

Award No. 10921

Docket No. CL-13094

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5116) that:

(1) Carrier violated the Schedule for Clerks governing hours of service and working conditions between the parties when on February 25, 1961, it took Clerk Montell Sanders out of the service of the Carrier, failing to accord her an investigation as required under the Agreement.

(2) Clerk Sanders be restored to her position with seniority and all rights unimpaired.

(3) Clerk Sanders be compensated for February 27, 1961 and each subsequent date for time lost as a result of the Carrier's action in violation of the Schedule for Clerks.

OPINION OF BOARD: The Claimant was employed as a clerk by the Carrier. When the events leading to this dispute arose she was on vacation which was due to expire on February 6, 1961. While on vacation and on January 30, 1961, she requested a 90 day leave of absence. This was refused by the Carrier on February 2, 1961, but she was granted a 2 weeks leave which would expire on February 20, 1961. On February 6, 1961, she advised the Carrier she was expecting a child on or about June 17, 1961, and requested maternity leave. On February 8, 1961 the Carrier neither granted or declined her request but advised her that it would be necessary for her to furnish a statement from her doctor stating that she was "an obstetrical patient, indicating the approximate date of confinement, and that a leave of absence at this time is recommended." On February 13, 1961, the Claimant sent a statement from her doctor and wrote the Carrier, "I hope that this is what you need in order to give me a maternity leave of absence". Claimant's leave of absence expired February 20, 1961. On February 23, 1961, the Carrier inquired by telephone of Claimant's doctor and was advised by the doctor's nurse that the doctor was not recommending leave for Claimant at that time. On February 25, 1961, the Carrier wrote the Claimant advising her that the request for leave of absence due to pregnancy was not granted and

also advised her that she was considered out of service of the Company under Rule 31 (c) of the current Agreement. Subsequently the Claimant, through the Organization, protested this action, claiming the Carrier violated the Agreement and requesting compensation from February 25, 1961.

The dispute was timely progressed to this Division. The variance in the form of the Statement of Claim made on the property and made here is not of such substance as to mislead the Carrier as to the nature of the dispute or its possible liability thereunder.

The Carrier contends that Rule 28 (Discipline and Grievances) has no application here and that the action of the Carrier was solely based on Rule 31 (Leave of Absence). There is no doubt that the Carrier intended to apply Rule 31, but under the peculiar circumstances of this case, we believe it did so erroneously. This is not the case where the Employee blatantly or capriciously flaunted his obligation to perform the services expected of him by his Employer. Here we have an Employee who was attempting to obtain leave by consent of the Carrier—leave which, under the facts here, she must have thought was most important to her. While it was her duty to return to service at the expiration of her leave previously granted, nevertheless, the Carrier, having pending before it a request for maternity leave and having asked for and received a statement from her doctor, was under a duty to advise the Claimant prior to the termination of her existing leave that such statement was inadequate and that maternity leave would be denied. It is reasonable to conclude that the absence of such timely advice lulled the Claimant into a false sense of security. Thus by failing in this duty the Carrier, in effect, prevented Claimant from exercising her rights under Rule 31 (b).

By reason of the failure to give Claimant timely notice that her request was denied, the letter of February 25, 1961, which combined the refusal of the maternity leave with notice that she was out of service amounted to a dismissal. It is argued that if the employee felt thereby aggrieved her recourse was under Rule 28(e) and that she did not make timely request for a hearing.

Rule 28 treats with 3 subjects and provides certain procedures to be followed. These are discipline, dismissal and "otherwise unjustly treated". Rule 28(a) which treats with dismissals requires an investigation in 7 days. There is no requirement that the employee must apply for such investigation. Rule 28(e) treats with matters other than discipline and dismissal. That must be the intent of the phrase "**otherwise** unjustly treated". This paragraph does not apply to the case before the Division.

We have concluded from the facts of record, that the letter of February 25, 1961, constituted a dismissal and under Rule 28(a) an investigation was required.

The Carrier further contends that by restoring the Claimant to the seniority list in her proper place will adversely affect all Employees with subsequent dates. This might be so in a proper case under Rule 31, but not under the ruling here. Besides, the Organization's brief states that if there is a sustaining award "no one will be injured thereby".

For the reasons herein above stated we have concluded that the claims are valid as hereinafter stated.

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 Employees involved in this dispute are respectively Carrier and Employees 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

AWARD

Claim (1) sustained, Claim (2) sustained, Claim (3) sustained for compensation after September 15, 1961, less all outside compensation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of November 1962.

