NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19431
THIRD DIVISION Docket Number DC-19667

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Joint Council of Dining Car Employes, Local 495
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(Seaboard Coast Line Railroad Company

STATEMENT OF CLAIM: Claim of the Joint Council of Dining Car Employes, Local 495 on the property of the Seaboard Coast Line Railroad Company for and on behalf of Mr. Oscar Taylor, seniority date December 14, 1955 for 180 hours' pay at the over-five (5) years waiter's rate each month from December 15, 1970 until he is allowed to exercise his seniority or is awarded a position in accordance with his seniority, as a result of the Carrier awarding a regular assignment to a junior waiter on December 10, 1970, Bulletin No. 885, Train 2-1.

OPINION OF BOARD: Claimant, a Dining Car Waiter, asserts a monetary claim on account of his seniority rights under Rule IV of the applicable agreement being violated by Carrier. The Claimant contends that he submitted a proper bid on all waiters' positions on December 4, 1970, and that on December 10, 1970, he was not assigned a position although waiters' positions were improperly assigned to junior employees.

FACTS OF RECORD

Claimant worked off the extra list. Beginning on November 26, 1969, and continuing for nine or ten months, Claimant obtained indefinite leaves of absence from the Assistant Superintendent of Dining Cars at various periods of time to attend to personal matters involving criminal charges in the performance of his duties as a city councilman. After each off-duty period from his employment with Carrier, he notified the Assistant Superintendent of Dining Cars when he was available for duty.

On September 5, 1970 Claimant obtained another indefinite leave of absence from the Assistant Superintendent of Dining Cars. After this leave of absence he did not report available for duty to the Assistant Superintendent of Dining Cars.

On October 14, 1970 the Claimant was found guilty in the trial of criminal charges, after admitting he had accepted a bribe in connection with his duties as a city councilman. On October 27, 1970, the Claimant was notified by Carrier to appear for formal hearing on November 6, 1970 on the following charges.

"You are charged with violation of that portion of General Order No. 70 relating to dishonesty. You are further charged with being an undesirable employee in that you have been tried, convicted and on October 14, 1970, sentenced in the Criminal Court of Record, Duval County, Florida, on a charge of accepting a bribe. In connection with your indictment on charges of accepting bribes you were on occasions publicly identified as an employee in such a way to bring discredit upon the Company."

Claimant's representatives requested and obtained postponement of the November 6, 1970 hearing, and also obtained several additional postponements.

On December 4, 1970, while his requested postponements of hearing were in effect, Claimant submitted a bid on all waiters' positions. (As previously noted, Claimant had obtained another leave on September 5, 1970, but had not thereafter reported available for duty to the Assistant Superintendent of Dining Cars.) In awarding the positions on December 10, 1970, the Carrier did not award a position to Claimant although employees junior in seniority were awarded positions.

The hearing on Carrier's charges was held on January 12, 1971, and, as a result of evidence developed therein, the Claimant was dismissed from service on February 1, 1971.

The Organization submitted the claim herein on December 30, 1970. On January 11, 1970 the Carrier rejected the claim on the following grounds:

"My records indicate that Mr. Taylor notified Assistant Superintendent Dining Cars Rennie on September 5, 1970 that he would have to be off duty until further notice as he was scheduled for trial in connection with charges made against him as Councilman for the City of Jacksonville. As of this date, he had not reported for duty and neither has he notified Mr. Rennie that he was ready for duty.

"Inasmuch as Mr. Taylor took himself out of service and as of this date is still off on his own accord, your claim is denied."

The Carrier elaborated on these grounds in a February 22, 1971 letter to the Organization and expanded them in a March 17, 1971 letter.

EXCERPT, CARRIER LETTER OF FEBRUARY 22, 1971

"When Mr. Taylor returned to duty as waiter November 26, 1969, he informed me that he would have to be off duty for various periods of time to attend to personal business in connection with the charges made against him while serving as Councilman for the City of Jacksonville. His request was granted and each time after being off duty he would notify Mr. Rennie's office when he was available for duty. He did not follow his customary practice after requesting time off September 5, 1970."

EXCERPT, CARRIER LETTER OF MARCH 17, 1971

"As stated to you in conference and here confirmed, we are in full agreement with Mr. Peeler that there is no merit to this claim. On September 5, 1970, while on the extra board, Mr. Taylor advised Assistant Superintendent Dining Cars that he would have to be off until further notice in connection with his court trial on charges of accepting a bribe while serving as Councilman for City of Jacksonville, for which he had been indicted by the Grand Jury. His request was granted and he was then on leave of absence. On October 14, 1970, he was found guilty by the court, after admitting that he had accepted a bribe. On October 27, 1970, he was notified by General Superintendent Dining Cars Peeler to appear for formal hearing on November 6, 1970, on charges outlined therein. Thereafter, you requested several post-postponements of the hearing, and it was finally held on January 12, 1971. As result of evidence developed therein, Mr. Taylor was dismissed on February 1, 1971.

