

Award No. 9111
Docket No. TE-10749

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roscoe G. Hornbeck, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY
(Chesapeake District)

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Chesapeake and Ohio Railway, that:

1. The Carrier violated the terms of the Agreement between the parties when it, without cause, charges or investigation, arbitrarily and capriciously dismissed Operator H. E. West from service; and

2. Claimant West shall now be restored to his proper status under the rules of said agreement with seniority and all other rights unimpaired and paid for all time lost from December 16, 1957, and his record cleared.

OPINION OF BOARD: H. E. West, for whom this claim is made, hereinafter referred to as Claimant, began employment with the Carrier as a Telegrapher on October 2, 1946, with seniority of that date.

Prior to the occurrences the subject of this claim Mr. West was assigned to Relief Position No. 22 at KC Junction.

On the 24th of September, 1957, Claimant entered a plea of "guilty" to two charges of unlawfully receiving Railroad Retirement Insurance, a Federal offense, and was sentenced to 90 days on each count, the sentences to run concurrently. He served his term and was released on December 14, 1957.

Claimant elected to take a vacation and was granted that right from September 24, 1957, the day he was sentenced for the offense to which he plead guilty, to October 4, 1957, inclusive.

On December 16, 1957, two days after Claimant's release from prison, he reported for duty with the Carrier but was not permitted to return. Instead he was handed a letter hereinafter set out.

During his absence it is said, that he made an oral request for leave, to which the attention of Carrier was later called by letter from the prison, but no leave was ever granted. When he reported for duty he had been away without leave of absence from October 5 to December 16, 1957.

The letter of December 16, 1957, heretofore referred to, follows:

"On Friday, December 20, 1957, at 9:00 A. M., hearing will be held in the office of Trainmaster, 14th and Madison Avenue, Covington, Kentucky, in order to permit you to show cause, if any, why your seniority as telegrapher should not be forfeited."

Hearing at the time stated in the letter was held and facts developed, as hereinbefore set out, and thereafter this letter was sent to Claimant, dated January 7, 1958:

"On December 20, 1957, hearing was held in the office of the Trainmaster at Covington, Ky., in order to permit you to show cause, if any, why your seniority as telegrapher should not be forfeited."

"The hearing resulted in the following conclusions:

'H. E. West, failed to protect his seniority as Telegrapher on the Cincinnati-Russell-Sub-Division in accordance with provisions of the Telegraphers' Agreement. Seniority as Telegrapher, Cincinnati Russell Sub-Division forfeited.' "

The Claim asserts that Rule 22 of the Telegraphers' Agreement was violated in the action taken against Claimant in the letter of January 7, 1957. The Carrier relies on Rule 52 of the Agreement to support its action.

The issue then is whether the facts disclose a violation of Rule 22, or if the action taken by the Carrier was authorized under Rule 52. Rule 22 provides:

"* * * An employe will not be disciplined without proper investigation, at which he shall have the right to be present and to be represented by one or more duly accredited representatives of his craft or class. * * * At a reasonable time prior to the hearing, he shall be apprised in writing of the charge against him. * * * An employe who has been charged in accordance with this rule may waive his right to hearing * * * but in no case will an employe be permitted to waive hearing when the discipline to be administered is dismissal. * * *"

Rule 52, upon which the Carrier relies, after reciting that a leave of absence may be granted for 60 days but that such leave may be granted but once in each 12 months; that a leave for more than 60 days may be granted for good reasons stated in writing, continues:

"* * * However, unless otherwise arranged, the absentee will forfeit all rights to his regular position and will go on the extra list with full rights when he returns to duty. * * *"

Provision is then made for the termination of such leave for cause, upon 30 days written notice, and continues:

"* * * If upon investigation, it is found that the leave of absence has been granted or is being continued or misrepresentation of facts, the absentee shall forfeit all seniority rights. * * *"

It will be noted that the condition set up in the last quoted clause of the rule is a basis for forfeiture of **all seniority rights**. Clearly, it has no application to the facts developed because no leave of absence had been granted to Claimant. It follows then, that the order, as made by the Carrier, was not authorized by Rule 52.

