

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23364
Docket Number CL-22565

Dana E. Eischen, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship clerks,
 { Freight Handlers, Express and Station Employees
 { Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8568) that:

1) Carrier violated the provisions of the Clerks' Rules Agreement at Chicago, Illinois on March 23, 1977 when it improperly terminated the seniority of employee M. Dragisic and assessed the discipline of dismissal without giving him the benefit of investigation or hearing provided for in the Agreement.

2) Carrier shall be required to expunge Mr. J. C. Mander's letter of March 23, 1977 from the record and/or personal file of Mr. Dragisic; remove any and all alleged misconduct charges; and compensate him for all pay lost from March 24, 1977 to the date of his reinstatement on May 16, 1977.

OPINION OF BOARD: On March 22, 1977 and March 23, 1977, Claimant telephoned his Supervisor, to advise that he would not be in for work on those days. Claimant told Supervisor Adkins to "put him down sick." Subsequently, Claimant received the following letter dated March 23, 1977, from Mr. J. C. Manders, Manager-Accounting Administration, stating:

"Please be advised that as a result of accepting leave of absence on March 22, 1977, and again on March 23, 1977, other than as defined in the Clerks Rules Agreement, you have forfeited all seniority under Rule 23(g) of said agreement."

Claimant responded to the above in a letter addressed to his Supervisor, Mr. J. M. Conway, as follows:

"I am requesting an unjust treatment investigation under Rule 22(f) of current Clerks' Agreement.

"I am requesting the investigation because I was unjustly treated when on March 23, 1977, Mr. J. C. Manders wrote me a letter stating I took an unauthorized leave of absence and forfeited all my seniority per Rule 23(g).

"I authorize Mr. F. J. Curtin and members of the BRAC Local Protective Committee to act in my behalf. Please furnish the L.P.C. all information and/or correspondence concerning this matter, the same as you would me."

Mr. Conway then notified Claimant on March 28, 1977:

* * *

"Your request for an unjust treatment hearing under the provisions of Rule 22(f) will be held in Room 740, Union Station Building, 516 W. Jackson Blvd., Chicago, Illinois at 2:00 p.m. on Wednesday, March 30, 1977."

* * *

Following the hearing, Claimant's contention of unjust treatment was denied. This decision was appealed on behalf of Claimant by General Chairman J. R. McPherson. on May 9, 1977, Mr. v. w. Merritt, Assistant Vice President - Labor Relations sent a letter to Mr. McPherson which stated in part:

"Please be advised it is my decision that the charge of unjust treatment on the part of Mr. Dragisic was and is unsubstantiated, and is wholly without factual and/or schedule rule support; therefore, I concur with the decision rendered by Mr. Elwart.

"However, feeling that the period of time that has elapsed since Mr. Dragisic's departure from Carrier's service has had the proper effect on him, you may accept that I am, without prejudice, agreeable to reinstating Mr. Dragisic's seniority rights effective May 16, 1977, and if you are agreeable, to returning him to his former position effective that date."

The Organization and the Carrier signed a letter of understanding, agreeing that Claimant would return to his former position effective May 16, 1977 under the conditions set forth in Mr. Merritt's letter (supra). The instant claim was filed on behalf of Claimant on May 23, 1977.

Rules **from** the applicable agreement **st**issue in this case **are** the following:

Rule 22(a):

"An employee who has been in the service more than sixty (60) days, or whose application has been formally approved, shall not be disciplined or dismissed without investigation and prior thereto the employee will be notified in writing of the precise charge. Such charge will be filed with the employee within fifteen (15) days from the date the supervising officer would have knowledge of the alleged offense. At the investigation he may be represented by one or more duly accredited representatives. The employee may be held out of service pending such investigation, however, investigations will be held prior to the time employees are held from service when it is possible to do so."

Rule 22(c):

"If an appeal is taken from the investigation, it must be filed with the Assistant Vice President - labor Relations and a copy furnished the official whose decision is appealed within ten (10) days from date of receipt of advice of decision. A hearing on the appeal will be held within ten (10) days from the date of receipt of request therefor and decision rendered within ten (10) days after completion of the hearing on appeal. Copy of evidence taken in writing at the investigation or hearing on appeal will be furnished to the employee and his representative on request."

Rule 23(g):

"Employees accepting leave of absence other than as defined in these rules shall forfeit all seniority."

