Award No. 9103
Docket No. CL-11013

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Mortimer Stone, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE OGDEN UNION RAILWAY AND DEPOT COMPANY

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

(a) That the Carrier violated Rule 30 of the existing agreement when it dismissed Mr. Bartley L. Lower from the service of the Carrier on February 5, 1958 without giving the employe due and proper notice of investigation and without conducting an investigation within the agreement time limits of the rule; and

(b) That the Carrier shall now compensate Mr. Lower for one day's pay at the established rate of his regularly assigned position, 12 o'clock midnight to 8:00 A. M. Crew Caller, for each and every day withheld from service by the Carrier, beginning with February 7, 1958.

EMPLOYES' STATEMENT OF FACTS: Mr. Bartley L. Lower established seniority with the Ogden Union Railway and Depot Company on November 11, 1941 under the terms of the existing agreement between the Brotherhood of Railway Clerks and the Company. Such seniority as Mr. Lower held was applicable to class (a), class (b) and class (c) positions in all clerical departments of the company, which seniority date and status remained unimpaired and in full force up to the date of February 5, 1958.

On February 5, 1958 and for several months prior thereto, Mr. Bartley L. Lower was the regularly assigned incumbent of position No. 7-82, Crew Caller, 12:01 A. M. to 8:00 A. M. daily, with Saturday and Sunday as assigned rest days. Daily rate of pay $15.188.

On Saturday, January 18, 1958 Mr. Lower personally presented himself at the yard office at approximately 6:00 P. M. where he verbally requested permission from the Senior Assistant Chief Clerk, Mr. J. E. Newey, to lay off beginning Monday, January 20, 1958, to take care of personal matters. Permission for absence was verbally granted to Mr. Lower by Mr. Newey.

The position taken by the Carrier with respect to the leave of absence feature of this case applies with equal force and effect to the acceptance of other employment without permission.

In conclusion, the Carrier has shown and proven that:

1. The Claimant failed to report for duty at the expiration of a leave of absence, thus voluntarily leaving the service of the Carrier.

2. The provisions of Rule 36 are here controlling, which mandatorily required that the Claimant be considered out of service.

3. This was not a case involving infraction or disregard of Carrier imposed rules and regulations but was a violation of the agreement rules; hence the handling does not embrace discipline, dismissal or unjust treatment. Rule 30 has, therefore, absolutely no applicability.

4. The handling of the Claimant in this case conforms to the customary, historical and traditional practices, to which the Organization has given tacit approval and complete acquiescence.

5. The Agreement was not violated, but to the contrary was impeccably administered and applied.

6. The claim is without merit and it should be denied.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

(Exhibits not Reproduced.)

OPINION OF BOARD: Claimant B. L. Lower who was regularly assigned as crew caller, took his vacation period from January 6 to 17; the 18th and 19th were his rest days. On the 18th reported to the Senior Assistant Chief Clerk and orally requested permission to lay off. The clerk states that he asked to lay off on the 20th and claimant states that he asked to lay off beginning the 20th. Whichever the request, it was granted.

Claimant did not report for work on the 21st or thereafter until February 6. In the meantime he had been carried on the record from day to day as laying off until February 3rd when the record carried the notice "Out of service." This was followed on February 5 by written notice reciting facts and rules and advising claimant that:

"As you have made no written request for leave of absence and are absent without permission, you are considered out of service in accordance with rule 36 of the Working Agreement."

Rule 36 provides:

"Employes will be granted leave of absence when they can be spared without interference to the service, but not to exceed ninety

days * * *. Any employe who fails to report for duty at the expiration of leave of absence without reasonable excuse shall be considered out of service."

Carrier also cites Special Notice No. 12, which requires that:

"Clerical employes desiring to be absent for 5 days or more for personal reasons must make written request on the prescribed form to the head of department. If leave of absence can be granted it will be authorized in written form by my office."

The Organization asserts that Special Notice No. 12 is void as a unilateral attempt to change Rule 36. We cannot concur. It in no way attempts to modify Rule 36. Its provision for written request merely implements the rule in a reasonable and important way by setting up an orderly procedure for carrying out the rule.

There is no contention that claimant was not aware of the Special Notice, which had ben posted some ten years before and often followed. Thereunder both claimant and the clerk granting leave knew that if leave was sought for more than four days it must be by written application to the head of the department. It is not contended that there was any promise by the clerk to grant or extend the leave beyond January 20 so no question of waiver is present.

The chief contention of the Organization is that Carrier violated Rule 30 which requires that no employe shall be dismissed without a fair hearing, when it "dismissed" claimant. Carrier contends that he has not been dismissed but voluntarily put himself out of employment as provided for in Rule 36, wherefore no formal hearing was required.

Carrier supports its contention not only with reason but by citing eight instances where the rule has been so applied on the property and further sets out a conference agreement, made some six months after claimant's leave, that a rule requirement that an employe shall be considered "out of service" means the termination of seniority and employment rights and no investigation is required. True, this was signed by the General Chairman "with the understanding that it has no bearing upon, application to or interpretation of the B. L. Lower case," but it shows nonetheless the accepted interpretation and application of the rule at present and no contrary past interpretations are shown. Several awards of this Division show like interpretation of similar rules of other agreements, and these precedents should be followed here.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived hearing on this dispute; and

That the Carrier and the Employe involved in this dispute are respectively carrier and employe 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 Carrier has not violated the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of December, 1959.