

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23119
Docket Number CL-23112

A. Robert Lowry, Referee

PARTIES TO DISPUTE: { (Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(CL-8865) that:

1) Carrier violated the Clerks' Rules Agreement at Milwaukee, Wisconsin on March 17, 1978 when it falsely accused employee Daniel Dawe of accepting a leave of absence other than as defined by the rule, rather than regarding his absence as covered under the provisions of Rule 25.

2) Carrier further violated, and continues to violate, the Agreement when it removed Employee Dawe from service and denied him the right of investigation.

3) Carrier shall be required to restore Employee Daniel Dawe to his former position with all seniority rights and other rights unimpaired and compensate him for all wage loss sustained from March 17, 1978 and continuing for each workday thereafter.

4) Carrier shall be required to make Employee Dawe whole for any money he was required to spend for medical, dental or hospital services and other benefits for which he would otherwise be covered beginning on March 17, 1978 and continuing until he is restored to service.

5) Carrier shall be required to pay interest in the amount of seven and one-half ($7\frac{1}{2}$) percent on all wage loss sustained from March 17, 1978 and continuing until Employee Dawe is returned to service.

OPINION OF BOARD: Mr. Daniel Dawe, the claimant, was the regularly assigned incumbent of Storehelper Position No. 52180 with assigned hours 7:00 A.M. to 3:00 P.M., Monday through Friday, with Saturday and Sunday rest days. On March 17, 1978, the Carrier wrote claimant the following letter:

"On Friday, March 17, 1978, you did not report for work nor did you advise the company you would be absent and/or the reason(s) therefore.

As a result thereof, you accepted leave of absence on March 17, 1978, other than as defined in the rules of the Clerks' Rules Agreement and have forfeited all seniority in accordance with the provisions of Rule 23(g) of said Clerks' Rules Agreement."

After receipt of this letter, claimant, on Sunday, March 19th, 1978, (Saturday & Sunday are the claimant's rest days) responded by informing the Carrier that he awoke at 6:00 A.M. on the 17th with strong stomach pains and nausea, attempted to telephone the office but received no answer, took some medication for his illness, which recently hospitalized him, and did not wake up until almost 6:00 P.M. that evening.

On March 20, 1978, claimant requested an unjust treatment hearing under Rule 22(f) of the Agreement between the parties. Carrier refused and confirmed its position that he had forfeited his seniority and was not entitled to a hearing. The Organization progressed the claim through all appeals procedures on the property without success in obtaining a hearing under Rule 22(f). The record indicates claimant is still out of service.

Rules 22(f) and 23(g) read as follows:

Rule 22(f)

"An employe, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within fifteen (15) days from cause of complaint."

Rule 23(g)

"Employes accepting leave of absence other than as defined in these rules shall forfeit all seniority."

This is not the first dispute these same parties have had before this Board involving the interpretation and application of these two rules.

A study of the record before this Board of disputes involving the interpretation and application of the "unjust treatment" rule, (Rule 22(f) in this case) reveals Referee Edward F. Carter in Award 3053 decided a dispute between this Organization and another Carrier but with practically an identical rule, and similar circumstances in which the Carrier discharged an employe without a hearing. Referee Carter decided in favor of the employe with the following compelling statement:

"When the Carrier declined to recognize as true her assertions that she had no intention to and did not resign, and felt that she had been unjustly treated, Mrs. Thornhill, the Claimant, was entitled to an investigation if requested in the manner provided for in the Agreement."

In Award 3233, Referee Lynch decided a dispute between the parties now before this Board, concluding Carrier had violated the "unjust treatment" rule when it failed to give the employe a hearing when timely requested after he had been removed from service because of a physical condition.

Referee Bernstein in Award 9415 thoroughly reviewed the history of this Board's decisions involving the "unjust treatment" rule making it redundant to repeat here. In the 9415 case Bernstein sustained the claim, concluding the employe who was disqualified from a position was entitled to an "unjust treatment" hearing under the rule.

