

Award No. 6010
Docket No. MW-6005

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
GEORGIA SOUTHERN AND FLORIDA RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the effective agreement when it dismissed Section Laborer Robert Sullivan without preferring charges or conducting a hearing to determine if he was guilty of unsatisfactory service;

(2) That section Laborer Robert Sullivan be restored to his former position with all seniority rights and privileges unimpaired and that he be compensated for all wage loss suffered because of the violation referred to in Part (1) of this claim.

OPINION OF BOARD: There is in evidence an Agreement between the parties effective August 1, 1947 with amendments and interpretations.

The Claimant Robert Sullivan was employed by the Carrier as a Section Laborer. According to the seniority roster dated January 1, 1950 he holds seniority as of October 12, 1940.

On December 13, 1950, he was arrested on the charge of grand larceny of three barrels of turpentine and taken into custody. On December 21, 1950, he was released from custody on a recognizance of \$250.00 for his appearance to answer to the charge of larceny at the April term of the Circuit Court of Bradford County, Florida.

The Claimant reported for work December 25, 1950 to his foreman and was advised he was taken out of service, which is confirmed in writing by Section Foreman Hall, as follows:

"To whom it may concern.

"Why Robert Sullivan is out of service is on account accused of stealing Turpentine. I had to write him out of service. Mr. Moon told me not to put him back to work."

The Employes assert:

That during the time the Claimant was in jail the Carrier was aware of his whereabouts.

That an Agent of the Carrier delivered the Claimant's pay check to him on December 18, 1950, and at that time the Claimant requested the Agent to advise his Foreman he could report for work upon his release from confinement.

That the Agent by signed statement admits the delivery of the pay check to Claimant but states the only conversation he had with Claimant was with reference to his being in jail and his comments about procuring counsel.

That Carrier subsequently abandoned its position that Claimant was properly taken out of service on account of being involved in a charge of larceny and thereafter contended Claimant was absent without leave, failed to protect his seniority and left the service voluntarily.

The claim is:

That the Carrier violated the effective Agreement, when it dismissed Claimant without preferring charges or conducting a hearing to determine if he was guilty of unsatisfactory service.

That he be returned to his former position with all seniority rights and privileges unimpaired and be compensated for all wage loss because of Carrier's violation of the Agreements.

The Carrier's contention is that an investigation disclosed the Claimant was arrested on the charge of grand larceny after going off duty December 13, 1950. That on December 14, 1950 he failed to report for work; that between quitting time December 13 and Monday, December 25, 1950, no effort was made by the Claimant to report for work or get permission from Section Foreman (Lynn Hall), his immediate superior, to be absent. He therefore was absent without leave in violation of the Agreement. That he was discharged for conduct unbecoming him as an employee.

On December 28, 1950, the Brotherhood's General Chairman wrote the Carrier's Engineer saying, among other things, "I have a letter from Robert Sullivan, Section Laborer, Hampton, Fla. P. O. Box 42, asking me to assist him in returning to the services after being discharged or dismissed from the services by Mr. Lynn Hall, Section Foreman, Hampton, Fla. * * * Will you please investigate this case and return Robert Sullivan to the services at least until such time as the Courts prove or find him guilty of this crime." On January 10, 1951, the Brotherhood's General Chairman called Carrier's Division Engineer by telephone with respect to Sullivan and discussed the situation briefly and on January 17, 1951, Carrier's Division Engineer wrote the Brotherhood's General Chairman:

"Since our conversation the other day I have learned a little more about the Sullivan case and definitely believe that both you and I would do well to have little to say about it."

On February 6, 1951, the Brotherhood's General Chairman wrote Carrier's Division Engineer, referred to his letter of December 28, 1950 and telephone conversation of January 10, 1951, and requested that "Robert Sullivan be given a hearing in accordance with Rules 17 and 18, Pages 113 and 114 of Laborer's Agreement" (Current Agreement). The claim was filed and properly processed through the proper channels on the property. The Chief Engineer M&S on May 23, 1951 denied the claim, stating Sullivan (Claimant) was notified of his dismissal from service but failed to comply with Rule 18 of the Agreement, in that he did not make written request to his immediate superior within the ten day period specified in the rule.

