

Award No. 14275
Docket No. CL-15692

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5766) that:

1. Carrier violated and continues to violate the Clerks' Rules Agreement when it refused to allow Employee Charles Mullens to return to Carrier service following his request to do so prior to the expiration of his leave of absence.

2. Carrier shall now be required to compensate Employee Charles Mullens for the following time he was not permitted to work Relief Position No. 3 during the period August 7, 1964 through August 21, 1964 and for each and every day that the violation continues thereafter. This also to include any overtime which he would have been entitled to which is specified in the bulletining of Relief Position No. 3.

August 7, 1964	8 hours at \$18.7824
August 8, 1964	8 hours at \$18.7824
August 9, 1964	8 hours at \$18.7824
August 12, 1964	8 hours at \$18.7824
August 13, 1964	8 hours at \$18.7824
August 14, 1964	8 hours at \$18.7824
August 15, 1964	8 hours at \$18.7824
August 16, 1964	8 hours at \$18.7824
August 19, 1964	8 hours at \$18.7824
August 20, 1964	8 hours at \$18.7824
August 21, 1964	8 hours at \$18.7824

Reparation due Employee Charles Mullens to be determined by joint check of Carrier payroll and/or other records.

"Referring to your letter of October 6, 1964, Case A-2308, in connection with the situation involving Employee Charles Mullens and the proposal outlined in your letter of September 9, 1964 for disposition of the matter.

Your proposal for disposing of this matter was submitted to Mr. Mullens for his consideration and he advises that he is not in agreement with it and feels that the claim he has submitted should be progressed. Under these circumstances, your proposal is not acceptable."

On October 14, 1964, the claim which Mr. Mullens had presented to Superintendent Barry on August 21, 1964 was declined by Mr. Barry on the basis that Mr. Mullens was not "dismissed" from service as alleged, but instead he had forfeited his seniority rights under the rules of the Clerks' Agreement and, therefore, his claim was not supported by schedule rules or agreements.

Under date of November 5, 1964, Mr. Gilligan appealed the claim in behalf of Mr. Mullens to Mr. Amour, who, on November 24, 1964, replied to Mr. Gilligan as follows:

"Referring to your letter of November 5, 1964, File: Case 171, wherein you present, on appeal, claim in behalf of Charles Mullens.

As indicated to you in my letter to you in connection with this case dated September 9, 1964, it is my position that Mr. Mullens forfeited his seniority rights under the rules and for that reason the claim in his behalf is respectfully declined.

However, without waiver of or prejudice to my position that Mr. Mullens forfeited his seniority rights under the rules, I am willing to restore Mr. Mullens to service with seniority rights unimpaired and to restore him to the position which he held at the time of his forfeiture of seniority at any time that you will assure me that no claim will be filed in behalf of any other employee that might be affected as result of the restoration of Mr. Mullens to service with seniority rights unimpaired or his restoration to the position which he held at the time of forfeiture of seniority."

Mr. Gilligan never replied to Mr. Amour's aforequoted letter of November 24, 1964.

OPINION OF BOARD: Until July 3, 1964, the Claimant was the regularly assigned occupant of Relief Position No. 3 at Marion, Iowa between the hours of 8:30 P. M. and 5:30 A. M., Wednesday through Sunday with rest days on Monday and Tuesday. Claimant requested a sixty (60) day leave of absence effective June 9, 1964 to attend his sick wife during the night hours when he normally was on duty. On June 11, 1964, Carrier's Superintendent notified the grievant that his request had been granted. However, the Carrier subsequently learned that the grievant had made application for employment with the Highway Equipment Company of Cedar Rapids, Iowa on June 8, 1964 and had commenced working for said Company on June 11, 1964. The Carrier then notified the Claimant on July 3, 1964 that he had forfeited his seniority rights under Rule 23 (g) of the controlling Agreement between the parties as a result of such outside employment. Thereafter, the Claimant, by letter dated August 1, 1964, requested permission to return to work on August 7, 1964 but was advised by the Carrier that no consideration could be given his request

since he had forfeited his seniority rights. The claim was filed with the Carrier on August 21, 1964.

