Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27797
THIRD DIVISION Docket No. CL-27540
89-3-87-3-198

The Third Division consisted of the regular members and in addition Referee Mary H. Kearney when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10162) that:

1. Carrier violated the Agreement between the parties when, by letter dated April 16, 1985, Superintendent C. J. Wehrmeister advised Clerk W. L. Jamerson that she was considered out of service and had automatically forfeited all her seniority, without just cause or reason.

In support of this claim, we cite Rules 17, 27 and 65 among others of the Master Clerical Agreement dated April 1, 1973.

2. As a result of the aforegoing violation Carrier shall now be required to compensate Clerk W. L. Jamerson with eight (8) hours pay at the pro rata rate of Extra Board 4-NT, located at Norfolk Terminal, Norfolk, Virginia for April 16, 1985, and continuing until claimant is returned to service."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Among other issues, this case involves a dispute over what was established as fact on the property. The weight of the record discloses the facts to be as follows:

Claimant was furloughed on May 31, 1982. On March 25, 1985, Carrier's Norfolk Terminal Superintendent sent Claimant a notice assigning her to a position at Norfolk and stating further:

> "This notice is given pursuant to Rule 20(f), and you should arrange to report within the period specified in the above mentioned rule."

Rule 20(f) provides in relevant part:

> "Furloughed employee recalled to regular positions must return to the service within ten calendar days after being notified ...or give satisfactory reason for not doing so."

Claimant received the notice on March 27, 1985, and under the above-specified time limit, had until April 6, 1985, to appropriately respond.

The day before Claimant received the notice she was advised by her doctor to have surgery on her right wrist which she had previously injured in a motorcycle accident. The doctor diagnosed Claimant's condition as "typical carpal tunnel syndrome," and asked the Claimant to respond to his recommendation for surgery within two weeks.

While on furlough the Claimant had worked on an entry-level job at Westvaco, Milk Carton Division. On Thursday, April 4, 1985, the Claimant informed her Westvaco Supervisor that she would have to leave work early the next day for a doctor's appointment. Also on April 4, 1985, Claimant's brother-in-law a former Assistant Superintendent with the Carrier, contacted the Chief Clerk to the Superintendent concerning Claimant's recall notice.

During the discussion which ensued the Carrier learned that the Claimant's doctor had recommended surgery on her wrist. It was also established that the office would be closed on April 5, 1985, in observance of the Good Friday holiday and, therefore, the Claimant would not be able to deliver to the Carrier a doctor's note on that day as she had planned to do. At some stage in the discussion the Chief Clerk suggested that the Claimant call in and mark up for work and then mark off sick. However, the Chief Clerk suggested this without knowing that the Claimant was scheduled to work at Westvaco the next day for part of a shift, since Claimant's brother-in-law failed to state this fact.

Sometime on April 4, 1985, the Claimant visited her doctor's office and obtained a note from a member of his staff indicating that she was under doctor's care and unable to report to Norfolk. The substance of the note is in accord with the doctor's records chronicling his treatment of Claimant.

At approximately 9:35 PM, April 4, 1985, the Claimant called the Norfolk Crew Office and marked up and then immediately marked off sick.

On April 5, 1985, Claimant worked at Westvaco from 7 AM to 10 AM, and then left. On her next scheduled workday, April 9, 1985, she reported to the Administrative Manager with a doctor's note dated April 8, 1985, stating that Claimant was under his care and may have to have surgery on her wrist in the ensuing months. Claimant informed the Westvaco Manager she was unable to work and did not return.

On April 16, 1985, the Carrier sent Claimant a letter which read in part:

> "This to advise the Railway Company has documented evidence that your are currently employed by WESTVACO... and you performed service for this company on April 5, 1985, while marked off sick form the Railway Company.
>
> Rule 17(g) of the Master Agreement provides:
>
> 'An employee absent on leave, or absent account of personal sickness or disability, who engages in outside employment without written agreement between Management and the General Chairman will be considered out of service and automatically forfeits all seniority.'
>
> Since no written agreement was made between the Carrier and the General Chairman to permit you to engage in outside employment during the period of time you have been absent account personal sickness or disability, you have forfeited all seniority."

