

File

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19565
Docket Number CL-19802

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline & Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(Railroad Perishable Inspection Agency

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7141)
that:

(1) The Agency did wrongfully remove Mr. Victor Simas' name from the Agency rosters and from all Agency service on August 31, 1971.

(2) The Agency be now required to return Mr. Simas to service with all seniority and other rights and privileges unimpaired and compensate him for all time lost, plus interest payable on such loss of pay.

OPINION OF BOARD: This claim arises under agreement between the parties effective January 1, 1948. It is alleged that claimant, Mr. Victor Simas, with seniority date of July 1, 1968, was wrongfully removed from Agency rosters and Agency service. The last service performed by claimant for the Agency was in the position of Inspector, Hunts Point Market, New York, N.Y.

FACTS

A July 2, 1971 dismissal of claimant, which forms part of the background facts of this case, has been litigated to finality in a separate proceeding; thus, the basis of that dismissal is not relevant to the claim herein.

On July 2, 1971 the Agency disciplined claimant by dismissal. By a July 23, 1971 letter, signed T. J. McKenna, Assistant Manager, this dismissal was changed to a fifty-nine (59) day suspension. In pertinent part Mr. McKenna's letter reads as follows:

"After a complete review of all the facts and circumstances involved in the Investigation and Appeal Hearing, it is my decision to reinstate Mr. Simas to service with the Railroad Perishable Inspection Agency effective August 2, 1971.

Further as discipline, Mr. V. Simas will be assessed 59 days without pay for the period May 11, 1971 thru July 30, 1971."

The McKenna letter was sent to claimant registered mail, return receipt requested; it was accepted by another person on claimant's behalf on July 24, 1971. While it is not clear when claimant actually received the McKenna letter, or whether he did, it is certain that he either received it or knew of its contents at least by August 29, 1971.

Between July 2 and July 23, 1971, i.e., while appeal of the July 2 dismissal was being progressed on the property, claimant left the country for Portugal. According to facts set forth in Organization correspondence on the property, which have not been challenged of record, the Agency was informed that claimant was out of the country due to the death of his father and the settling of the father's estate and that claimant would not be available for service until August 28, 1971. This information was conveyed to Mr. T. J. McKenna, Assistant Manager, by Messers. T. J. Stearns, General Chairman, and John R. Bohling, Local Chairman, on July 16, 1971.

On August 28, 1971 Claimant returned to New York from Portugal. Under date of August 29, 1971, claimant wrote Mr. A. J. Franklin, Manager of Agency, copy to Mr. Strobino, the following letter:

"As you were advised by Mr. T. J. Stearns, I have just returned from Portugal on August 28, 1971, after taking care of some personal business related to my father's estate. Upon my return I still have to take care of some unfinished matters, that will require some time to do so.

I will be available to return to work on the 12th of September."

By letter dated August 30, 1971 the Agency notified claimant he was dropped from the seniority rosters and his employment relationship terminated as of August 31, 1971. The letter of notification, signed by Mr. R. Strobino, District Inspector, reads as follows:

"This refers to letter dated July 23, 1971, by Mr. T. J. McKenna, Assistant Manager, RPIA, which was sent via Registered Mail - Return Receipt Requested to Mr. T. J. Stearns, General Chairman, BRAC, with copy to you and Mr. J. R. Bohling, in which you were advised that you were reinstated to service with the RPIA effective August 2, 1971.

"Copy of our July 23, 1971 letter directed to your home address was receipted for by your authorized representative on July 24, 1971.

Since the date of your reinstatement (August 2, 1971) thirty (30) calendar days have elapsed without written advise from you regarding your failure to report for duty and without written request from you for a leave of absence in accordance with Rule 12 'Leave of Absence' item (c) of the agreement dated January 1, 1948 between the RPIA and Brotherhood of Railway and Steamship Clerks, etc.

Therefore, in view of the silence on your part and your failure to comply with the requirements of Rule 12 (c) we concluded that you have no desire to return to service with the RPIA.

Accordingly, you are dropped from the seniority roster and your employment relationship with the RPIA is terminated as of August 31, 1971."

The claimant was not afforded opportunity for a hearing on the matters set forth in Mr. Strobino's letter.

On October 12, 1971 the appeal of the action taken by Mr. Strobino was held in the office of Mr. McKenna. In denying the appeal in a October 21, 1971 letter, Mr. McKenna, in pertinent part, stated:

"After a complete review of all factors involved and consideration of the statements made by you in your official appeal on behalf of Mr. V. Simas on October 12, 1971, it is my decision that Mr. Strobino's action regarding Mr. Simas is solidly based on:

1. Mr. Simas' failure to report for duty when reinstated to Agency service on August 2, 1971.
2. Mr. Simas' failure to comply with Rule 12 'Leave of Absence' item (c) of the Agreement dated January 1, 1948, between the Railroad Perishable Inspection Agency and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Mr. Simas' course of action in these circumstances was at his own volition.