There are but two arrangements under which leaves of absence may be granted. Neither of them having application that sentence beginning "However, unless otherwise arranged" controls the situation here. Claimant having made no arrangement for leave of absence, it was appropriate, under Rule 52, to order that he forfeit "all rights to his regular position" and go on "the extra list with full rights" therein, when he was permitted to return to duty which would have been on the 16th of December, 1957, when he presented himself for service. That order and no more was authorized under Rule 52. This was the position of the Local Chairman of the Organization at the hearing of December 20, 1957.

The action taken was not authorized by Rule 52 to the extent ordered by the Carrier and what it did was tantamount to a dismissal of Claimant. Had it desired to accomplish this effect it must have resorted to the rule specifically relating to discipline. If it had adopted this procedure it would have had two charges upon which to proceed: absence from duty without leave and conviction of crimes involving moral turpitude.

The Carrier failed to observe the essential requirements of this rule in several particulars.

No investigation as contemplated by the rule was held. The letter of December 16 did not purport to state any charge against Claimant and, thus, he was not apprised of the charge which he would have to meet. The burden of showing why his seniority should not be forfeited was put upon him. If he had been specifically charged with a violation of Rule 22, the burden would have been upon the Carrier to prove the charge. Rule 22 was not properly invoked and this charge, as asserted, was insufficient to authorize any action under Rule 22.

The numerous Awards cited by the Carrier relate to hearings properly instituted under rules of like tenor to Rule 22 and none is authority for the dismissal of an employe without compliance with the rule.

The Carrier is clearly right in its contention that it should not be required to grant a leave of absence to an employe while serving a sentence in a penal institution. It did not so do and no rule requires it. However, it only had authority under Rule 52 to make the order we have heretofore stated and it went too far under that rule.

It has been suggested, and can be plausibly argued, that had there been a proper charge under Rule 22, set up against Claimant, the result must have been the same as that sought to be accomplished by the order under review.

If this Board had equity jurisdiction, we could very properly invoke the "clean hands" doctrine and say, that, because the Claimant does not come before us with clean hands we will leave him where we found him. We have

no such authority. The Claimant has the right to invoke the rules adopted by the parties themselves and we must conform to them.

It would be strange indeed, if the parties knowing that employes in instances would be absent from their work without leave would take no cognizance of that fact in the rule treating of Leave of Absence. This lends support to the construction which we have given to the sentence of Rule 22 which the Carrier had the right to invoke but under which it exceeded its authority in assessing the penalty of forfeiture of seniority. Rule 52, being a special rule on Leave of Absence, could, where it has application, be given precedence over Rule 22, a general rule on Discipline.

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

That the parties waived hearing on this dispute;

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 has been violated to the extent stated in this opinion.

AWARD

The order made upon the Charge under Rule 52, will be changed to provide that Claimant shall forfeit all rights to his regular position and will go on the extra list with full rights as to that position, as of December 16, 1957. We do not have sufficient data in the record to fix any compensation due Claimant. The Claim as to compensation will be remanded to the property of the Carrier to be adjusted by recourse to its records.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of December, 1959.

DISSENT TO AWARD NO. 9111, DOCKET TE-10749

In this case, the Claimant absented himself from duty without permission October 7 through December 13, 1957 while serving a jail sentence upon conviction, after pleading guilty, in Federal Court to defrauding the Railroad Retirement Board in amount of \$3,208 for sick benefits from fund contributed to by the Carrier. While Claimant had requested a leave of absence to cover the period of his enforced absence, the Carrier's refusal to grant same is properly upheld by the Majority Opinion.

However, the Majority Opinion is in gross error when it ignores two generally acknowledged facts—(1) that an employe may leave a Carrier's service at will which many times is evidenced only by his continued and prolonged absence, and (2) that Carriers are responsible in this forum only for that which they have contracted; and reinstates this Claimant on the basis

that his voluntary removal of himself from this Carrier's service constituted discipline, without proper investigation, by Carrier in absence of a provision in the Leave of Absence rule whereby he forfeited all his seniority by his absence without permission.