DISSENT TO AWARD NO. 10921, DOCKET NO. CL-13094

The Majority errs in concluding that Claimant was dismissed under Rule 28(a) and that therefore an investigation was required. Claimant was advised that further leave (approximately seven months) could not be granted and the reason therefor (her own physician did not think it necessary and refused to recommend it), and was also advised that she was out of service under Rule 31(c) for not having returned to duty upon the expiration of her two-week leave.

The Majority correctly holds that an employee is obligated to return to duty upon expiration of a leave, but erroneously excuses Claimant's failure to return by saying that she was lulled into a false sense of security by not being notified sooner that further leave would not be granted. The rules do not so provide or waive her obligations thereunder in any event.

With respect to the seven-month leave that was not granted, Rule 31(b) states that the arbitrary refusal of a reasonable leave is improper and may be handled as "unjust treatment under this Agreement." The "unjust treatment" provision in the Agreement is Rule 28(e) which states:

"An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above, **if written request is made to his immediate superior within seven (7) days of the cause for complaint.**"
(Emphasis ours.)

Thus, had Claimant felt she was unjustly treated by Carrier's denying her further leave, Rule 28(e) would apply through Rule 31(b); however, no written request, timely or otherwise, was made for a hearing pursuant to Rule 28(e). Contrary to the Majority's conclusion, Carrier did not prevent Claimant from exercising her rights under Rule 31(b). Rather,

Claimant lost the right when she failed to make timely written request for a hearing on the basis of alleged unjust treatment. Compare **Awards 9048** (Weston) and **10838** (Ray).

The only possible way Rule 28 could have applied in this case is as explained above, but as the Claimant made no request for hearing as required, Carrier was correct in holding that Rule 28 in its entirety was not applicable. When an employee fails to report for duty at the expiration of leave of absence, Rule 31(c) provides that the employee shall be considered out of service. This is not discipline and requiring of an investigation under Rule 28(a). **Awards 3140** (Youngdahl) and **9103** (M. Stone). In disciplinary matters the Carrier is vested with discretionary powers, but where rules such as Rule 31(c) are involved, the Carrier has no discretion as the operation of the rule is automatic. (**Award 8892** — H. A. Johnson). Thus, it is clear that the Majority erred in concluding that Rule 28(a) applied.

For the reasons stated, **Award 10921** is erroneous and we dissent.

R. A. Carroll

P. C. Carter

W. H. Castle

D. S. Dugan

T. F. Strunck

**LABOR MEMBER'S ANSWER TO
CARRIER MEMBERS' DISSENT TO AWARD 10921,
DOCKET CL-13094**

The Dissent is nothing more than a reiteration of the argument previously presented in panel and rejected by the Division, as such contentions are not based on the pertinent facts and controlling rules.

It is crystal clear from the record that Claimant was arbitrarily discharged without a formal investigation, while at the same time she was notified that her request for an extension of her leave was denied. Not only was she misled by the Carrier into a sense of false security, but her rights to an unjust treatment investigation under Rule 28 (e) were taken from her by such action. Therefore, Awards 9048 and 10838, cited by the Dissenters, have no application to the confronting factual situation.

Carrier erroneously dismissed Claimant under the provisions of Rule 31(c), reading as follows:

"An employee who fails to report for duty at the expiration of leave of absence shall be considered out of service **except that, when failure to report on time is the result of unavoidable delay, the leave will be extended to include such delay.**"
(Emphasis ours.)

In view of the exception contained in this Rule, Carrier proceeds at its peril when it arbitrarily discharges an employee thereunder without first holding an investigation under Rule 28 to determine whether the employee's failure to report on time was the result of unavoidable delay.

Rules 28 and Rule 31 (c) must be read together, as the former provides that "an employe who has been in service sixty (60) days or more shall not be disciplined or dismissed without investigation".

Awards 3140, 9103 and 8892 lend no support to the Dissenters' contentions, as they are based on entirely different factual circumstances and rules. Award 3140 supports the proposition that a hearing or investigation should be held, where an exception is contained in the Leave of Absence Rule. The Board stated:

"The record indicates that Carrier attempted to contact employe several times during November 1944, both at his home, and at a gas station which he was operating, without success. * * *, we are of the opinion that he was doing outside work and did not comply with Rule 61 in providing a satisfactory explanation for his absence. Employe had the opportunity to get his complete story into the record when Carrier offered to conduct a hearing but Brotherhood declined the offer in his behalf."

In Award 9103, the Organization had agreed that no investigation was necessary. In Award 8892, the Carrier held an investigation. None of these circumstances are present in the confronting dispute.

Award 10921 was properly determined on the facts of record and governing rules.

J. B. Haines
Labor Member