

Award No. 10035
Docket No. CL-12259

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Harvey Daly, Referee

PARTIES TO DISPUTE:

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

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4866) that:

1. Carrier violated the Clerks' Agreement when it failed to render decision within seven days after completion of investigation, as required by Rule 18 (a) of the rules and working conditions Agreement; and on June 10, 1960, dismissed from its service R. W. Casebolt, Auto Messenger, Kansas City, Missouri, following investigation held on June 2, 1960, which investigation did not sustain the Carrier's charge against Mr. Casebolt.

2. Mr. R. W. Casebolt shall be restored to service with seniority and all other rights unimpaired.

3. Mr. R. W. Casebolt shall be compensated for all wage losses incurred on and after June 8, 1960, until reinstated.

OPINION OF BOARD: The Claimant, R. W. Casebolt, seventy years old, and a Carrier employe since April 8, 1943, was an Auto Messenger, Yard Office, Kansas City, Missouri, assigned 7:00 A. M. to 3:00 P. M. Wednesday through Sunday, with Monday and Tuesday as rest days.

On May 22, 1960, the Claimant had asked Chief Clerk C. W. Zinn for the following Sunday (May 29th) off to attend a family reunion. Mr. Zinn told the Claimant "that we would try to work it out and it looked like he could make it." However, on May 27th Dwight Davis reported in sick with the mumps, leaving only the Messrs. Casebolt and Bullock to protect three messenger jobs. The regular relief man was off and out of town.

On Saturday, May 28, 1960, at about 10:00 A. M., Mr. Zinn told the Claimant that due to the manpower shortage there was no messenger available to relieve him on Sunday, May 29th and that it would be impossible for him to be off on that day. The Claimant, according to Mr. Zinn, stated that he "would have to be off if he had to make a liar out of himself and be off sick."

On May 29, 1960, at about 1:30 A. M. the Claimant telephoned and informed Mr. I. Y. Elliott, Chief Yard Clerk, that he would be unable to

protect his job at 7:00 A.M. that day because he was ill. As is the Carrier's practice, Mr. Elliott made no attempt to ascertain the nature of the extent of Claimant's illness. Subsequently, it was learned that the Claimant stated he was troubled with a skin infection.

On May 29, 1960, Special Officer N. A. Pruitt called at the Claimant's home, 5005 Manchester Avenue, Kansas City, Missouri, between 11:00 and 11:30 A.M. and received no response to repeated knockings on front and back doors.

On May 31, 1960, Carrier's Trainmaster, Mr. J. M. McJannet, notified Claimant as follows:

"Report to Superintendent's Office, Kansas City, Mo., at 2:00 P.M. Thursday, June 2, 1960, for formal investigation to determine facts and place responsibility in connection with your failure to protect your assignment between hours of 7:00 A.M. and 3:00 P.M. on Sunday, May 29, 1960. Bring representative, if desired.

cc—EHC GHN ASW CRS CWZ JIW RVH

J. M. McJannet, TM 9:15 A.M."

The Claimant with his representative, Mr. J. L. Walls, Division Chairman Clerks, attended the June 2, 1960, investigation and testified in his own behalf. Present at that hearing, in addition to the Messrs. Casebolt and Walls, were the Messrs. A. S. Welch, C. W. Zinn, I. Y. Elliott, N. A. Pruitt, J. M. McJannet and B. Rutledge.

On June 9, 1960, the Claimant was in the office of Superintendent E. H. Campbell and what took place at that time may be gleaned from the following letter from the Claimant to Mr. Walls, dated September 8, 1960, which, it might be added, the Carrier did not dispute:

"Kansas City, Mo.,
Sept. 8, 1960

Mr. J. L. Walls
Division Chairman
Kansas City, Mo.

Dear Sir:

Wish to advise the following information in regard to my conversation with M. E. H. Campbell, Superintendent, in his office on June 9, 1960.

On June 9, 1960, I was in the Missouri Pacific RR Superintendent's office to sign up for Railroad Retirement Unemployment benefits and Mr. Campbell, Superintendent, called me into his private office and told me that in view of the facts developed at my investigation he would have to dismiss me from service unless I wanted to make application for my annuity. I informed Mr. Campbell that I did not wish to retire and the conversation ended and I left his office.

On June 10, 1960, Mr. Campbell again talked to me over the telephone about this matter and I again informed him that I did not

wish to retire and he then informed me that he was going to dismiss me from service which he did on that date.

