

Award No. 6769

Docket No. DC-6659

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

UNITED TRANSPORT SERVICE EMPLOYEES

SOUTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim is filed on behalf of Charles H. Walker, Waiter employed in the Dining Car Department of the Southern Railway System, and is for pay in lieu of vacation earned in the calendar year of 1949 in accordance with provisions of Rule 30 (c) of the rules agreement currently in force on the property.

Mr. Walker was out of the Carrier's service from January 5, 1950 until ordered reinstated by Award No. 5366 of this Division, dated June 20, 1951. Said Award provided that "Claimant should be reinstated with seniority and other rights unimpaired, but without pay for time lost."

STATEMENT OF FACTS: Charles H. Walker was employed by the Southern Railway System as a Waiter in the Dining Car Department on December 15, 1941 and rendered continuous service until January 5, 1950. The fact that he worked a minimum of 1728 hours during the calendar year of 1949 and had worked at least that number of hours for at least five years prior to 1949 has not been contested by the Carrier. Under Rule 30 (b) of the Agreement, Mr. Walker was entitled to twelve days' vacation.

Mr. Walker was dismissed from the service on April 12, 1950 as the result of investigations growing out of charges that he had violated the Carrier's rules on January 5, 1950. The details of these charges are not relevant to this dispute, but they appear in some detail in Award No. 5366 of this Division dated June 20, 1951. For the purpose of this discussion, we quote the Findings of the Board in this Award:

"**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 Employees involved in this dispute are respectively Carrier and Employees 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

Board recognized that Walker's loss of time from January 5, 1950 to time of his reinstatement in 1951 was a sufficient penalty "for his insubordination."

The claim here before the Board is for a monetary loss because of time lost by Walker between January 5, 1950 and the date of his return to service on July 30, 1951. The Third Division decided that such a claim was **not** valid in making Award No. 5366.

Under the circumstances, the claim should be dismissed by the Board for want of jurisdiction, but if not dismissed should be denied. Carrier, therefore, respectfully requests that if the Board does not see fit to dismiss the claim that an award denying it be made.

Carrier in making response to notice of the Third Division, without having seen the Brotherhood's submission, undertaking to meet the issues raised in the handling of the claim by correspondence, reserves the right, after being apprised of the Brotherhood's allegations of fact, statement of position and argument, to present such additional evidence and written and oral argument as to it may seem appropriate or necessary for a complete presentation of the case.

All factual data submitted in support of the Carrier's position has been submitted to representatives of employees and is part of the record in this case.

OPINION OF BOARD: During 1949 and preceding years the Claimant rendered sufficient service to qualify for twelve days vacation with pay in 1950. However, on January 5, 1950, he was suspended from service for alleged improper and disorderly conduct. He was given a hearing on January 18 and on April 12 he was discharged for said improper disorderly conduct and also for insubordination committed at the hearing. Claimant appealed to this Board which, by its Award 5366 rendered on June 20, 1951, directed that, "Claimant should be reinstated with seniority and other rights unimpaired but without pay for time lost." The present Claim is for the vacation pay which the Claimant had earned in 1949 and which he says he should have received in 1950.

The Carrier first contends that this Board is without jurisdiction of the Claim and should dismiss it because the requirements of the Railway Labor Act, the Rules of Procedure of the National Railroad Adjustment Board and Rule 21 of the effective Agreement were not complied with. It is asserted that the Claim was not initially channeled through the proper officers on the property, that there was no conference with respect to it and that it was not presented in time. The record discloses, however, that the Carrier's Personnel Officer rejected the Claim, on the merits, before it came to this Board on the sole ground that Rule 30 (f) of the Agreement provides that, "No vacation with pay will be due an employe whose employment relation has terminated prior to the taking of his vacation in a vacation year***" Under these circumstances, the Carrier has waived noncompliance with the procedural requirements which it now seeks to invoke. See Awards 3269 and 5227.

Looking to the former Award of this Board (5366) we find that it was therein specifically determined in the Findings, "That some disciplinary action was warranted but (that) dismissal from service (was) found to be excessive." Following this finding of fact, the Award directed that, "Claimant should be reinstated with seniority and other rights unimpaired but without pay for lost time." On this state of the record it cannot now be said that the Claimant's employment relation was ever properly terminated, within the meaning of Rule 30 (f). The effect of the Finding upon which the Award was predicated was to exonerate the Claimant of the charge, for which he was first suspended and later discharged by the Carrier, on

the single condition that he should not receive pay for time lost. The exception is not broad enough to bar the Claimant's demand for the vacation pay that had accrued before Award 5366 became effective.

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 Employees involved in this dispute are respectively Carrier and Employees 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 the Claimant is entitled to the vacation pay that he claims.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 28th day of September, 1954.