NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24348
Docket Number MS-23940

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: (Cynthia Ellis and Willie Anderson
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(National Railroad Passenger Corporation

STATEMENT OF CLAIM: "Please consider this as the usual and customary notice of our intent to file within thirty (30) days an ex parte submission having the following claim:

Claims of Cynthia Ellis and Willie Anderson, members of Joint Council Dining Car Employees Local 456, employees of AMTRAK, for total and full reinstatement and further to be made whole for all losses suffered as a result of their termination."

OPINION OF BOARD: This docket joins together the cases of two different individuals under somewhat different circumstances. The Board will thus discuss each case separately.

The first case involves Claimant Cynthia Ellis. The claim before the Board asserts that the Carrier violated the agreement when it terminated Ms. Ellis from service on July 11, 1979. The claim is for reinstatement and for backpay.

Ms. Ellis' case has the following background. She was, at the time of termination, employed as a food specialist. On July 11 she received a letter which is quoted in pertinent part below:

> "In accordance with your request for leave of absence dated June 1, 1979, you were scheduled to return from leave on July 1, 1979. You have not reported, as required, for service at the expiration of your leave. Therefore, in accordance with current agreement provisions, you have forfeited your seniority rights and are now considered out of service as of July 11, 1979.
>
> Please return all company property that you may have in your possession, including your Rail Travel Privilege Card, immediately."

Ms. Ellis' termination involves the interpretation and application of Rule H(3) of the effective Interim Agreement. Rule H(3) reads as follows:

> "(3) An employee who fails to report for duty at the expiration of leave of absence shall forfeit his seniority rights and be considered out of service unless the employee presents sufficient proof that circumstances beyond his control prevented such return. In such case, the leave will be extended to include the delay."

There is no material dispute that on or about May 10, 1979, the Claimant requested and received a leave of absence to care for her infant daughter. The leave was extended until June 1, 1979. On May 21, 1979, the Claimant was injured in an automobile accident and on May 29 the Claimant visited the Carrier's office and filled out a leave-of-absence form. The form, which was made part of the record, indicates that the request was made for the period of June 1 ending June 30, 1979. At the time of the request, the Claimant also provided a note from a doctor indicating that she would be disabled "until about 6/21/79". The next development in the case was the aforementioned termination letter of July 11, 1979.

Ms. Ellis essentially claims that she was led to believe by Carrier Official Steven Fanzi that her leave of absence was unlimited and that there was no time limit placed on it. Therefore, because of her good-faith reliance on the Carrier's advice, she cannot be faulted for not reporting to work by June 30, 1979. She also asserts that not only is this discharge unwarranted but if she had breached Section H(3), the discharge is harsh and far too drastic.

The Carrier points out that the Claimant's failure to report back to work after July 1 was unexpected and prevented them from scheduling her for work during the peak summer traveling seasons. The Carrier also points out that the leave-of-absence form signed by the Claimant clearly set forth the limit of the leave (June 30) and clearly warned her against overstaying her leave. The following words were taken from the form:

> "You are hereby granted leave of absence, without pay, commencing June 1, 1979, and expiring at midnight on June 30, 1979, subject however, to recall to service anytime your services are needed. You will be expected to report for duty on or before the day following the last above-mentioned day. If, for any reason, you find you will be unable to so report for duty, you are to notify the undersigned, in writing, setting forth the length of time you desire to have this leave of absence extended, and the reasons for making such necessary. Request for extension must be made in ample time to permit action thereon before expiration of this leave.
>
> Failure to report for duty on or before the date of expiration of leave of absence, unless application for extension shall have been made, will be considered sufficient cause for dismissal."

After considering the arguments and evidence, it is the Board's conclusion that the termination did not violate the agreement. This Board has many times considered contractual rules similar to Rule H(3) and it has consistently been held that such rules, when they are contractually based, are self-executing. The rule clearly spells out that an employe who fails to report at the end of a leave of absence will forfeit their seniority. Because the rule directly spells out the result of such failure, our consideration is limited to whether the rule was violated. Given a violation, we cannot substitute our judgment.

In this case there is convincing evidence that the Claimant did violate the rule because there was no proof of her being detained beyond her control. The Claimant's assertion that she was under the impression earlier that her leave of absence was unlimited is not persuasive in light of the clear and unambiguous directives contained in the leave-of-absence request form that she clearly and undisputedly affixed her signature to. Moreover her actions in requesting an extension of her first leave of absence is indicative that she understood the requirements.

The Petitioner also alleges that the Claimant was a victim of discrimination prohibited by Title VII of the 1964 Civil Rights Acts and was ill-advised by her Union not to accept an offer by the Carrier for reinstatement on a leniency basis In respect to these contentions, it is the Board's opinion that we are without jurisdiction to consider these issues. Section 3 First (i) of the Railway Labor Act clearly sets forth the parameters of our jurisdiction. The two issues raised above by the Petitioner are not related to the interpretation or application of contracts and thus are outside our authority.

In respect to Claimant Anderson, the following reflects the Board's consideration of her case. First it should be noted that Ms. Anderson was offered reinstatement on a leniency basis at the same time as Ms. Ellis and accepted the offer. She was reinstated without backpay on November 16, 1979. Thus the Claim represents only a claim for time lost from the date of her termination on July 9 until the date of her reinstatement.

The record indicates that Claimant Anderson was on vacation from May 24 to June 4. On June 5 she requested permission to lay off her assignment. Nothing had been heard from her as of June 26, 1979, and the Carrier directed a letter to her indicating in pertinent part:

> "Our records indicate that you last worked on June 4, 1979, and have been absent without authorization since that date.
>
> You are directed to appear at the Oakland Crew Base within seven (7) days from the date of this letter to clarify your employment status with Amtrak. Failure to appear may result in termination of employment."

The letter was sent to the Claimant's address of record but was returned "unclaimed" after three notices. On July 9 the Carrier sent a termination letter to the same address and it was received on July 24. There is no dispute that as of June 8 she was considered as being on an indefinite leave of absence under Rule H(3).

The Board finds that in respect to Ms. Anderson there is no basis to find a violation of the agreement. While it is unfortunate she did not receive the June 26 letter, it was not improper for the Carrier, under the circumstances, to dismiss her. It has often been stated that the Carrier is not the guarantor of delivery of a notice and that constructive notice is given when the notice is sent certified mail to the employe's last address of record. It cannot be disputed that the address was proper and thus the Carrier cannot be held accountable for the Claimant's failure to receive notice. Further, it is the opinion of the Board that while there is evidence to believe Ms. Anderson was

ill during this period, there is no evidence to believe that her illness prevented her from receiving the notice of June 26 or contacting the Carrier upon receipt of the termination letter of July 9 to explain her absence. There is no reason to believe that she could not have contacted the Carrier at that time and explained or presented sufficient evidence of her inability to report. The record reflects that she failed to contact the Carrier or to contest that she was unavoidably detained from reporting until September 21, 1979. Thus it is the conclusion of the Board that the Carrier's action did not violate the agreement and thus Claimant Anderson's plea for backpay is without foundation.

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

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of April 1983.