

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21128
Docket Number CL-21275

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(Pittsburgh and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7868) that:

(a) The Carrier violated the Rules Agreement, effective September 10, 1946, particularly Rule 20, when it assessed discipline of dismissal on Claimant, Barbara Kline, a Clerk on leave of absence from the Carrier's Accounting Department at Pittsburgh, Pennsylvania.

(b) Claimant Barbara Kline's record be cleared of the charges brought against her on August 20, 1973.

(c) Claimant Barbara Kline be restored to service with seniority and all other rights unimpaired.

OPINION OF BOARD: Claimant was found guilty of violating Rule 23 because she allegedly engaged in business while on leave of absence:

"RULE 23 - LEAVE OF ABSENCE

An employe may have thirty (30) days' layoff upon receipt of permission from proper officials without written leave of absence. If for over thirty (30) days or under ninety (90) days, he shall have written leave of absence. The limit of leave of absence to be one year, after which, if an employe returns to the service, he shall be employed as a new man except in cases of sickness, disability, or while engaged on committee work or special duty for the company.

NOTE: It is understood that the application of Rule 23 will not permit the granting of a leave of absence to engage in business or to accept employment in outside service."

The record shows that Claimant had received a leave of absence due to a physical disability, which was subsequently extended. The last extension granted was due to expire in October, 1973, but the Carrier's actions, discussed herein, terminated it on August 20, 1973.

The Organization maintains that the "Note" to Rule 23 does not apply to the instant case, because the alleged activities in question occurred after the leave of absence was properly obtained and extended, whereas the pertinent language prohibits the "... granting of a leave of absence to engage in business...." (underscoring supplied).

Although it is undisputed that Claimant was the President-Treasurer of the Global Lounge, Inc., during the time in question, and that she was observed serving patrons, the Employees deny that this activity violated Rule 23 as it neither constituted employment or involved the physical stress of her clerical position.

Carrier contends that Claimant clearly "engaged in business outside of service" while on leave of absence, as shown by her ownership of the business and the observation of her serving in the bar. It states, further, that Claimant's failure to report for a service examination confirms her intention to violate Rule 23. Carrier states, in its submission, that if Claimant had complied with the instruction to report to Chief Surgeon Happel's office to determine whether or not she was capable of performing clerical services and had been found incapable of working, her leave of absence would not have been terminated.

At first blush, there is a tendency to presume that the Note to Rule 23 serves as a contractual deterrent to activities of a business nature while an employee is on a leave of absence. But, the rule is not so worded. It refers to a "granting" of leave. The admonition contained in Award 12558 is particularly pertinent here:

"We may not inject our predilections as to what is fair, just and equitable. Nor can we engage in speculation as to what might have been in the minds of the parties, but not evidenced in the Agreement as executed, or otherwise proven."

We do not mean to suggest that the Carrier is without recourse if it charged, and proved, a fraud in the obtaining of a leave or an extension thereof; but such is not the allegation here. Moreover, the Carrier is not precluded from a consideration of its knowledge of outside activities concerning a request for an extension. Under those types of circumstances, questions of whether ownership of a business is embraced within the term "engage in business" - questions of proof, etc. - ~~may~~ be quite material to a resolution. But we do not find that those issues are material here. In short, we feel that, under the precise wording of the rule, the Carrier's attempt to terminate the leave in August, 1973 was premature.

Reliance upon an Award of Public Law Board No. 1376 is misplaced. That dispute concerned significantly different factual circumstances.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

G. W. Parker
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.

NATIONAL RAILROAD ADJUSTMENT BOARD

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PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
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ON REMAND FROM THE
UNITED STATES DISTRICT COURT -
WESTERN DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 77-348

INTERPRETATION TO AWARD 21128, DOCKET CL-21275

We are called upon to render an interpretation of Award 21128 of this Division, particularly as to whether or not there is an entitlement to receive back wages under that Award.

Initially, we are inclined to remind the parties that the purpose of an Interpretation is to clarify an Award; but it is not a means to provide an avenue to reargue the original claim.

In the Court's Memorandum Opinion which accompanied the Order of Remand, we find:

"The plaintiff on the other hand, claims that an intention to award back wages can convincingly be inferred from the NRAB's opinion."

In that regard the Court noted Rule 20(e):

"If the employee is found not guilty of the offense with which charged, he shall be reinstated, compensated for his net wage loss, if any, and his record cleared."

Reference to the cited Rule was made in the Employee's original Submission. Carrier did not challenge or rebut that inclusion as being "new argument" or not a matter which had been raised when the matter was under review on the property prior to the original Submission. Significantly, the Board considered - and rejected - the Rule 20(e) argument in view of the circumstances presented in this dispute.

Our "Claim Sustained" Award was merely responsive to the Statement of Claim, and the issuance of a "Blank Order" is a Division practice which does not require a "payment of money."

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The employe is not entitled to back wages under Award 21128.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, Illinois, this 18th day of November 1977.