We find the issues and circumstances of the present case to be virtually on all fours with those in our previous Award 22479 (Third Division), involving these same parties. In that award, Referee Carter states:

"The Petitioner contends that the Carrier's action was in violation of Rule 22(a) of the Agreement, in that claimant was removed from the service without the benefits of an investigation under that rule."

"It is the Carrier's position that the language of Rule 23(g) is unambiguous, the rule is self-executing, and is the controlling rule.

"The question to be resolved is whether, under the circumstances that existed, Rule 23(g) was applicable."

* * *

"It is well settled that language used in an agreement must be given its ordinary and customary meaning, unless some other intent is clearly indicated. The commonly accepted meaning of the term "leave of absence" is absence with permission. The work "accepting" ordinarily and customarily means taking or receiving something that is offered. The failure of claimant to protect his assignment on September 2, 1976, especially after being instructed to do so by his superior officer, cannot properly be construed as "accepting leave of absence other than as defined in these rules," as referred to in Rule 23(g). It follows, therefore, that it is our considered opinion that Rule 23(g) was not applicable. We would agree with the contention that the provisions of rule 23(g) would be self-executing if the rule were applicable."

* * *

Further, by restoring Claimant to his position with seniority rights, Carrier implicitly defines its action as a disciplinary suspension. Carrier's action, therefore, comes under the aegis of Rule 22(a) of the Agreement. We find that Carrier did violate Rule 22(a) of the Agreement by not affording Claimant a hearing prior to his discipline. Accordingly, we sustain part one of this claim. Part two of the claim is sustained except to the extent it departs from the provisions of Rule 22(e) of the Agreement (supra). Claimant "shall be reinstated and paid for all time lost less any amount earned in other employment."

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

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

That the Agreement was violated.

A W A R D

Claim is sustained to the extent set forth in the above Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

A. W. Paulos


ATTEST: _____
Executive Secretary

Dated at Chicago, Illinois, this 28th day of August 1981.

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT IN
AWARD 23364, DOCKET CL-22565
(REFEREE EISCHEN)

The gist **of** the decision in Award 23364, as in 22479. is that Rule 22(a) and not Rule 23(g) was the proper rule **to govern** the **circumstances**. Whether the "without prejudice" settlement affected the Referee's decision is immaterial for, since Rule 23(g) is not applicable then, of course, all the "without prejudice" settlement did was lessen Carrier's liability.

If the one sentence Carrier Members complain of were deleted, the Award would still be entirely **correct**, and if the Dissenters are truly interested in good labor **reia-**tions, they should bear in mind that the time to eliminate such "**objectionable**" language is before the adoption of an Award.

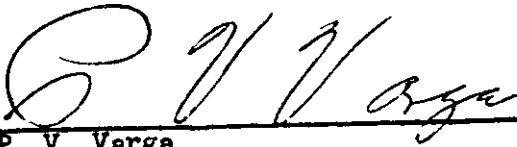

J. C. Fletcher
Labor Member

10-7-81

CARRIER MEMBERS' DISSENT
TO
AWARD 23364, (DOCKET CL-22565)
(REFEREE EISCHEN)

It was pointed out in **this** case that Claimant was terminated through the **self-executing provision** of Rule 23(g). However, while this **Board** has concluded that the Discipline Rule should have been **followed**, **it** errs **when** it **determines** by **implication** that Carrier's restoration of **Claimant** substantiates Its "action as a **disciplinary** suspension". It has always been the right of **the parties** during the appellate process to amend **and** to **modify** actions taken.

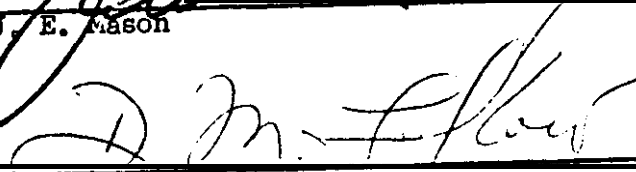
That is the **purpose** for subsequent levels of **appeal and** is inherent to good labor relations. Where no modification **is** permitted there **is** no effective processing of the dispute **toward** resolution. The **re-employment** of the Claimant was without prejudice, and as such, should have had **no** bearing on the Majority's review of the merits of this dispute. **The rationale** expressed in the last paragraph of the **Opinion** is a disservice to the **parties** when such defines by implication that resolution made on **some** middle ground, and without prejudice, is to be used to convict. The only **logical** outcome of such a process is the frustration and **abandonment** of the appellate **review** process. With that proposition we can **not agree**.


P. V. Varga


W. F. Euker


J. R. O'Connell


J. E. Mason


D. M. Lefkowitz

