

**Award No. 12436**

**Docket No. MW-13804**

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

**George S. Ives, Referee**

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**PARTIES TO DISPUTE:**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES**

**ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement when it dismissed Truck Driver-Laborer Carl V. Young from service without just and sufficient cause.

(2) Mr. Young now be reinstated to service with seniority, vacation and all other rights unimpaired, the charges be stricken from the record and he be reimbursed for all wage loss suffered, all in accordance with the provisions of Rule 1(c) of Article 4 of the Agreement.

**OPINION OF BOARD:** On April 23, 1961, Carl V. Young, hereinafter called the Claimant, sustained a broken right foot as well as other injuries while on duty as a Truck Driver-Laborer. He was hospitalized for a period of fourteen days during which time a cast was placed on his injured leg. Thereafter, additional medical attention was required and he did not return to work until February 1, 1962.

It is mutually agreed by the parties that the Claimant requested and was granted a 90-day leave of absence based upon a letter from a physician employed by the Carrier dated May 10, 1961. On June 28, 1961, an additional leave of absence was sought by the Claimant based upon the request of his personal physician. This was granted by the Carrier and said period expired on September 20, 1961.

Thereafter, the Claimant continued his convalescence until he notified the Carrier on January 12, 1962, that he would report back to work on Thursday, February 1, 1962. He was informed at that time that he had failed to protect himself with a proper leave of absence and that he had lost his seniority rights.

A formal hearing at the request of the Organization was held on February 13, 1962, under the unjust treatment rule of the current Rules Agreement.

At the hearing, it was established that the Carrier received correspondence from the Claimant's doctor on behalf of the Claimant requesting an additional leave of absence to February 1, 1962, but that said correspondence was not received until sometime during the month of December, 1961.

The Claimant offered into evidence at the hearing copies of letters from his personal physician stating that he had sent a letter of recommendation dated November 27, 1961, to the Carrier requesting a further leave of absence to February 1, 1962, and had earlier requested an extension by letter dated September 14, 1961 to expire on December 14, 1961.

Being unaware of the request for an extension in September, Mr. C. A. Peebles, Division Engineer, addressed a letter to the Claimant dated November 24, 1961, advising him that the records of the Carrier indicated that his leave of absence had expired on September 20, 1961. He stated that the Claimant should protect his working seniority by obtaining a doctor's certificate showing approximately how many days he would still be off because of physical disability. The purpose of this letter was to permit the Carrier to "handle additional leave". Thereafter, the Claimant testified that he endeavored to protect his seniority resulting in the hereinbefore mentioned letter from his personal physician dated November 27, 1961.

The Claimant testified that he took no further action until he reported to work on February 1, 1962, assuming that the additional leave of absence had been approved.

Upon reporting back to work on February 1, 1962, the Claimant was advised that he was dismissed from the service because of his alleged failure to keep his leave of absence current during his entire period of convalescence.

The Agreement in effect between the parties to this dispute is dated April 1, 1961, and the pertinent provisions are as follows:

"ARTICLE 2, RULE 19(a)

\* \* \* \* \*

Employees given leave of absence in writing by proper authority of the railway shall retain their seniority. Employees failing to return on or before the expiration of their leave of absence will lose their seniority rights, unless an extension has been obtained."

Rule 183 of the Rules for Maintenance of Way and Structures effective March 1, 1957, reads in part, as follows:

"Leave of absence, properly approved, is required in every instance of any employe entitled to be working who is absent for thirty (30) days or more."

Rule 1(b) of Article 4 which reads:

"(b) An employe disciplined or who feels unjustly treated, shall upon making written request to the immediate superior within fifteen days from date of advice, be given a fair and impartial hearing within fifteen days thereafter and a decision will be rendered within ten days after completion of hearing. Such employe may be represented by duly accredited representative of the Brotherhood of Maintenance of Way Employes and shall have the right to have witnesses present."

Rule 1(c) of Article 4 which reads:

“(c) If the charge against the employe is not sustained, it shall be stricken from the record. If by reason of such unsustained charge, the employe has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost, while out of the service of the railway at not less than the rate of pay of position formerly held or for the difference in rate of pay earned, if in the service, less any amount earned in other employment.”

### THE ISSUE

The basic issue involved in this dispute is whether or not the Claimant was properly dismissed from service by his failure to perfect his request for an additional leave of absence on the grounds of physical disability from September 20, 1961 to February 1, 1962.

### DISCUSSION

The Claimant had established and held seniority as a Truck Driver-Laborer for twenty years prior to the instant dispute. He was injured in the course of his employment and no evidence was offered contesting the extent of his injuries nor his physical disability until the time he reported back to work on February 1, 1962.

The Carrier has taken the position that the Claimant's failure to properly perfect his request for an additional leave of absence pursuant to Article 2, Rule 19(a) automatically had the effect of terminating his seniority as of September 20, 1961. Yet, a supervisor of the Carrier under letter dated November 24, 1961, urged the Claimant to protect his seniority by obtaining a certificate from his doctor requesting a further leave of absence based upon his need for additional recuperation.