On April 26, 1985, the Claimant underwent surgery.

The record convincingly shows that the contact the Claimant made with the Carrier was for the exclusive purpose of protecting her seniority pursuant to the requirements of Rule 20(f). Under Rule 20(f) the Claimant had until April 6, 1985, to return to work or give satisfactory reason why she could not do so. Within this time frame, on April 4, 1985, the Claimant contacted the Carrier indicating she could not return to work due to health reasons.

The Carrier contends that the Claimant's reason for not returning to service was unsatisfactory. In Third Division Award 19834 it was established that where a dispute arises over such a determination by the Carrier the Board will test the reason asserted by the Claimant.

After carefully weighing all the relevant factors the Board concludes that the reason Claimant gave for not returning to work from furlough status was satisfactory. The record shows that the Claimant's condition was diagnosed the day before she received the notice to return to work. Within the two weeks her doctor gave her to respond to his recommendation for surgery the Claimant informed the Carrier and her outside employer that she could not continue to work due to her physical condition. Central to the Board's determination is the fact that the Claimant left her job at Westvaco within hours after informing the Carrier of her condition and, subsequently, did not return to that job. Further, the evidence fails to demonstrate that the Claimant intentionally concealed her employment at Westvaco from the Carrier. Since the Claimant could have marked up and then off on April 5, 1985, (after she left her Westvaco employment) and still have satisfied the time requirements

of Rule 20(f), it was clearly to her advantage to have informed the Chief Clerk on April 4, 1985, that she was scheduled to work the next day. Finally, the record reveals that on April 26, 1985, the Claimant did in fact undergo surgery.

Concerning the question of whether Rule 17(g) properly applies to the instant case the Board finds Third Division Award 17072 analogous. In that decision the Board held that since the Claimant engaged in outside employment while he was absent on vacation, as opposed to absent account of personal sickness or disability, he had not automatically removed himself from service under the self-invoking provision of Rule 17(g). In comparison, the Claimant herein remained absent on furlough. Since the language of Rule 17(g) specifically refers to employes absent account of personal sickness or disability and not to employes absent on furlough, Claimant cannot be determined to have automatically removed herself under that rule.

In light of the foregoing, the Carrier shall restore the Claimant's name to the appropriate Seniority Roster as of the date she was removed from that roster and her seniority rights shall be unimpaired. Further, Claimant shall be compensated for all wages lost to which she would have been entitled based on her fitness, ability and seniority.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.

Serial No. 340

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 27797

DOCKET NO. CL-27540

NAME OF ORGANIZATION: Transportation Communications International Union

NAME OF CARRIER: Norfolk and Western Railway Company

The following constitutes the Board's findings with respect to the Transportation-Communications International Union's request for an Interpretation of Award 27797, Docket CL-27540.

Carrier, in computing the amount of wage loss to be paid Claimant pursuant to the Board's ruling in Award 27797, deducted compensation Claimant had received from other employment. In so doing, Carrier followed Rule 27, paragraph "d" of the Master Clerical Agreement which provides:

> "If the charge against the employe is not sustained, his record shall be cleared of it. If dismissed or suspended, on account of unsustained charge, the employe will be reinstated and compensated for wage loss, if any, suffered by him, less compensation received from other employment."
>
> (Underscoring added)

The Board concludes that the Carrier's action does not conflict with its ruling in the subject Award.

It was the intent of the Board that Claimant be made whole for wage losses she incurred pursuant to her Claim. Payment to Claimant for wages she would have earned with the Carrier and additionally for wages she did in fact earn with another employer would go beyond what the Board considers just compensation under the circumstances.

The Board further notes that in its original Submission to the Board, the Organization relied on Rule 27 as a basis for its position, and it cited the Rule in total. Moreover, Rule 27 had been advanced by the Organization as part of its Claim on behalf of Claimant from the inception of same. In light of this and the above, the Board finds that the Carrier's reliance on Rule 27 in computing Claimant's compensation was neither untimely nor otherwise improper. Accordingly, the Board concludes that the Carrier has fully complied with its ruling in Award 27797.