This is a true statement of the facts regarding my conversations with Mr. Campbell on dates indicated.

Yours truly,

R. W. Casebolt /S/
5005 Manchester
K. C. Mo."

Under date of June 10, 1960, the following letter was received by the Claimant:

"Dear Sir:

You are this date dismissed from service of the Missouri Pacific Railroad Company account your failure to protect your assignment between hours of 7:00 A. M. and 3:00 P. M., Sunday, May 29, 1960.

E. H. Campbell /S/
Superintendent"

On June 15, 1960, Division Chairman J. L. Walls wrote to Superintendent Campbell appealing the latter's decision on the following basis:

"We are appealing from the dismissal from service, decision made by you to Automobile Messenger, Mr. R. W. Casebolt as per your letter to him dated June 10, 1960, received by him on June 11, 1960, our appeal being based on the following facts involved in the case in connection with the charge made against him that he failed to protect his assignment at 7:00 A. M. May 29, 1960.

First—The investigation was held and completed on June 2, 1960, your decision as stated in above paragraph being made on June 10, 1960, which was eight days after the investigation was completed or one (1) day late of the time limits provided for in Rule 18 paragraph A of the Clerk's Current Agreement.

Second—Mr. Casebolt contends that regardless of the remark he made to Chief Yard Clerk, Mr. Zinn about being off, that he was actually sick and not able to work on May 29, 1960, and days following up to June 8, 1960. As brought out in the investigation, he contends he went to the Missouri Pacific Employees Hospital Association office on May 31, 1960 and talked to Dr. J. E. Castles about his condition who gave him an order to go see Dr. H. R. Staley, Member of the Association Staff. However, Dr. Staley was not available on that date and he did not get to see him until June 6, 1960, and on that date Dr. Staley advised him that in his opinion he would be able to return to work on June 8, 1960.

Being held from service Mr. Casebolt was unable to return to work on June 8, 1960 and in view of these circumstances and the fact that the time limits provided for in Rule 18-A of the Clerk's agreement were not complied with, it is our position that he should, as contended by him, be returned to service and paid for any wage loss sustained beginning with June 8, 1960.

Will you kindly favor us with your decision regarding this protest and claim.

Yours truly,

J. L. Walls
Division Chairman"

On June 17, 1960, Superintendent E. H. Campbell addressed the following to Mr. Walls:

"Dear Sir:

Your letter June 15 appealing the case of Mr. R. W. Casebolt who was dismissed from service of Missouri Pacific Railroad Company account his failure to protect assignment 7:00 A. M. May 29, 1960.

The investigation conducted with Mr. Casebolt on June 2 developed definitely that he failed to protect his assignment and that he did not have permission to lay off and further that his alleged illness was undoubtedly premeditated since the alleged attack developed approximately 10 hours after he had made statements to Chief Yard Clerk to the effect that he would be compelled to pretend illness if necessary in order to be relieved.

While it is a fact the actual dismissal notice was not issued until June 10, 1960, which was the 8th day following the date investigation was conducted, Mr. Casebolt was in my office on June 9 and he was verbally informed that on the basis of the facts developed in the investigation I would have no alternative but to dismiss him from service, and that my decision would be dismissal unless he might desire to make application for annuity, which in view of his advanced age would be given consideration provided he elected to take that course. He was given opportunity to give the matter consideration and was requested to inform me of his decision which was not done until the afternoon of June 10, one day following the 7 day period as set up in the current wage agreement with the BofFRC.

As we see it, the discipline assessed was proper in view of the facts developed, and we are unwilling to give consideration to your appeal for reinstatement and payment for time lost.

(Signed) E. H. Campbell
Superintendent'

A subsequent interchange of correspondence took place between the Messrs. Frank D. Lupton, General Chairman, BofFRC, and D. T. Barksdale, Assistant General Manager and between the Messrs. Lupton and B. W. Smith, Chief Personnel officer without any change or alteration in the disposition laid down by Superintendent Campbell.

DISCUSSION

The Carrier contends that the Claimant was informed verbally of his dismissal by Superintendent Campbell on June 9, 1960 and that this dismissal notice was in accord with Rule 18 (a) which reads as follows:

"An employe who has been in service more than 60 days, or whose application has been formally approved, shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending such investigation. The investigation shall be held within seven days of the date when charged with the offense or held from service. A decision will be rendered within seven days after the completion of investigation." (Emphasis supplied by Referee.)

