agreement specifically provided forfeiture for failing to return to service after a leave of absence. Award No. 15 039 turns on language where leaves were limited by agreement. Award No. 12 028 (Rudolph) dealt with a claimant accepting employment on another railroad.

The Agreement does not provide for forfeiture of employee's seniority for failing to give good cause for absence. Nor does the record before us indicate there is any past practice to this effect. The Agreement does not include forfeiture for outside employment, and the Carrier asserts the same practice exists in respect to employes failing to file names and addresses after furlough and employes failing to return after a properly granted leave of absence; but the Agreement does not extend to this factual situation. To include specifically one thing is to exclude specifically others, and by including forfeiture for outside employment only, the parties excluded forfeiture for failing to give good cause for absence. Others, however, may be sanctioned by past practice.

The Carrier also argues that the entire claim is barred because the Claimant and the Local Committee, who were sent copies of both letters, did not file a claim within sixty days of June 4 taking exception to their actions. The Claimant and the Organization deny receiving the letters. We have stated before that in time limit issues the burden is on the sending party to show a claim or reply is received. As proof of receipt of the May 7 letters by the Claimant, the Carrier offers copies of signed receipts. The Board is not convinced the Carrier has sustained the burden in this respect. The receipt sent to the jail was signed by two employees of the jail, the Carrier contends. The Claimant's name was signed to the receipt sent to the Claimant's home. The June 4 letter was sent to the jail and signed again by someone the Carrier asserts was an employee of the jail.

The Carrier has only proved that persons other than the Claimant signed the receipts. It has not supported its assertion that the signers of the cards sent to the jail were employees of the jail or that they were authorized agents to sign for the prisoners. Nor have they provided statements from the alleged employees that they did, in fact, deliver the letters to the Claimant. Regarding the letter sent to the Claimant's home May 7, the signature on the card obviously can not be Gallion's because it is agreed that he was in jail. Without a showing that the letters were, in fact, received there can be no time limit violation. See: Second Division Award No. 7761 (Weiss) and Third Division Award No. 11505 (Dorsey).

We find that the Carrier disciplined the Claimant without the benefit of a hearing and direct the Claimant be granted a hearing consistent with Rule 39 to determine if the Claimant was absent without permission in connection with his alleged absence from service beginning May 3, 1973. The question of seniority cannot properly be decided until a hearing is held. See: First Division Award No. 12 016 (Johnson) and Third Division Award No. 21272 (Quinn). We find further support for our actions in Third Division Awards 2728 (Shake), 2637 (Shake) and 1193 (Shaw).

The Board will retain jurisdiction. Upon conclusion of the hearing the case will be handled as discipline cases customarily are. Any further actions of the parties must be consistent with the Agreement as of that date. The question of back wages and reinstatement will be dependent on the evidence brought out at that hearing and will be passed upon by this Board, if and when properly referred to it. The decision is a narrow one and fitted to unique circumstances of this case.

A W A R D

Claim remanded consistent with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 19th day of April, 1979.