It appears from the record that Claimant was acquitted of the charge of grand larceny April 25, 1951 by a jury.

The Employees invoke Rule 17 (a and b) in support of their contention and the Carrier invokes and relies on Rule 18.

The Rules are as follows and must be read together to ascertain their meaning:

"ARTICLE IV--DISCIPLINE AND DIFFERENCES

"Advice of Cause—Rule 17:

"(a) An employe who has established seniority and who is disciplined or dismissed will be advised of the cause for such action, in writing, if requested in writing.

"(b) An employe who is entitled by service as described in note under Rule 7 to have his name posted on the seniority list, accused of unsatisfactory service, will not, except in a major case, be taken out of service until after a hearing. If time is lost in attending any investigation this shall not be deemed a violation of this Rule 17 (b)."

"Hearing—Rule 18:

"Except as provided in Rule 17 (a) and (b), an employe disciplined or who feels unjustly treated shall, upon making a written request to the immediate superior within ten (10) days from date of advice, be given a fair and impartial hearing within ten (10) days thereafter and decision will be rendered within twenty (20) days after completion of hearing. Such employes may select not to exceed three (3) employes to assist at the hearing."

The Employees contend that Rule 18 is applicable except as provided in Rule 17 (a) and (b); that in the instant case the Claimant was held out of service and dismissed therefrom, therefore Rule 17 became applicable and requires a hearing before dismissal or suspension.

Contra as previously indicated the Carrier contends that the Claimant must comply with Rule 18 before he is entitled to a hearing.

There is some contention that Rule 17 (a) and (b) refers to discipline and dismissal and Rule 18 refers only to discipline; therefore, Rule 18 could not be applicable. We are not in accord that dismissal from service is not considered discipline. We believe it has always been so considered.

The title to Rule 17 (a) and (b) is Advice of Cause.

Considering (a) thereunder it provides that an employe who has established seniority and is dismissed from service has a right to be advised of the reason therefor if he makes a request in writing. The Claimant in the instant case made no such request in writing. However, he was advised in writing why he was dismissed from service as heretofore indicated.

Under (b) of this Rule an employe who has met the requirements of seniority as provided for in Note under Rule 7, who is accused of unsatisfactory service, may be taken out of service only when a major case is involved. Was a major case involved in the instant case where the Claimant was taken out of service? We believe there was. The charge of grand larceny is a felony charge. If the accused is convicted by a jury, in most jurisdictions, his punishment is a term in a penitentiary.

It will be observed that by its title and context Rule 17 (a) and (b) is not the rule that sets up the procedure for a hearing.

Now let us make references to Rule 18 which is titled HEARING. It applies to Claimant. He was disciplined by being dismissed from service. The rule provides if he desires a hearing he must make a written request as provided for in Rule 18, ten (10) days from date of advice, the date he

was removed from service. If he gives the proper notice he is then entitled to a fair and impartial hearing within ten (10) days thereafter. It is obvious Rule 18 is the rule that sets up the procedure for a hearing. Compliance with this rule must be had to obtain a hearing.

The General Chairman's letter of December 28, 1950 is merely a request to put the Claimant back to work pending the outcome of his trial for larceny in the Circuit Court.

The written request for a hearing made in behalf of Claimant was not made until February 6, 1951, long after the ten (10) days, as required by Rule 18, in fact, approximately forty three days from the date of advice. Therefore there was no compliance with Rule 18 within the time designated therein for making a written request for a hearing.

The failure to request a hearing within ten days as provided for in Rule 18 is the equivalent of the acceptance of the final decision of the Carrier.

For the reasons given herein, the claim should be denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 25th day of November, 1952.