This Board accepts the reasoning and conclusions these three referees place on the interpretation and application of the "unjust treatment" rule.

In the most recent award involving these same parties interpreting the "unjust treatment" rule, under similar circumstances, and also involving the interpretation of Rule 23(g), which is applicable here, Referee Paul C. Carter, Award 22479, concluded the employe who was discharged without a hearing for not protecting his assignment on a day when he claimed transportation was not available, was covered by the provisions of Rule 22(a), and stated "....that Carrier violated the rule in not preferring charges against claimant and conducting investigation as provided therein." The first sentence of Rule 22(a) reads as follows:

"(a) An employe who has been in the service more than sixty (60) days, or whose application has been formally approved, shall not be disciplined or dismissed without investigation and prior thereto the employe will be notified in writing of the precise charge."

This Board subscribes fully to Referee Paul C. Carter's reasoning in his decision and so concludes that the Carrier in this dispute violated Rule 22(a) by not preferring charges against claimant and conducting a hearing as provided in the rule.

The claim shall be sustained. Claimant shall be reinstated with full seniority and all other rights unimpaired with back pay as specifically agreed upon by the parties in Rule 22(e).

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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of January 1981.

DISSENT OF CARRIER MEMBERS
TO
AWARD NO. 23119, DOCKET CL-23112
(REFEREE LOWRY)

It is evident that the Majority in this dispute did not fully consider the facts of record and its decision is therefore defective.

March 17, 1978, was not a proper claim date as the facts of record clearly substantiate that Claimant was required to notify the Carrier if he was ill. The record substantiated that there were people available and that the telephone was working properly at the time. Carrier provided unrebutted statements of two officials that clearly refuted the Claimant's contention that no one answered the phone at 6:20 A.M. Despite the clear evidence of record, the Majority simply concludes that Claimant:

".....attempted to telephone the office but received no answer....."

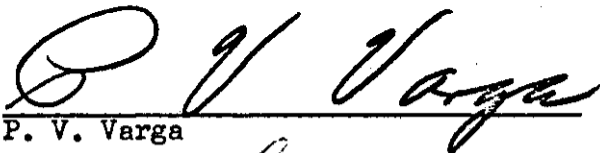
The Majority relies upon Awards 3053, 8233 and 9415 to support its conclusion of a violation of Rule 22(f). Award 3053 involved an asserted resignation and is not factually similar to the present case; and Award 9415 recognized that


"The phrase 'other than covered by these rules' is a limitation...." (Emphasis added)

on the application of the Rule. It was recognized that the rule does not grant carte blanche. In this regard Award. 8422, involving the same

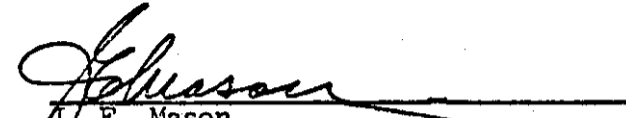
parties, as well as Public Law Board 1376, Award 16; Public Law Board 1790, Awards 51, 55, 57, 86; and Public Law Board 2127, Award No. 1, Case No. 2, were cited concerning such a limitation.

Such misunderstanding of the record warrants our dissent.


P. V. Varga


W. F. Euker


P. E. LaCrosse


J. E. Mason


J. R. O'Connell

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT
TO
AWARD NO. 23119, DOCKET CL-23112
(Referee Lowry)

Carrier Members' dissent is interesting, not in what it states, but in what it fails to state. The dissent mentions no less than ten awards to support a fallacious argument that the award is defective. The dissent ignores the fact that Award 23119 correctly recognized that the instant case was "not the first dispute these same parties have had before this Board involving the interpretation of these two rules." The dissent ignores the fact that Award 23119 cited with approval and followed closely the most recent award "involving these same parties" on the issues in dispute - Award 22479, Referee Carter.

Contrary to what Carrier Members' dissent alleges, the majority did not misunderstand the record. The Carrier discharged an employe without an investigation in violation of the agreement. This violation correctly required that the claim be sustained.



I. C. Fletcher, Labor Member