Referee Mary H. Kearney sat with the Division as a Member when Award 27797 was rendered, and also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1991.

CARRIER MEMBER'S DISSENT TO

AWARD NO. 27797, DOCKET NO. CL-27540

(Referee Kearney)

This claim was presented on behalf of a clerk who was terminated for engaging in outside employment without written agreement between Carrier and the Organization while marked off sick.

In sustaining this claim, the majority has totally miscomprehended the facts and the Master Agreement.

The pertinent rules involved in this case read as follows:

Rule 20 - Reduction in Force

> (f) Furloughed employes recalled to regular positions must return to the service within ten calendar days after being notified (by mail or telegram sent to the last address on file with the Carrier officer and the Local Chairman) or give satisfactory reason for not doing so. Furloughed employes failing to comply with the provisions of this paragraph will forfeit all seniority rights in the seniority district to which recalled.

Rule 17 - Leave of absence

> (g) An employe absent on leave, or absent account of personal sickness or disability, who engages in outside employment without written agreement between Management and the General Chairman will be considered out of the service and automatically forfeits all seniority.

From May 31, 1982 to March 25, 1985, Claimant was in a furlough status. During furlough she worked for a milk carton plant. On March 25, 1985, she was assigned to a guaranteed extra board position. Under Rule 20(f), supra, she had until April 6, 1985 to accept recall and return to service or to

give satisfactory reason for not doing so. On April 4, 1985, Claimant accepted recall, marked up for service and immediately marked off sick to have surgery. The following day she worked for the milk carton plant. The next Monday she informed her supervisor at the milk carton plant that she would be off work for surgery. Carrier learned Claimant was employed by the milk carton plant while marked off sick and notified Claimant she had forfeited all seniority under Rule 17(g), supra.

On Page 3, the Board states:

> The record convincingly shows that the contact the Claimant made with the Carrier was for the exclusive purpose of protecting her seniority pursuant to the requirements of Rule 20(f). Under Rule 20(f) the Claimant had until April 6, 1985 to return to work or give satisfactory reason why she could not do so. Within this time frame, on April 4, 1985, the Claimant contacted the Carrier indicating she could not return to work due to health reasons.
>
> The Carrier contends that the Claimant's reason for not returning to service was unsatisfactory.
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> * * *
>
> After carefully weighing all the relevant factors the Board concludes that the reason Claimant gave for not returning to work from furlough status was satisfactory.

The majority ignored Carrier's position in this matter and based its decision on its own hypotheses. At no time in the handling on the property or in oral argument before this Board did Carrier make such an argument. Carrier never implied Claimant forfeited her seniority because she failed to give satisfactory reason for not returning to service from furlough

status.

The reason Carrier terminated Claimant was because she was employed elsewhere when off because of sickness.

Moreover, the majority clearly engaged in speculation and as such, violated the guidelines set forth in Circular No. 1 when it stated that "since the Claimant could have marked up... on April 5, 1985... " [emphasis added], when the record clearly reveals that Claimant actually marked up on April 4, 1985. Plus, the majority admitted that Claimant was simultaneously employed by the Carrier and Westvaco when it stated "... Claimant informed the Carrier and her outside employer that she could not continue to work... " [underscoring added], which clearly supports the Carrier's position.

In applying Rule 20(f), supra, it is easily determined that Claimant complied with the rule when she marked up for work on April 4, 1985, and became the regular incumbent of the extra board job. When she marked off sick, she held a job and was absent on sick leave. She was no longer furloughed. The findings of the majority that she remained a furloughed employee are in direct conflict with Rule 20(f) and this Board's prior decisions. In Award 19544, this Board correctly held that:

> When the junior furloughed employe assumed said Steno-Clerk positions she, for all intents and purposes, became the regular incumbent of that position and a part of the regular work force. She was not, therefore, on date of claim in a furloughed status.

Secondly, Carrier never challenged Claimant's need to mark off sick for surgery. Thus, there is no factual basis whatever to support the conclusion that Claimant gave satisfactory reason for not returning to work from furlough status and was improperly terminated by Carrier.

