NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23409
THIRD DIVISION Docket Number CL-23447

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (9284) that:

1. The Company violated the Rules Agreement effective June 1, 1975, particularly Rules 43, 45 and 53, when it arbitrarily and unilaterally "dismissed" Ms. Sharon K. Harris from service while on extended medical leave of absence.

2. Claimant should be reinstated to service immediately and allowed compensation of $1,210.11 per month, commencing December 8, 1978, and continuing each and every month thereafter. In addition, she should be reinstated with all rights unimpaired, i.e. Retroactive pay and COLA allowances, Health & Welfare coverages, Vacation, Sick Allowance, et cetera, and an amount equal to all overtime she would have been entitled to work, subject to a check of Carrier's records, had she been allowed to resume work upon being released by her physician on December 8, 1978.

OPINION OF BOARD: Before discussing the merits of the dispute, we feel compelled to again point out the well-established principle that this Board, being an appellate tribunal, may only consider the issues and defenses raised by the parties in the usual manner of handling of disputes on the property, and that new issues and new defenses may not be raised for the first time before the Board.

The record shows that claimant was assigned to the position of Guaranteed Extra Board Clerk, Zone 2, at the Kansas City Freight Station, Kansas City, Missouri, with a seniority date of October 11, 1968. The Organization states that during the calendar year 1978, claimant was under the care and treatment of several staff physicians of the Union Pacific Railroad Employes' Hospital Association, and her illness was diagnosed as "Severe Nervous Depression."

Rule 43 - Leave of Absence, of the applicable agreement in effect at the time, read:

> "(a) Employes shall be granted leave of absence when they can be spared without interference to the service, but not to exceed ninety (90) days in a calendar year, except in cases of sickness, physical disability of the employe, Organization work, service with railroad bureaus, Interstate Commerce Commission, or holding public office or by agreement between the supervising officer and Local Chairman.

"(b) Acceptance of other employment while on leave of absence other than as provided in Section (a) of this rule, without the approval of Local Chairman and supervising officer, shall terminate an employe's service and seniority.

"(c) All leaves of absence in excess of ten (10) working days must be in writing and copies shall be furnished Local and Division Chairmen. Leaves of absence of ten (10) days or less may be required in writing.

"(d) An employe desiring to return from leave of absence before the expiration thereof must give at least thirty-six (36) hours advance notice before making displacement.

"(e) After an employe has been on leave of absence for a period of one year, the position vacated and previously held by such employe shall be bulletined as a permanent vacancy pursuant to Rule 11 of this Agreement, in lieu of temporary.

"(f) Failure to report for duty at the expiration of leave of absence shall terminate an employe's service and seniority unless a reasonable excuse for such failure is furnished not later than ten (10) days after expiration of leave of absence.

"(g-1) An employe voluntarily leaving the service, or who has been absent from duty, except in case of illness or other physical disability, without proper leave of absence, which must be in writing if in excess of ten (10) working days, shall terminate service and seniority rights.

"(g-2) An employe whose service and seniority rights have been terminated in accordance with the provisions of this rule or who has been dismissed, may be reinstated by the Company under the provisions of and subject to Section (j) or Rule 45.

"(g-3) Employes whose service and seniority rights are terminated under this Section (g) shall be granted a hearing provided request therefor is made in writing by the employee or their representative to the supervising officer within thirty (30) days from date service and seniority rights are terminated. Notice of such termination shall be given in writing and the thirty (day) period shall commence upon receipt of such notice.

"(H) The termination provisions of this rule shall not apply to an employe who has returned to active service for a period of ten (10) days or more."

It will be noted that exceptions are made in some sections of the rule concerning cases of sickness or physical disability. See Sections (a) and (g-1) of the rule.

