Award No. 11664
Docket No. DC-11251

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYEES, LOCAL 233

NEW YORK CENTRAL (Lines West)

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes Local 233 on the property of the New York Central System (Lines West) for and on behalf of Waiter Allen Smith, Jr., that he be paid compensation, beginning January 5, 1958, for 18 days' vacation.

EMPLOYES' STATEMENT OF FACTS: On January 21, 1958, Organization filed the above mentioned claim, as amended January 23, 1958 (Employes' Exhibit A). The claim was denied by Carrier's Superintendent Dining Car Service on February 21, 1958, on the ground that claimant had forfeited his seniority (Employes' Exhibit B).

Under date of April 3, 1958, additional information was submitted by Organization, advising Carrier that claimant bid for his vacation on January 1, 1958, and was granted vacation date of January 5, 1958, but was refused vacation on that date, and further advising that there were junior employes given their vacation during the period denied him, and further advising there were three other employes given their vacation after having obtained employment elsewhere (Employes' Exhibit C).

On April 16, 1958, Carrier's Superintendent Dining Service again reiterated denial of the claim on the basis that claimant forfeited his seniority (Employes' Exhibit D).

On April 8, 1958, Organization appealed to Carrier's Manager Dining Service Department, the highest officer on the property designated to consider such appeals (Employes' Exhibit E). The appeal was denied on July 1, 1958 (Employes' Exhibit F) on the same ground as the claim was theretofore denied.

Prior to the initiation of the instant claim on January 21, 1958, claimant discussed the matter of his illness with Carrier's Superintendent Dining Service and advised him that, under doctor's instructions, he was to refrain from doing porter's work; that he would return to work as soon as his doctor advised his condition permitted and that Carrier's Superintendent Dining Service refused to contact claimant's doctor to verify claimant's statement or claimant's request and that he refused to contact Carrier's doctor for verification of claimant's physical condition (Employes' Exhibit G).

The nature of claimant's physical disability was certified to on January 25, 1958, by Chauncey L. Morton, M.D., of 111 East 47th Street, Chicago 15,

The Claimant in that case had requested, and was granted, leave of absence which "should expire August 24, 1954". * * *

> "Claimant made no further request until August 31, when she requested extension to be granted retroactively to August 24. She gave no reason for failure to make the application prior to August 24 except that she had been busy and had allowed the time to slip by her. The Carrier took the position that her seniority had been automatically terminated on August 24 under the terms of Rule 28(c), and that she was no longer an employe."

In its decision, the Board affirmed the Carrier's position and denied request of the Employes that Claimant be restored to service.

4. Having terminated his employment relationship prior to taking his vacation, Carrier was not obligated under the agreement to accord vacation to Claimant.

Section 5 of Rule 10 (Carrier's Submission, Sheet 3) specifies in unequivocal language that:

> "No vacation with pay or payment in lieu thereof will be due an employe whose employment relation with carrier has terminated prior to the taking of his vacation, except that employes retiring under the provisions of the Railroad Retirement Act shall receive payment for vacation due."

As Carrier has demonstrated, Claimant forfeited his seniority by engaging in work elsewhere while on leave and thereby severed his employment relationship. The sole exception appearing in Section 5 does not have application to Claimant's position. Clearly then, the language of Section 5 bars Claimant to either vacation with pay or payment in lieu thereof.

That this premise is well taken is demonstrated by reasoning of the Board in its Opinion in Award 4024. Involved therein was the identical rule quoted above. In its determination as to application of the rule, the Board interpreted it as follows:

> "* * * We are of the opinion the intent of Sub-paragraph 4 is to limit vacation rights to those in the employ of the Carrier at the time the vacation, or its equivalent is taken. The stated exception itself would indicate this. It expressly excepts only those employes not then employed who have retired, and authorizes vacation benefits to them.
>
> The use of the word 'terminated' emphasizes the idea of placing some sort of a limit. The limit here is the end of the employment relation, and no vacation or benefit is authorized so long as that relation does not exist, subject of course to the exception stated."

Conclusion

For the reasons hereinbefore cited, Carrier respectfully submits that the claim of the Employes in this docket is without merit and should be denied.

All the facts and arguments herein presented were made known to the Employes during handling on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was employed as Dining Car Waiter since September 17, 1941. He last performed services for the Carrier on

October 29, 1957. He was not offered any assignment until November 27, 1957, at which time he informed the Crew Dispatcher that he was unable to accept work because of illness.

Claimant rendered compensated service of not less than 160 days for the year of 1957 and was assigned to vacation period beginning January 19, 1958. Prior to Claimant's vacation, Carrier learned that he was working as a bus driver; and thereupon Claimant was informed that his vacation was being deferred pending clarification of his status. A verification of other employment was made, and Employe was removed from the seniority roster.

The issue presented is whether Rule 5(a) or Rule 6 is applicable.

Carrier maintains that by Claimant accepting employment without making special arrangements in advance he forfeited his seniority rights under Rule 5(a). Claimant contends that he was not on leave of absence as contemplated by Rule 5(a) but was unable to work because of illness. He claims that striking his name from the seniority roster was tantamount to dismissal, which action requires a hearing under Rule 6 of the Agreement. Carrier argues that Rule 5(a) is self-executing and by unilateral action it can strike Claimant's name from the seniority roster.

It is the opinion of the Board that taking unilateral action, as was done by Carrier in striking Claimant's name from the seniority roster without a hearing, was a violation of the Agreement of the parties. To condone such action would give Carrier authority to make its own findings a fact without permitting Claimant the right to explain and justify his position.

An examination of the record does not make clear the status of Claimant prior to Carrier's removal of Employe's name from the seniority roster. Even if Carrier's assumption that Claimant severed his employment by his new employment is correct, nevertheless employe was not charged by Carrier with a violation, but was summarily dismissed. The Board does not attempt, in this situation, to judge Claimant's conduct. It holds that his right under Rule 6, to be given a hearing, was denied by Carrier. First Division Award 13501 and Third Division Award 10921 support this ruling.

For the reasons heretofore stated, we find that the Carrier has violated the Agreement of the parties hereto.

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 did violate the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 31st day of July 1963.

DISSENT TO AWARD NO. 11664, DOCKET NO. DC-11251

Award 11664 is in serious error in holding "that taking unilateral action, as was done by Carrier in striking Claimant's name from the seniority roster without a hearing, was a violation of the Agreement of the parties", particularly when the Majority admits—

> "An examination of the record does not make clear the status of Claimant prior to Carrier's removal of Employe's name from the seniority roster."

Not knowing what Claimant's status was at the time required a denial Award, without more.

In the first place, the roster does not create or confer seniority (Awards 3625, 7586). In the second place, no claim or contention was made in the record, by inference or otherwise, that Claimant's name should be restored to the seniority roster under Rule 6 or any other rule of the Agreement, or otherwise. Furthermore, numerous Awards were cited which sustained claims of other employes under self-executing provisions similar to Rule 5 (a) in the instant case when Carriers permitted employes to retain seniority who had applied for and accepted other employment.

The Majority cites First Division Award 13501 and Third Division Award 10921. Neither Rules 2 and 17 nor the facts involved in First Division Award 13501 are comparable to Rule 5 (a) and the facts, respectively, in the instant case. The Dissent to Third Division Award 10921 shows the error thereof.

For the foregoing reasons, among others, Award 11664 is in error and we dissent.

/s/ W. H. Castle

/s/ D. S. Dugan

/s/ P. C. Carter

/s/ T. F. Strunck

/s/ G. C. White