The majority's findings on Page 4 that:

> Concerning the question of whether Rule 17(g) properly applies to the instant case the Board finds Third Division Award 17072 analogous. In that decision the Board held that since the Claimant engaged in outside employment while he was absent on vacation, as opposed to absent account of personal sickness or disability, he had not automatically removed himself from service under the self-invoking provision of Rule 17(g). In comparison, the Claimant herein remained absent on furlough. Since the language of Rule 17(g) specifically refers to employes absent account of personal sickness or disability and not to employes absent on furlough, Claimant cannot be determined to have automatically removed herself under that rule.

defy comprehension. No logic supports the majority's reliance on Award 17072 that Rule 17(g) is not controlling in this case. Either the majority did not read the Opinion very carefully, or cannot understand plain language. In that case the Board specifically stated that when the Claimant requested and received permission to be on vacation he was no longer absent account of personal sickness or disability when he engaged in outside employment. In finding Award 17072 analogous, the majority should have found that when the Claimant in the instant case marked up for work and then

marked off sick, she was off on sick leave, not furloughed, and subject to Rule 17(g). The findings of the majority in this award and Award 17072 are in direct conflict; Award 17072 does not give justification to the decision reached in this award.

The majority has wrongfully expanded Rule 20(f) to cover employees after they have accepted recall and marked up for service. The conclusion is inescapable that the majority has exceeded its jurisdiction and we do not accept or recognize this award as precedent setting.

The issue before this Board was very straight forward: did claimant mark off sick and did she subsequently work elsewhere while still marked off sick from her position with Carrier in violation of Rule 17(g) of the Master Agreement? The proper answer is "Yes" and the claim should have been denied. Because of the gross error of these findings, the award must be treated as an aberration and, therefore, fully lacking precedent value.

James E. Yost

C V Vaze

M W Fingerhut

Michael C. Lesnik

Robert L Heiles

LABOR MEMBER'S RESPONSE TO

AWARD NO. 27797, DOCKET NO. CL-27540

(REFEREE KEARNEY)

Suffice it is to say that the Minority Dissent does not detract from the sound reasoning of Award No. 27797.

In the dispute at bar the Carrier simply attempted to remove Claimant from the Seniority List and Payroll on fallacious grounds. The Majority correctly saw through such and properly reinstated Claimant with seniority rights unimpaired and compensation for all monies lost.

Contrary to the Minority Dissent Award 27797 is correct and is precedential.

William R. Miller

Willaim R. Miller

Date April 20, 1989

Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27798
THIRD DIVISION Docket No. MW-27599
89-3-87-3-28

The Third Division consisted of the regular members and in addition Referee Mary H. Kearney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company

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

(1) The one hundred and twenty (120) days of suspension imposed upon Section Foreman D. G. Stone for alleged violation of Rules A, J, 406 and 1420 was excessive and an abuse of the Carrier's discretion (System File D-52/013-210-S).

(2) Section Foreman D. G. Stone shall be allowed the remedy prescribed in Rule 48(h)."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was hired by the Carrier on June 3, 1975. On August 23, 1985, while holding the position of section foreman, Claimant was assigned to Section 6163 at Murtaugh, Idaho. At approximately 9:00 AM, the Train Dispatcher issued Claimant track warrant Number 732 and gave Claimant line 9 of the warrant for Extra 3697. The Claimant correctly repeated to the Dispatcher track line 9. Line 9 prohibited Claimant's motor car from being on the track until Extra 3697 had passed.

Claimant, however, was distracted during his discussion with the Train Dispatcher and misunderstood the communication. Consequently, Extra 3697 and Claimant's motor car collided. Claimant and his three crew members jumped from the motor car immediately prior to impact. No personal injury was incurred, but the motor car was demolished.

The only issues before the Board are procedural in nature. First, [illegible] the Organization's contention that the safety [illegible] was a serious violation as is contemplated under the [illegible]. Second, the record reveals no indication that Claimant's rights were prejudiced by the hearing officer's comment [illegible] and application to the subject facts. Finally, the [illegible] is upon [illegible] to conclude that the Carrier's assessment of a [illegible] to the Claimant was excessive or otherwise inappropriate.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Nancy J. Dever Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1989.