The Organization contends that claimant was granted a medical leave of absence under the above rule on June 2, 1978, to expire on July 4, 1978, which was extended upon the recommendation of her attending physician until August 5, 1978, and was subsequently extended for thirty day periods on advice of her attending physician until November 8, 1978. According to the Organization, on October 19, 1978, while on medical leave to expire November 8, 1978, claimant contacted her physician, Dr. Cesar V. Menez for further medical leave; that Dr. Menez recommended a further leave until December 11, 1978; he contacted the Union Pacific Railroad Employe's Hospital Association at Kansas City, advising that his client was still "severely depressed," and asked that claimant's leave of absence again be extended. On October 24, 1978, claimant again contacted Dr. Menez if he had taken measures to have her medical leave extended. Claimant was advised by Dr. Menez that he had contacted Mrs. Ruth Weil, the Association Secretary and she assured Dr. Menez that "she would take care of everything." Dr. Menez later confirmed his part in the transaction in letter addressed "To Whom it May Concern," dated December 20, 1978, reading:

"December 20, 1978

Re: Sharon Harris

To Whom It May Concern:

On October 19, 1978 I conferred with Ruth Weil, by telephone, concerning the status of Mrs. Sharon Harris. I told Ruth at the time that I felt that Mrs. Harris was still severely depressed and asked that she extend Mrs. Harris' leave. Ruth confirmed that she would do this and that she would take care of everything.

Mrs. Harris visited me the following week on October 24th and asked if I had contacted Ruth Weil. I told her I had and that Ruth assured me she would take care of everything.

If you should have any questions regarding this please do not hesitate to contact me.

Sincerely
(sgd) Cesar V. Menez M.D.
Cesar V. Menez M.D.

Claimant did not report for work November 9, 1978, assuming that arrangements had been made to extend her medical leave until December 8, 1978.

On December 8, 1978, claimant attempted to return to work, with a release from another doctor of the Hospital Association, Dr. Masucci, dated the same day stating that claimant had been on medical leave of absence from June 6, 1978, until December 11, 1978, and "released still under treatment." It is interesting to note that this Form 5 of the Hospital Association contains in parentheses "(To be given to the employe who will present it to his employer)." When claimant reported on December 8, 1978, the Carrier's agent contended that he had notified her on December 6, 1978:

> "Relative to your Form 163, Request for Leave of Absence, covering the period October 8 through November 8, 1978, inclusive.
>
> "As you have failed to comply with Rule 43(f) of the Agreement, which reads: 'Failure to report for duty at the expiration of leave of absence shall terminate an employe's service and seniority, unless a reasonable excuse for such failure is furnished not later than ten (10) days after expiration of leave of absence,' your seniority rights are hereby forfeited and you are dismissed from service."

The record also contains a note from the doctor who signed the Form 5, of the Hospital Association, heretofore referred to:

> "12/11/78
>
> "To Whom It May Concern:
>
> Sharon K. Harris has been off work because of 'depression.' She was under the care of Dr. Menez.
>
> There was a breakdown in communication for her continued leave of absence. It is my opinion that this leave of absence is necessary.
>
> Sincerely yours
>
> J. M. Masucci M.D."

On December 28, 1978, Mrs. Ruth Weil, the Secretary of the Hospital Association in Kansas City, wrote to Agent J. W. Blanchard:

> "Re: Mrs. Sharon Harris.
>
> With reference to the leave of absence for Mrs. Sharon Harris. When I am instructed to write a leave of absence for any employe I do it immediately and place it in the Company Mail, directed to the proper department.

"My thinking is that this was lost, somewhere between this office and your office."

The Organization denies that claimant received the letter of December 6, 1978, from Agent Blanchard.

On December 28, 1978, the Local Chairman of the Organization wrote Agent Blanchard, requesting a hearing for claimant in connection with her dismissal, which request was denied on the basis claimant was terminated under Rule 43(f).

The Local Chairman, on January 24, 1979, filed with agent Blanchard a monetary claim in claimant's behalf. The agent replied:

"Claim is hereby declined as Mrs. Harris is no longer an employee of this Company."

On March 23, 1979, the Carrier's Appeals Officer, advised the General Chairman that a "fact-finding discussion" had been scheduled for 10:00 A.M., March 28, 1979, in the Kansas Division Superintendent's Conference Room. No transcript of the "fact-finding" discussion was made.

The Board notes that in a letter to Carrier's highest designated appeals officer, dated May 1, 1979, the General Chairman stated:

"From June 6, 1978, when claimant obtained her initial leave of absence, the Carrier was aware that she was suffering from 'severe mental depression.' On October 19, 1978, Doctor Cesar V. Menez advised that he felt claimant 'was still severely depressed' and was in no condition to return to service. He advised claimant at that time that he was taking steps to have her leave of absence extended. At that time Doctor Menez was on the staff of the Union Pacific Hospital Association.