Aside from the fact that Mr. Taylor could not be classified as being available for assignment to positions for which he submitted a bid on December 4, 1970, account being scheduled for formal hearing, your claim is not supported by the applicable rules of the working agreement.

"Leave of absence Rule VII specifies that, 'An employee returning to duty after leave of absence, sickness, disability or suspension, may only return to his former position or exercise seniority to any position bulletined during his absence in either instance, subject to provisions of Rule VI (a), but must do so within ten (10) days after reporting ready for duty.' Of course, as pointed out by Mr. Peeler, Mr. Taylor never reported ready for duty after getting a leave of absence on September 3, 1970, and did not comply with Rule VII.

Also, Rule VI(a), referred to in Rule VII, provides that:

'The principle of seniority is recognized, but it will not be applied in such a way as to result in impairing the efficiency of dining service. The exercise of seniority under any provision of this agreement is contingent upon the employees who seek to exercise such rights having fitness and ability for the position sought; the General Superintendent Dining Cars to be the judge thereof.'

Therefore, even if Mr. Taylor had complied with Rule VII, he did not meet the 'fitness and ability' requirement specified in Rule VI (a), in view of his having been found guilty by the court on October 14, 1970, of having accepted a bribe, which he had admitted in court, after having assured Carrier officials and the public of his innocence, and being under charges by the General Superintendent Dining Cars of being dishonest and an undesirable employee bringing discredit upon the Company. Such conclusion is confirmed by the fact the charges were substantiated in the hearing on January 12, 1971, resulting in dismissal on February 1, 1971."

The applicable agreement covers the subject of return to duty after leave of absence in Rule VII, fourth paragraph, which reads:

"An employee returning to duty after leave of absence, sickness, disability or suspension, may only return to his former position or exercise seniority to any position bulletined during his absence in either instance, subject to provisions of Rule VI(a), but must do so within ten (10) days after reporting ready for duty." (emphasis added).

RULINGS ON PETITIONER'S CONTENTIONS

The Petitioner does not dispute Carrier's assertions that Claimant took a requested leave of absence on September 5, 1970, and did not thereafter report ready for duty to the Assistant Superintendent of Dining Cars. Instead Petitioner contends that Claimant's December 4, 1970 job bid must be construed both as a proper report to duty and as a proper job bid. Petitioner concedes that "Carrier had the option to suspend Claimant prior to the formal hearing if they so desired" but argues that, since suspension action was not taken, Carrier was obliged under the agreement to award Claimant a position pursuant to his bid of December 4, 1970. And finally, Petitioner contends that the Carrier's views on Claimant's "fitness and ability" (Rule VI(a)), first raised in Carrier's March 17, 1971 letter, cannot be used by Carrier to support its method of handling Claimant's bid of December 4, 1970.

Petitioner's contention concerning "fitness and ability" is well taken. This is not material, however, as Carrier's position is supported by the record without regard to this contention.

We find that Claimant's bid cannot be construed to be "reporting ready for duty" as contemplated by Rule VII of the agreement. We note here that Petitioner's sole contention is that Claimant's bid, constructively, amounts to a proper reporting for duty; the record does not reflect any mitigating or excusable circumstances in his behalf.

For a period of about ten months, beginning in November of 1969, Claimant at various times obtained indefinite leaves of absence. His reasons for the leaves are not relevant. The method by which he reported back is the controlling consideration.

After each indefinite leave, except the last one, Claimant reported ready for duty to the Assistant Superintendent of Dining Cars. He may or not have had reasons for not reporting for duty to the Assistant Superintendent in regard to the last leave of absence. The record does not enlighten us on this point, and there are no logical inferences to explain why he did not follow his past practice. But the record does show there were concrete reasons why he should have reported according to his regular past practice. He had always reported to the Assistant Superintendent in the past and, for this reason alone, he was obligated to do so in regard to the last leave. His leave was of indefinite duration, until "further notice", which further implies an obligation to make a positive, unequivocal report for duty. And, finally, since the Claimant was under the cloud of serious charges, involving the prospect of suspension, this was another reason for Claimant to know that he should not deviate from past practice.

On the record as a whole, therefore, we find that Claimant had not reported ready for duty as required by Rule VII and that the Carrier did not violate Rule VI by not awarding him a position on December 10, 1970.

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 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 was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 17th day of October 1972.