The Majority erroneously supports its conclusion by citation (1) of the only provision of the Leave of Absence rule providing for forfeiture of all seniority rights—when the leave has been granted or continued on misrepresentation of facts; and (2) of the fourth sentence of that rule—

“* * * However, unless otherwise arranged, the absentee will forfeit all rights to his regular position and will go on the extra list with full rights when he returns to duty * * *.”

which follows sentences providing that Carrier may unilaterally grant 60-day leaves, that only 1 such 60-day leave may be so granted in any 12 month period, and that leaves in excess of 60 days must be agreed to by both Carrier and the Organization.

This quoted fourth sentence of the Leave of Absence rule has been taken out of context and misinterpreted by the Majority to cover unauthorized leaves as opposed to the proper and reasonable contract construction interpretation given it on the property—that if an employe on leave does not arrange, prior to his return to duty, for return to his former position, or otherwise, he—

“* * * will forfeit all rights to his regular position and will go on the extra list with full rights when he returns to duty * * *.”

It is to be especially noted that this conclusion of the Majority has been reached despite the fact that both the Agreement and Operating rules governing this Claimant's employment specifically provide that an employe shall not absent himself from duty without permission, except for sickness or injury, and remain in Carrier's service.

Obviously, this Claimant removed himself from this Carrier's service by reason of his voluntary act of absenting himself therefrom without permission and/or leave, hence was not disciplined under the Discipline Rule.

The Majority opinion here makes the Agreement and Operating rule requirements for leaves of absence but a nullity.

By reason of the foregoing, the undersigned dissent to the conclusions of the Majority in the Opinion in this Award 9111.

/s/ C. P. Dugan

/s/ J. E. Kemp

/s/ W. H. Castle

/s/ J. F. Mullen

SUPPORTING OPINION IN AWARD NO. 9111, DOCKET TE-10749

The incoherent and irrational dissent of the minority impells me to set forth my reasons for having been a part of the majority that adopted Award 9111.

First of all, the majority did not uphold the Carrier's refusal to grant the leave of absence requested by claimant—as the dissenters allege—no such question was before us for consideration.

The claimant was found guilty of an offense against the law, and was punished for the offense by being required to serve a period of time in a prison camp. That punishment was inflicted by a court fully competent to judge, and was the total penalty required. Then, when claimant had paid that penalty and reported ready to resume his employment the Carrier sought to inflict an additional penalty by depriving him of his job.

Carrier sought to accomplish its object not by charging claimant with being absent without leave—a possible transgression of its general rules—and then holding a hearing, as required by the agreement, to establish the soundness of its charge. Instead, it contended that this man had, by his absence without leave for more than 60 days, forfeited his seniority as provided by Rule 52 of the Telegraphers' Agreement, and dealt with him accordingly.

Rule 52 provides, among other things that if an employe secures an extended leave of absence by misrepresenting the facts he will forfeit all seniority rights. The only other provision in the rule concerning forfeiture of seniority rights is where an employe, absent because of sickness or injury engages in other employment. Clearly, neither of these provisions applied, and the Referee correctly so found. It follows that the Carrier's action of depriving claimant of his job was not authorized by Rule 52, as it contended.

The award correctly holds that the effect of the Carrier's action was to discipline the employe without benefit of the procedures laid down in Rule 22. Obviously, under such circumstances the employe is entitled to return to work and be compensated for the loss of earnings occasioned by Carrier's improper actions.

That portion of Rule 52 quoted by the dissenters clearly means that if the parties designated therein to make arrangements for an extended leave of absence do not at the same time make arrangements for the employe to return—at expiration of his leave—to his regular assignment (or make some other arrangements in lieu thereof) he will forfeit all rights to his regular position and will go on the extra list.

The Referee apparently felt that under all of the circumstances of this case there existed what amounted to a constructive leave of absence without any arrangements having been made for the employe's return to his regular assignment. Application of the literal language of the rule to such a situation obviously must result in a finding that claimant should have reverted to the extra list with full rights when he reported ready for duty. Incidentally, this interpretation and application of the rule was urged by the Local Chairman while the case was being handled on the property.

Since the rule most certainly is susceptible of such an application, and since it provides the claimant with a substantial measure of justice, I supported the award and voted for its adoption with a clear conscience.

J. W. Whitehouse,

Labor Member.