On October 24, 1978, claimant once more visited Doctor Menez and again inquired if he had taken steps to extend her leave of absence. In letter dated October 20, 1978, Doctor Menez advises that he had made contact with Ruth Weil, the Hospital Association Secretary, and she assured the doctor that everything would be taken care of. Consequently, Claimant after having been assured by a Union Pacific Hospital Association Doctor that her leave had been extended took no further action. The usual and customary practice at Kansas City and other locations is for the Hospital Association staff to make the necessary preparations for sick leaves or the extensions of same.

"During the so-called 'fact finding discussion' at Kansas City on March 28, 1979, you made the bald assertion that the Union Pacific Railroad Company is not affiliated with the Union Pacific Hospital Association and therefore, the Doctors and staff of that Organization cannot grant or extend leaves of absences for employes of the Carrier. Such a self-serving erroneous statement cannot go unchallenged by the Organization."

We do not find where such contention by the General Chairman was rebutted or refuted in subsequent handling on the property. It appears that claimant's requests for extensions to her leave of absence were handled in this manner.

In a subsequent letter of May 23, 1979, the General Chairman cited a number of cases of leaves of absence that were handled differently than the present case.

Based upon our study of the entire record, the Board is forced to the conclusion that the Carrier acted in a hasty and arbitrary manner in terminating the claimant in the manner in which it did, especially considering the letters of Dr. Menez and Dr. Masucci. We will sustain the claim for reinstatement with former seniority and other rights unimpaired, and with pay for time lost, computed in accordance with Rule 45(c). The Board takes note of the fact that during the period that claimant was out of the service she gave birth to a son. The Carrier will not be required to make any payment to claimant for two months prior to and one month subsequent to the date of birth. The Organization has submitted no agreement support for the claim for Hospital and Welfare Coverage, and that portion of the claim is denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

A W A R D

Claim sustained to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 3rd day of November 1981.

CARRIER MEMBERS' DISSENT
TO
AWARD NO. 23409, DOCKET CL-23447
(REFEREE CARTER)

The Carrier Members believe one of the fundamental rights of due process to which every party before the National Railroad Adjustment Board is entitled is the obligation of the Majority to address the merits of each of the arguments raised by the Carrier.

In Award No. 23409, the Majority did not meet this obligation. The Opinion of Board fails to address the merits of any of the substantial arguments raised by the Carrier.

In its initial submission to the Board, the Carrier set forth its position:

> "I. The Carrier has never treated this case as a Rule 45 discipline case -- the case involves a termination of seniority under Rule 45(f)."
>
> "II. Rule 43(f) is an agreed-upon rule and contains a clear mandate than an employe who fails to report at the expiration of a leave of absence terminates service and seniority."
>
> "III. It is the employe's responsibility to ensure that a request for a leave of absence has been made to and then approved by a proper official of the Carrier."
>
> "IV. The Carrier has neither inconsistently nor discriminatorily applied Rule 43(f)."

A reading of the Opinion Of Board will reveal not one reference to any of these arguments. In fact, a reader might conclude the Majority used only the Employe's Submissions in preparing the Opinion Of Board. Such references as "The Organization states" (page 1), "The Organization contends" (page 3), "According to the Organization" (page 3), "The Organization denies" (page 5), "the General Chairman stated" (page 5) and "the General Chairman cited" (page 6) stand as strong testimony that only only party's submission was considered.

It is the position of the Carrier Members that this gross denial of due process to the Carrier by the Majority renders Award No. 23409 a nullity.

In addition, the Majority denied the Carrier two additional due process rights -- the right to know the basis for the decision and the right to know which of the Carrier's arguments were rejected on the grounds of the "new evidence" rule.

Surely no one will acknowledge that the single phrase "Based upon our study of the entire record" constitutes a sound and meaningful basis for the Majority's decision. The Carrier is entitled to know the specific reasons for the Board's decisions.

Likewise, no one will acknowledge that all the Carrier's substantial arguments would rightfully be rejected because of the "new evidence" rule. Yet the Board's introductory paragraph plus its wrongful refusal to address any of the Carrier's arguments leads to that conclusion. However, because of the Majority's failure to list any rejected arguments and explain the reasons for rejection, the Carrier is unable to adequately refute the Majority's actions.

