# Award No. 6254
# Docket No. CL-6382

## NATIONAL RAILROAD ADJUSTMENT BOARD
## THIRD DIVISION

**Frank Elkouri, Referee**

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## PARTIES TO DISPUTE:

## BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

## THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Agreement when it summarily dismissed Lauretta K. Hall from service on March 21, 1949, without a hearing, and

(b) That the Carrier shall now restore Lauretta K. Hall to service with rights unimpaired, and that she shall be reimbursed for all monetary losses sustained as a result of her improper dismissal, retroactive to March 21, 1949, from the date she is restored to service.

**OPINION OF BOARD:** Claimant Lauretta K. Hall entered the services of the Carrier on June 16, 1945, as an extra telephone operator. Claimant's employment with the Carrier consisted of filling short vacancies of less than thirty calendar days' duration. By virtue of Rule 33 of the applicable Agreement employes such as Claimant, filling short vacancies that have not been bulletined, are not to be "considered as establishing seniority under Rule 23 by such employment."

On March 21, 1949, the Carrier sent the following notice to Claimant:

"This to advise you that as you have failed to respond for work when called and on information that you have a regular position, your services with the company are hereby terminated."

While the Organization admits that Claimant had no seniority rights by reason of Rule 33, it contends that Claimant did have employe status under the Agreement which entitled her to a fair hearing under Rule 47 (b) of the Agreement. This rule provides:

"No employe shall be disciplined without a fair hearing by a designated officer of the Railroad Company. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this Rule. At a reasonable time, prior to the hearing, the employe shall be apprised of the precise charge against him, and shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be represented at the hearing by representatives of his choosing."

Carrier's notice of March 21, 1949, contains implicit recognition that Claimant possessed employe status; otherwise, why should the notice state that "your services with the company are hereby terminated." Thus it seems only reasonable that Claimant should be considered to have been an employe of the Carrier on March 21, 1949, unless Claimant had by her own conduct destroyed her employe status prior to that date by resignation or something tantamount thereto. (In so far as Carrier's Exhibit "C" is concerned, it suffices to say that it is well established that provisions of the applicable collective agreement cannot be set aside by individual employment contracts with the employes.)

The Record contains a statement by Mrs. Irene M. Turner to the effect that Mrs. Turner, as Claimant's supervisor when Claimant entered the service of the Carrier, had informed Claimant that "the work would require her to relieve operators on any trick night or day." Mrs. Turner also stated that soon after December 30, 1948, Claimant called her and told her that "she would only be available over the week-ends" and that "at that time she was regularly employed at Sykes Chair Company." Claimant admits "contacting Irene Turner and telling her I would be available on the week-ends," but Claimant states that she gave Mrs. Turner information as to the Sykes Company employment so that the Carrier could reach her at **any time.** Claimant declares that her statement to Mrs. Turner "was certainly not intended to convey the idea of changing my habit of abandoning everything else in order to respond to a call from the Railroad." It is unnecessary to speculate as to which statement is correct, since BOTH ladies agree that Claimant told Mrs. Turner she would be available on week-ends. IT IS THUS CLEAR THAT CLAIMANT DID NOT INTEND TO REMOVE HERSELF FROM THE EMPLOY OF THE CARRIER, and that the Carrier knew of Claimant's intention in this regard. Under the circumstances of this case employment with an employer other than the Carrier does not per se constitute a resignation from the Carrier's service. The Record shows that extra employes such as Claimant have performed work for other employers, to the Carrier's knowledge, and the Carrier does not appear to have objected as long as the extra employes fulfilled their obligation to the Carrier. It may well be that the Carrier on March 21, 1949, or earlier, had just and reasonable cause for terminating Claimant's services, but Rule 47 (b) of the Agreement requires a hearing prior to such action since the Record does not support the conclusion that Claimant had resigned. The Carrier's notice of March 21, 1949, made no mention of a hearing—it merely stated that Claimant had failed to respond for work when called and a regular position, and it ended with the statement that "your services with this company are hereby terminated." Rule 47 (b) provides that "No employe shall be disciplined without a fair hearing * * *." Thus the right to a hearing is guaranteed to **all** employes under the Agreement, not just to those employes holding seniority rights. Although not so in all cases, in the instant case any distinction between involuntary termination of services and "discipline" is a distinction without a difference. It must be concluded that the Carrier violated the Agreement and Claim (a) must be sustained.

But under the facts of this case it would be improper to sustain that part of Claim (b) requesting monetary payment. Nor can any awarded reinstatement be ordered "with seniority rights unimpaired", since as noted above by virtue of Rule 33 Claimant held no seniority rights when her services were terminated.

The Record discloses that on or about April 30, 1949, some five weeks after receipt of the termination notice, Claimant called Carrier's Superintendent C. H. Youst at his home to request a hearing. Claimant's affidavit states the outcome of that call as follows: "Mr. Youst said that such a hearing would have to be arranged through his office. * * * I agreed to call his office for such an appointment." But Claimant did **not** thereafter call his office, the proper place to handle such matters, as she had agreed. As a result, to the five weeks' delay by Claimant in protesting the termination was added further delay in the prosecution of Claimant's claim, until September 22, 1949, when the Carrier was again approached on the matter, this time by

the Organization. The Carrier immediately responded that if a hearing was desired and if the Organization would so advise, "arrangements will be made accordingly." THE CARRIER DID NOT HEAR FROM THE ORGANIZATION FOR ALMOST A FULL YEAR, when, on August 8, 1950, the Organization advised the Carrier that "we are not opposed to a hearing at this date, provided that prior to the conducting of such hearing, Mrs. Hall shall be restored to service with seniority rights unimpaired and that she shall be paid for all wage loss sustained since March 21, 1949." At least one term of this qualified acceptance of the Carrier's hearing offer made it difficult for the Carrier to agree—Claimant had no seniority rights to be restored unimpaired. And in fact on August 22, 1950, the Carrier did refuse to grant the August 8 request. The Organization failed to take up the matter again for almost another full year, that is, until July 2, 1951. (On April 23, 1951, an attorney had sent a letter to the Carrier in behalf of Claimant.) On October 23, 1951, Assistant General Manager-Personnel Bimson denied the claim, and, after exchange of several letters by the parties, notice of intention to file the claim with this Division was given August 8, 1952. The failure of Claimant to take early advantage of any of the Carrier's offers for a hearing, and the extreme delay of Claimant in pursuing the claim up to its submission to this Division, renders any penalty monetary award improper.

Moreover, the fact of Claimant's numerous instances of failure to respond for work when called prior to receipt of the notice of termination, as evidenced by the Record, considered along with the fact that this Division in Award 6043 held that a Carrier was not required to use an employe holding no seniority rights in an employment situation similar to that involved in the instant case, makes Claimant's actual monetary loss so speculative that any monetary award would be characteristically a penalty against the Carrier. Since, as noted above, Claimant has not been reasonably alert in processing the claim, such a penalty against the Carrier would not be proper.

**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 Carrier violated the Agreement in failing to give Claimant a hearing before terminating her services.

## AWARD

Claim (a) sustained.

Claim (b) sustained only to the extent that Claimant shall be reinstated.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 7th day of July, 1953.