The Claimant testified that he did take such action and the undisputed fact is that his physician addressed a letter to the Carrier dated November 27, 1961, requesting a further leave of absence for the Claimant until February 1, 1962. This correspondence at least reached the Carrier sometime during the month of December, 1961. Even assuming that the Claimant had not properly protected his seniority until November 24, 1961, the action taken by a responsible official of Carrier advising the Claimant to cure any problem with respect to additional time off, constitutes a waiver of the pertinent work rules relied upon by the Carrier in its disposition of this dispute, at least until that time. Waiver constitutes the relinquishment of a known right and certainly the official of the Carrier was fully cognizant of his actions and their effect.

The Claimant further testified that earlier correspondence from his physician requesting an additional leave of absence had been addressed to the Carrier on or about September 14, 1961, and he offered without objection at the hearing, correspondence from said physician supporting his statements. Although the Carrier denied receiving such correspondence, no testimony was offered to refute the position of the Claimant. Under the circumstances of the Claimant's prolonged recuperation and the fact that two previous requests for additional leave had been granted, it must be held that the Claimant exercised due diligence.

Whether or not the Claimant was to be considered automatically out of service as of September 20, 1961, or was dismissed as a disciplinary action by the Carrier pursuant to the letter dated February 19th, is a matter which need not be resolved in that the Claimant was offered an opportunity to correct any omission on his part more than two months after the expiration of the last approved leave of absence and the fact that he then did exercise due diligence to protect his seniority.

Therefore, the Claimant was improperly dismissed from service by the Carrier and should be reinstated to service with seniority, vacation and all other rights unimpaired.

**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 Agreement was violated.

#### AWARD

Claim sustained in accordance with Opinion.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of THIRD DIVISION**

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April 1964.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 12436

Docket No. MW-13804

**NAME OF ORGANIZATION:** Brotherhood of Maintenance of Way Employees.

**NAME OF CARRIER:** St. Louis-San Francisco Railway Company.

Upon application of the representative of the employee 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 requested interpretation arises from the Carrier's position that the sustaining Award did not include a requirement for the payment of money. The Carrier asserts that the Order accompanying Award 12436 is conclusive evidence and proof that there was no requirement for the payment of money as no date for payment was named and inserted therein. The Carrier contends that Section 3, First, paragraph (o) of the Railway Labor Act, as amended, requires the inclusion of such a date in all Orders issued with sustaining Awards of the Division requiring the payment of money.

The Carrier also contends that the Board declined to sustain the monetary claim by specifically omitting the underscored portion of Item 2 of the Claim from its Award, which is as follows:

"(2) Mr. Young now be reinstated to service with seniority, vacation and all other rights unimpaired, the charges be stricken from the record and he be reimbursed for all wage loss suffered, all in accordance with the provisions of Rule 1 (c) of Article 4 of the Agreement." (Emphasis ours.)

The Carrier argues that the Board would have expressed itself in clear and concise language had it been its intention to include all of Item 2 of the Claim in its Opinion and Award.

The thrust of the Organization's application on behalf of the Claimant is that the provisions of Rule 1 (c) of Article 4 of the Agreement between the parties automatically became applicable, even though not specifically incorporated in the Opinion and Award, when the Board found and held that the Claimant was improperly dismissed from service by the Carrier. The Organization contends that it was the intention of the Board to incorporate by reference, the provisions of Rule 1 (c) under the phrase "all other rights unimpaired", which appears in the last sentence of the Opinion of the Board in Award No. 12436. In support of its position, the Organization cites the

fact that the Board included the full text of Rule 1 (c) of the Agreement in the text of the Opinion as one of the pertinent provisions involved in this dispute.

The import of the Award No. 12436 is clearly set forth in the final sentence of the **Opinion of the Board**, which is as follows:

“Therefore, the Claimant was improperly dismissed from service by the Carrier and should be reinstated to service with seniority, vacation and all other rights unimpaired.”

No mention of the monetary relief sought under Item 2 of the Claim appears in the Opinion of the Board and the Award merely provides that the claim is sustained in accordance with the Opinion. However, during consideration of the proposed Award by the Third Division, the neutral referee stated that the Award did not propose the payment of money for time lost, and this disposition is further substantiated by the fact that the Order accompanying the sustaining Award does not contain a date which would have been inserted if an award of money had been contemplated.

At the time the Opinion and Award were rendered by the Division, the relief contained therein was considered appropriate and in accordance with the facts then before the Division. Subsequent events, including the untimely and tragic death of the grievant, were not officially known to the Division and were not before it for consideration in determining an appropriate remedy.

The omission of any provision for back payment of wages for time lost, as provided for in Rule 1 (c) of Article 4, was not inadvertent as alleged by the Organization and the Award to this extent has been properly interpreted by the Carrier.

The Division has no authority under the guise of an interpretation to amend, modify or expand the scope of an Award and can only explain and interpret it in light of the circumstances that existed when the Award was rendered. Therefore, the Division cannot consider any of the specific monetary claims enumerated in the application of the Organization for an interpretation which were not before it when Award No. 12436 was issued and the Division makes no disposition of such alleged monetary claims other than back payment of wages for time lost which was initially considered and denied.

Referee George S. Ives, who sat with the Division, as a neutral member, when Award No. 12436 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 8th day of July 1965.