It is the position of the Carrier Members that these additional denials of due process by the Majority further reveal the folly of the Award No. 23409.

The Carrier Members will give the Majority its due -- there is one example in the Opinion Of Board when the relevant facts are discussed. However, the Majority's reasoning in that situation is faulty. The situation in question involves the issue of uncontroverted evidence and the Majority's finding that the Carrier failed to rebut the Employe's contention.

On page 6 the Board quotes the following passage (naturally from the General Chairman's letter):

> "...you made the bald assertion that the Union Pacific Railroad Company is not affiliated with the Union Pacific Hospital Association and therefore, the Doctors and staff of that Organization cannot grant or extend leaves of absences for employes of the Carrier..."

The Majority then says:

> "We do not find where such contention by the General Chairman was rebutted or refuted in subsequent handling on the property."

It is the Carrier Members' position that the original contention was made by the Carrier and the General Chairman then answered that contention. That surely should be sufficient. The only question then is which of the two arguments is more persuasive, the Carrier's or that of the Organization.

Finally, the Carrier Members protest the actions of the Majority which attempt to saddle the Carrier with potential liability of the mistakes of others not under the Carrier's control. The Majority accepts the following precedure:

> "The usual and customary practice at Kansas City and other locations is for the Hospital Association staff to make the necessary preparations for sick leaves or the extensions of same."

The Carrier denies, as it did at the "fact-finding discussion" and in its submissions, that this is an accepted procedure. Nevertheless, in light of the Majority's decision, it must be the Carrier's position that the Union Pacific Employes' Hospital Association is equally responsible for the failure of the Claimant to receive an extension of her leave of absence.

For all the foregoing reasons, we dissent:

J. R. O'CONNELL

W. F. EUKER

D. M. LEFKOW

J. E. MASON

P. V. VARGA

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 23409, DOCKET CL-23447
(REFEREE PAUL C. CARTER)

Carrier Members' Dissent in this case, wherein they grossly mistreated Claimant and with malice denied her those fundamental due process rights they now cry were not accorded the Carrier, reminds one of Samuel Johnson's remark about Rousseau: "a man who speaks nonsense so well must know he is talking nonsense." I suspect that each and every Carrier Member that signed the Dissent, i.e., the Minority in this case, would, with further soul searching, admit that the Dissent is nonsense.

The Dissent, with simplistic reasoning, attempts to convey the illusion of misconduct on the part of the Majority alleging a failure to consider any of the arguments raised by the Carrier. It cannot be denied that the Carrier had full opportunity to present and argue its case. The written record was quite extensive. Moreover, the Carrier requested and received the opportunity to appear before the Referee and argue its own case. At this hearing, which lasted an hour and twenty minutes, and was not concluded until all parties affirmatively indicated that they had presented all of their evidence, and had made all of the arguments they wished to make on their behalf, the Carrier had full and complete opportunity to be persuasive. They were not, and this failure rests with the simple fact that the Carrier was

wrong in refusing to allow Sharon K. Harris to return to work on December 8, 1978, and nothing said or done could now justify such wrongful conduct. That Carrier was not persuasive, however, is not license to accuse others of misfeasance or malfeasance.

Since December 8, 1978, the Carrier had ample opportunity to correct the basic error. The Carrier elected not to do so. That was their election, and their's alone. And now when this Board orders such correction, the Carrier whines about, "potential liability", and attempts to suggest that "mistakes of others" are part of the problem. Carrier's attitude, as manifest by the Dissent, in suggesting that the Union Pacific Employes' Hospital Association be held "equally responsible", is ludicrous! It was not the Hospital Association that refused to allow Mrs. Harris to work her own job on and after December 8, 1978 - it was the Carrier! It was not the Hospital Association that "stonewalled" Mrs. Harris at each and every step of the appeal process - it was the Carrier! Attempts to now shift the blame to the Hospital Association seem childlike.

Notwithstanding that which is written in the Dissent, the Award is sound. The Majority found and held that Claimant Harris was improperly denied the right to return to work on December 8, 1978, and fashioned an appropriate remedy. The Dissent does not change this.

J. C. Fletcher

12-21-81