

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY**

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers, Atchison, Topeka & Santa Fe Railway Company, that (a) the carrier improperly removed each, J. S. McCary, W. D. Smiley and G. E. Nachand from service because of their illnesses, and (b) the employment relation of each, McCary, Smiley and Nachand be restored and leaves of absence extended for the duration of said illnesses.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of December 1, 1938 as to rules and rates of pay exists between the parties to this dispute; copies thereof are on file with the National Railroad Adjustment Board.

J. S. McCary entered the service of this Carrier July 24, 1919; established a seniority date of October 14, 1920 as a telegrapher on the Northern Division. His employment relation with said Carrier was unilaterally severed by the latter effective May 24, 1941 because of his continued illness.

G. E. Nachand established a seniority date of May 25, 1912 as a telegrapher on the Carrier's Pecos Division. His employment relation with said Carrier was unilaterally severed by the latter effective December 31, 1940 because of his continued illness.

W. D. Smiley established a seniority date of May 18, 1922 as a telegrapher on the Carrier's New Mexico Division. His employment relation with said Carrier was unilaterally severed by the latter effective March 27, 1941 because of his continued illness.

POSITION OF EMPLOYES: The Telegraphers' Agreement, Article XVIII (a), reads:

"Employees may be granted leave of absence when they can be spared without interference to the service, but not to exceed ninety (90) days except in cases of sickness, or of employees on local or general committees representing other employees covered by this schedule, or who are selected as grand lodge representatives of the Organization of such employees or Associations of which it is a member, or employees promoted to supervisory or official positions with the railway Associations or who are temporarily loaned to the latter. In any case, such leave of absence must be covered by written permission of the ranking officer of the department in which employed."

which can only mean that employees have the inherent right, one firmly fixed, to protect their health, seniority rights, etc. by requesting, and being granted,

issuance of leaves of absence is a prerogative of management, limited only by the obligations in that regard assumed by the Carrier in the agreements with its employees. The claim of the organization in Docket TE-1569, and in the instant dispute as well, are simply attempts to compel the Carrier to grant indefinite leaves of absence and thus perpetuate an employment relationship for those employees whose physical condition is such that they cannot hope to reenter the active service of the Carrier. It has already been decided by the Board that Article XVIII (a) of the current agreement, quoted in the Carrier's statement of facts and upon which the employees rest their claim, does not place such an obligation upon the Carrier. Article XVIII (a) is strictly a permissive rule as evidence the words of Referee Garrison in his statement that it "* * * begins with the statement that leaves 'may' be granted and ends with a requirement of written permission by the carrier, * * *" (Emphasis supplied.)

Each of the three (3) former employees involved in this dispute was afflicted with an illness that permanently disabled him for further active service with the Carrier. The determination in each case that no further extension of leave of absence would be granted was made following the allowance of extended leaves of absence and on the basis of opinions rendered by attending physicians regarding the individuals' physical condition. Mr. McCary had been on continuous leave of absence for five years; Mr. Smiley had been on leave of absence since September 27, 1937 and in the case of Mr. Nachand the record will reflect that during the three years and ten month period February 25, 1937 to December 30, 1940 he had been on leave of absence a total of two years and one month, the last leave of absence being continuous from October 30, 1939 to December 30, 1940. Despite the absence of a contrary admonition in Article XVIII (a) of the current agreement, it cannot be said that the Carrier acted either arbitrarily or capriciously in any of the cases here involved.

The organization's claim in this dispute should be denied for the following reasons:

(1) The Carrier's handling has already received the approval of the Third Division in the latter's denial of an identical dispute filed by The Order of Railroad Telegraphers on this property in Docket TE-1569, Award No. 1589.

(2) Article XVIII (a) of the current agreement does not detract from the right of the Carrier to refuse further extension to leaves of absence to Messrs. McCary, Smiley and Nachand, but on the contrary supports the action of the Carrier.

(3) The claim is completely without support under the rules of the current Telegraphers' Schedule effective December 1, 1938 which is the sole agreement between the parties on which an action before this Board may be brought.

OPINION OF BOARD: The facts are sufficiently detailed in the respective statements of facts and positions of the parties.

This award should be read and construed in relationship to and in light of Award 1589 because the same carrier and same agreement are involved.

A review of the record herein shows nothing new except different claimants and the same principles must apply and the same conclusion reached.

We fail to see the force of the attempted argument based on the statement, "It will be noted that the claim in Award 1589 refers only to the question of extended leave of absence. In the instant case the claimants are asking that their employment relation be restored and leave of absence be extended for the duration of said illness." The allegation in the claim is that these employees were "improperly removed from service because of their illnesses" and relies exclusively on the alleged violation of Rule XVIII (a).

Attention is directed to the suggestion of Referee Garrison in Award 1589 that: "Whether or not the extended leave of absence should as a matter of equity and sound policy be automatically granted to a permanently disabled employe with less than thirty years of service is a question which should be determined by agreement of the parties. The function of this Board is limited to interpreting and applying the Rules agreed upon by the parties."

It may be that because of the comparatively short time elapsed between Award 1589 (November 13, 1941) and this one (July 24, 1942) that the parties have not had opportunity to give consideration to it but we hope that they will.

There was no violation of Rule XVIII (a) or of any other rule of the agreement.

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 there was no violation of Rule XVIII (a) or of any other rule of the agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1942.

Special Concurrence
to
Award No. 1885, Docket TE-1906

Our concurrence in this Award excepts the two errors in the Opinion, covered by the following paragraphs:

The record in the docket covered by Award 1589 shows that the quoted portion from that Award (fifth paragraph of Opinion) was not a suggestion but was a forthright statement in answer to contentions advanced by the Employes.

The 'hope' expressed in the sixth paragraph of this Opinion is the personal expression of the Referee.

/s/ C. P. Dugan
/s/ R. F. Ray
/s/ C. C. Cook
/s/ A. H. Jones
/s/ R. H. Allison