The Carrier claims that on June 9, 1960 the Claimant had notice of his dismissal and only on the happening of a condition subsequent, namely, Claimant's applying for retirement, would Carrier change its decision.

The Carrier further contends that the facts clearly show that the Claimant intentionally laid off sick so that he could attend a family reunion; that his excuse of having a skin condition was nothing more than an afterthought when he learned that Carrier was going to charge him with failure to protect his assignment between the hours of 7:00 A. M. and 3:00 P. M., on Sunday, May 29, 1960.

On the first contention—it is difficult for this Referee to understand why Superintendent Campbell, if he considered his verbal notice of dismissal final and binding, would telephone the Claimant on June 10, 1960, and again discuss the matter of retirement with the Claimant. Isn't it proper to conclude from Mr. Campbell's action—and I might add the Carrier hasn't denied or disproved Campbell's telephone call to the Claimant on June 10th—that the Claimant had not been dismissed on June 9th?

Further evidence to support that position might be gleaned from Mr. Campbell's letter of June 10, 1960, which reads as follows:

"Dear Sir:

You are this date dismissed from service of the Missouri Pacific Railroad Company account your failure to protect your assignment between hours of 7:00 A. M. and 3:00 P. M., Sunday, May 29, 1960. (Emphasis supplied by Referee.)

E. H. Campbell /S/
Superintendent"

The above letter made no reference to a prior decision or as serving as a confirmation of yesterday's oral decision. The letter of June 10, 1960, to Claimant stated in part "You are THIS DATE DISMISSED * * *" (Emphasis supplied by Referee.) In the opinion of the Board, this represents unmistakable and irrefutable evidence that June 10, 1960 was the date of the Claimant's dismissal.

As for the Carrier's contention that the alternative choice given to the Claimant by Mr. Campbell on June 9, 1960—which in substance amounted to retire or be fired—represented a notice of dismissal, the Board avers that this is shallow or specious reasoning. A choice is not a decision—it merely represents the election of one of two possibilities.

The last sentence of the first paragraph of Rule 18 (a) clearly states "A DECISION will be rendered within seven days after the completion of investigation." (Emphasis supplied by the Referee.) The Board cannot make that sentence more explicit or definite.

This Board is also of the firm conviction that Labor Agreements are purposeful and meaningful documents and must be observed. Rule 18 (a) is a negotiated part of the current Labor Agreement, consequently, it too must be observed.

There is no doubt in the Board's mind that the Carrier failed to comply with Rule 18 (a)—because the notice of dismissal to the Claimant was not sent until the eighth day. In Award 5472 Referee stated "When the Carrier failed to make its decision within the stipulated time, it had the effect of exonerating the Claimant on charge preferred." See Awards 2590, 3697, 3736. The Board agrees with position cited in Referee Carter's Award.

Accordingly, after a careful and objective study, analysis and evaluation of the record, awards cited and presented, briefs, rules and other pertinent material, the Board rules that the Claimant must be restored to his former position, with seniority rights unimpaired, and with compensation for wage loss from June 8, 1960 on until reinstated—less, of course, any compensation received in other employment.

Obviously, in view of the above decision, it is unnecessary to consider the question of the real or feigned illness of the Claimant.

The claim must be sustained.

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

That the parties waived oral hearing;

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 the Carrier violated Rule 18 (a) of the Agreement.

AWARD

The claim must be sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 4th day of August 1961.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 10035

DOCKET NO. CL-12259

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

NAME OF CARRIER: Missouri Pacific Railroad Company.

Upon application of the representatives of the Employees involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

The Organization contends that under Award No. 10035, the Claimant, in order to be compensated properly for "wage loss incurred", must receive holiday pay at the punitive rate for Thanksgiving Day (November 24, 1960) and George Washington's Birthday (February 22, 1961). The Claimant received eight (8) hours of straight pay for each of the holidays in question.

The fact that the Claimant's replacement worked the two holidays and was paid at the punitive rate does not constitute acceptable proof that the Claimant, had he been the incumbent, would also have worked those holidays. Such a position is, at best, merely conjecture and conjecture is not a valid basis for determining premium or punitive wage payments.

Referee J. Harvey Daly, who sat with the Division, as a member, when Award No. 10035 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April 1962.