

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24676
Docket Number MS-24766

Ida Klaus, Referee

PARTIES TO DISPUTE: (Walter B. Jay
(
(Louisville and Nashville Railroad Company

STATEMENT OF CLAIM:

1. Carrier acted with willful and arbitrary discrimination in removing my name from the clerk's seniority roster for holding a second job, breaking Rule 36B, when there are other clerks, engineers, and a dispatcher employed under the same rules who have not been removed from their seniority rosters for their violation of Rule 36B. I can present affidavits substantiating the fact that these people did, and continue to, hold second jobs with the carrier's knowledge.
2. Carrier did willfully and arbitrarily discriminate against me in not granting my request for a leave of absence to accept a job for one year with a federal jobs program under the supervision of the Baldwin County Commission. There is a clerk on the seniority roster at Sibert who has for years been on leave of absence who holds the position of County Administrator, a non-elected position, under the Mobile County Commission. Also, a clerk on the Montgomery seniority roster was granted leave of absence to accept a non-elected position with the Veterans' Administration in Montgomery.
3. Carrier did willfully and arbitrarily discriminate against me in that its agent, J. R. Clement, Train-Master/Agent at Sibert Yard, did tell me that it would take one year for me to learn the third-shift Transit Rate Clerk position that I bid in. It is in the agreement that a clerk has thirty days to qualify or not on any job. Because of his remark, I assumed he did not want me to take the award so I withdrew my bid. He subsequently awarded said position to Robert Scott, a displaced dispatcher assigned to the Mobile Seniority Roster.
4. Carrier did willfully and arbitrarily discriminate against me when its agent, D. R. Hutson, Assistant Superintendent, refused to cancel my hearing after I had agreed to quit the second job, and devote my full time to working and cubbing other jobs. J. R. Clement, Agent/Train Master agreed to accept my offer.

OPINION OF BOARD: The Claimant protests as unfair the removal of his name from the Clerks' Seniority Roster. He seeks restoration to Carrier service with full seniority.

The dispute concerns the propriety of the Carrier's application of Rule 36 (b) of the Clerks' Agreement. The Carrier determined that the rule was applicable to the claimant on the undisputed facts established by an investigation of charges issued to the Claimant.

During the period November, 1980 through February, 1981 the Claimant, while listed on the Clerks' extra board declined assignment on each of 57 days, claiming illness on each occasion. In that period he worked 23 days, all occurring on weekends and late Friday evenings. On February 20, 1981, a day of his unavailability on account of reported illness, the Claimant was found to be working at an outside job. Unbeknownst to the Carrier, he had been serving full time in the outside position since November 10, 1980. His request for a one-year leave of absence to accept that position had previously been refused by the Carrier on November 7, 1980.

Following the investigation, the claimant was advised that, by engaging in outside employment without permission, he had "forfeited" his seniority under Rule 36(b) and that his name was being removed from the seniority roster.

Rule 36(b), captioned "OUTSIDE EMPLOYMENT", provides:

"An employee absent on leave or off account sickness or injury who engages in other employment will forfeit his seniority unless special arrangements shall have been made with the official granting the leave of absence and the General Chairman."

According to the Carrier, Rule 36(b) is "automatic and self-executing". That is to say that, an employee who is absent from his Carrier work on account of illness gives up his seniority status by the act of serving in other employment without proper Carrier consent. Defending the rule as reasonable and fair to the Carrier as well as to other employees, the Carrier holds the rule to be properly applicable to the Claimant on the facts shown.

Upon analysis of the entire record, the Board finds that the Claimant has not made out a case for reversing the removal of his name from the seniority roster. This Board has held over the years in numerous decisions that an employee who accepts outside employment without permission while absent from his Carrier assignment terminates his seniority by his own hand and deed.

That general principle is plainly affirmed and clarified in the express language of Rule 36(b). To the extent relevant here, the rule reflects the clear intent of the parties to assure that employees will not abuse the privilege of excused absence for illness by working at other employment while they are not in attendance at their carrier assignment because of illness. We understand the sense of the rule to be that outside employment is generally inconsistent with Carrier employment and that an employee absent for illness who accepts outside work without permission is deemed to have chosen by that act to give up his seniority with the Carrier. Rule 36 (b) serves notice to employees of that risk.

As plainly appears from the record, the Claimant committed an aggravated abuse of his excused absence privilege by falsely claiming illness and using the time to engage in outside employment which the Carrier had previously disapproved for a leave of absence. It therefore unquestionably appears that Rule 36(b) applied to him and that he forfeited his seniority by operation of the rule.

There is no rational basis in the record, including the arguments made, on which this Board could find that he is entitled to the restoration of his seniority.

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

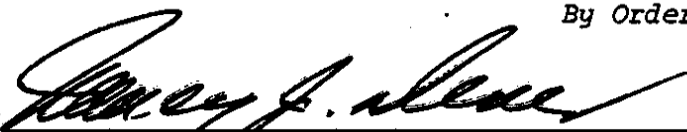
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 24th day of February 24, 1984.