"During your official appeal on October 12, 1971, you stated that you based your appeal on Rule 25 'Discipline' item (a) of our January 1, 1948 Agreement and that in the opinion of the Brotherhood the Agency has violated the Agreement under the terms of Rule 25 item (a).

As I advised you during our October 12, 1971 meeting, the Agency is in complete disagreement with your position and your use of Rule 25 item (a) as a basis for same."

Thus the correspondence shows that the parties joined issue on the property in respect to Rule 12, Leave of Absence, and Rule 25, Discipline. In their submissions, without objection, Petitioner asserted a violation of Rule 5 while the Agency asserted its action was supported by Rule 10 as well as by Rule 12. Rule 5 and 10, in pertinent part, read as follows:

"Rule 5 (c)

No change in seniority standing of any employee will be made on the part of the Management without conference and agreement with the Local committee representing the employees. Copies of the roster will be furnished employees' representatives."

"Rule 10 (f)

When forces are increased or vacancies occur, furloughed employees shall be recalled to service in the order of their seniority as provided for in rule 6. Furloughed employees who fail to return to service within ten (10) days after being notified (by registered mail or telegram sent to their last recorded address) or give satisfactory reason for not doing so, will forfeit all seniority rights." (Emphasis supplied).

CONTENTIONS OF PARTIES

Petitioner contends that the Agency violated Rule 5 (c), which requires a conference before a change in the seniority standing of any employee, and Rule 25, which requires the Agency to offer an employee a hearing in a disciplinary action.

The Agency contends that its action was mandated and supported by Rules 10 and 12 and that removing claimant from the rosters, being directed by the Agreement, was not an act of discipline as identified in Rule 25.

RESOLUTION

If the Agency had invoked Rule 10 initially on the property, and Rule 10 only, the provisions of the Agreement controlling this case would be the part of Rule 10 (f) which excuses a furloughed employee's non-compliance with the time limits for returning to service if he can "give satisfactory reason for not doing so". The issue in such a case would be whether a hearing was required to determine whether claimant's status was that of a furloughed employee and, if so, whether he had a satisfactory reason under Rule 10(f), or whether such status and reason could be properly evaluated and determined without a hearing. However, we shall not, and indeed cannot, base our decision on Rule 10 because the Agency did not limit its initial action to this Rule.

On the property the Agency initially based its action on the grounds that claimant gave no written advice concerning his failure to report for duty when reinstated on August 2, 1971, and that he failed to submit a written request for leave of absence in accordance with Rule 12 (c). Rule 10 came into the situation after these initial grounds had been stated by the Agency.

There is no doubt that the ground initially stated by the Agency constitute a proper basis for discipline. However, neither is there any doubt that Rule 25 guarantees an investigation, including a hearing, to any employee with more than 90 days service before discipline can be assessed against him. Claimant had more than 90 days of service when this matter arose; in addition, the facts of record clearly establish his employee status when he was removed from the Agency rosters and Agency service as of August 31, 1971.

Notwithstanding claimant's July 2, 1971 dismissal from service, his employee status was restored as of August 2, 1971 by the reinstatement letter of Mr. McKenna dated July 23, 1971. The McKenna letter reinstated claimant unconditionally; it was not contingent upon any act by claimant to make the reinstatement effective. Consequently, by not reporting for duty on August 2, 1971, claimant subjected himself to discipline but this in no way amounted to automatically removing himself from service. Thus claimant's employee status continued from August 2, 1971 until he received Mr. Strobino's August 30, 1971 letter which dropped him from the seniority roster and terminated his "employment relationship with the RPIA...as of August 31, 1971". The quoted language from Mr. Strobino's letter is an admission by the Agency that claimant had the employee status which we have indicated.

In several similar cases we have held that an employee is entitled to an investigation and hearing where the employer's action amounted to a dismissal. In Award 17072 (Goodman) this Board stated:

"Thus, Claimant's teaching school on October 28, 29 and 30, 1964, did not violate Rule 29 (g) since he did not engage in this outside employment while he was absent account of personal sickness or disability. Rather, he engaged in this outside employment while he was absent on vacation. Because of this latter fact, Claimant did not automatically remove himself from the service. Consequently, Carrier's removal of his name from the seniority list amounted to a dismissal without investigation and hearing, in violation of Rule 27."

See also Awards 17968 (Devine) and 6399 (McMahon).

In view of the foregoing, and on the record as a whole, we find that the Agency action as initially taken in Mr. Strobino's August 30, 1971 letter, and as reaffirmed in Mr. McKenna's letter of October 21, 1971, was action of a disciplinary nature and that claimant was entitled to a hearing to attempt to show that such action was not justified. We further find that the Agency not affording claimant opportunity for a hearing constituted a violation of Rule 25 of the Agreement. Accordingly, we shall sustain the claim. However, there is nothing in the record to support the claim for interest on loss of pay and we therefore deny the interest part of the claim.

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 was violated.

A W A R D

Claim sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

E. A. Kilham
Executive Secretary

Dated at Chicago, Illinois, this 30th day of January 1973.