NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21718
THIRD DIVISION Docket Number MS-21790

James F. Scearce, Referee

PARTIES TO DISPUTE: (William Cowan
(
(Consolidated Rail Corporation
((Former Penn Central Transportation Company)

STATEMENT OF CLAIM: This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of our intention to file an ex parte submission on May 19, 1976 concerning an unadjusted dispute between us and the Penn Central Railroad (Conrail) involving the Question:

1. Was Mr. Cowan a probationary employee?
2. Was Mr. Cowan fired for a good cause?
3. Regardless of whether Mr. Cowan was a probationary employee or not, can he be fired for giving advice to a fellow employee, an act which is covered in the National Railroad Relations Act?

OPINION OF BOARD: The Petitioner has a claim for reinstatement and back pay in behalf of Claimant who was employed as a Trackman by Carrier on November 6, 1974, and whose services were terminated effective February 4, 1975. Following the termination of Claimant's service allegedly on the grounds that he was not suitable as a Trackman, the Organization's representative appealed Carrier's decision to the Division Engineer. Carrier rejected this appeal on the grounds that Claimant was a probationary employe and further action under Rule 34 was not mandated. The matter was subsequently considered by the Regional Engineer on appeal by the Organization's Vice-General Chairman and the claim denied. In the meantime, Claimant was re-employed as a Trackman effective October 6, 1975. The Petitioner implies this reinstatement may have resulted "from a settlement of that claim" and "this reinstatement in the employ of the Carrier on October 6, 1975 proves that he continued to press his claim against the Carrier."

The Carrier has clearly documented that the claimant's hire date was November 6, 1974, by submission of Exhibit A, a "Change of Status Report". The petitioner has advanced no proof to the contrary. The claimant's termination date was February 4, 1975 -- a date which is in no apparent dispute.

The first and possibly only question properly before this Board is whether or not the claimant was or was not a probationary employe at the time of his initial termination.

The application of a time limit rule is not just now new before a Board convened under the Railway Labor Act. In a Second Division Award (No. 3545) dated September 27, 1960, that Board in dealing with a somewhat similar situation stated:

> "The general rule (in law) is that the time within which an act is to be done is to be computed by excluding the first day and including the last, that is, the day on which the act is to be done..." 86 Corpus Juris Secundum 13(1). "The words 'from' and 'after' are frequently employed as adverbs of time, and when used with reference to time are generally treated as having the same meaning." Ibid, 13(3). "Thus, if something is to be done 'within' a specified time 'from' or 'after' a given date or a certain day, the generally recognized rule is that the period of time is computed by excluding the given date or the certain day and including the last day of the period, and similarily, if something is to be done 'within' a specified time 'from' or 'after' a preceding event, or the day an act was done, the day of the preceding event or on which the act was done must be excluded from the count. Ibid, 13(7)."

In this case, Rule 34 is explicit:

> "(a) An employee who has been in the service of the company more than 90 days shall not be disciplined or dismissed without a fair and impartial hearing by his immediate superior..." (Emphasis added).

By applying the rule enunciated in Award 3545 (and preceded by numerous other consistent awards) and succeeded by others as well (including Award No. 19177, dated May 12, 1972, which is virtually identical to this case), the first day counted for purposes of determining the claimant's period of employment is November 7, 1974. Thus the full extent of the claimant's initial employment period is 90 days. Rule 34 is indisputable in its application to "more than 90 days."

The claimant was clearly a probationary employe at the time of his termination on February 4, 1975. His subsequent re-employment with a hire date of October 6, 1975 was just that -- re-employment. His second termination was as the first one -- as a probationary employe.

While its recitation is not necessary to the conclusion of this claim, another factor is equally compelling: this matter was not handled in the usual manner on the property.

The "usual manner" as above is incorporated into the applicable agreement as a procedure under Rule 35 - Claims and Grievances which specifies time limits and predetermined officers of the carrier authorized to handle and process any such claim. This requirement was not met in this case.

None of the other contentions in this case are properly before this Board.

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

The Agreement was not violated in that the claimant was a probationary employe and further action under Rule 34 was not mandated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1977.