An offer of settlement was rejected by the Claimant and on October 14, 1964, the claim was declined by the Carrier's representative on the basis that the Claimant had forfeited his seniority rights under the pertinent rules of the Agreement between the parties. An appeal was filed on behalf of the Claimant and on November 24, 1964 the Carrier by letter restated its position and again renewed its offer to restore the grievant to service with seniority rights unimpaired to the position he formerly held if certain conditions precedent were accepted by the Employees. The Carrier has received no response to its letter of November 24, 1964.

Rule 23 entitled Leave of Absence — (Voluntary Absence From Duty) of the Agreement between the parties, reads as follows:

"(a) Leave of absence for a period in excess of thirty (30) calendar days will only be given in writing, copy of same to be mailed to the General Chairman and made a matter of record.

(b) Except as provided in Rules 24 and 25, leave of absence in excess of ninety (90) days in any twelve (12) consecutive calendar months shall not be granted except by agreement between the management and the General Chairman.

(c) Employees will forfeit their seniority rights when they fail to report for duty at the expiration of leave of absence, except when failure to so report is the result of an unavoidable delay, leave of absence will be extended to include such delay.

(d) An employee on leave of absence desiring to return to service prior to the expiration of the leave of absence may do so, providing he gives thirty-six (36) hours advance notice to his employing officer, and such information will be immediately transmitted to the employees affected. The leave of absence is terminated when an employee returns to service.

(e) An employee returning after leave of absence may return to his former position providing it has not been abolished or senior employee has not exercised displacement rights thereon; or may, upon return or within fifteen (15) days thereafter, exercise seniority rights to any position bulletined during such absence, except, he may not exercise seniority rights to any position bulletined temporarily as a result of his absence from service. In the event the employee's former position has been abolished or senior employee has exercised displacement rights thereon, the returning employee will be governed by the provisions of Rule 12, and will have the privilege of exercising seniority rights over junior employees if such rights are exercised within fifteen (15) days after return. Employees displaced by his return may exercise their seniority in the same manner.

(f) The arbitrary refusal of a reasonable amount of leave of absence to employees when they can be spared is an improper practice and may be handled under the provisions of Rule 22(g).

(g) Employees accepting leave of absence other than as defined in these rules shall forfeit all seniority." (Emphasis ours.)

Inasmuch as Rules 24 and 25 are referred to in Rule 23 (b), it should be noted that neither Rule is applicable in the instant case.

Although it may be a violation of Carrier's policy for employees to secure outside employment without prior agreement, the pertinent Rule in the Agreement is silent on the subject. Carrier relies on Rule 23 (g) which merely provides that "Employees accepting leave of absence other than as defined in these rules shall forfeit all seniority." Employees have properly noted that the Rules do not prohibit an employee's acceptance of outside employment.

The Carrier was fully aware of the Claimant's need to earn a living while he was attending his sick wife and on leave of absence from the Carrier. Apparently no work was available during the daylight hours for the Claimant as an employee of the Carrier and he was compelled to seek other employment during this period of time. It is immaterial whether or not the Claimant sought outside employment prior to his request for a leave of absence because the record clearly discloses that he intended to return to service with the Carrier at the expiration of the sixty day period.

Nevertheless, the Carrier was properly perturbed by the Claimant's failure to notify it that he was gainfully employed by another Company during his leave of absence, which had been granted because of his wife's illness. This failure to communicate with the Carrier concerning his outside activities during the aforementioned leave of absence can not be condoned and is properly the subject of disciplinary action.

In view of the foregoing, the Board finds that the Claimant did not automatically forfeit his seniority by seeking and accepting outside employment during a period of time when he was on leave of absence from the Carrier. However, the Claimant's failure to disclose and discuss his outside employment with the Carrier constituted wrongful behavior for which the Claimant should be punished. Therefore, the Claimant shall be reinstated to service with seniority rights unimpaired and to the position which he formerly held prior to this dispute if it is feasible to do so, but without compensation for time lost while out of service.

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

That the parties waived oral hearing;

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

That the Agreement has been violated.

AWARD

Claim sustained in accordance with the Opinion and Findings of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1966.

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