Award No. 5731
Docket No. 5593
2-CUT-CM '69

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 150, RAILWAY EMPLOYES' DEPARTMENT, AFL-CIO (CARMEN)

CINCINNATI UNION TERMINAL COMPANY

The Second Division consisted of the regular members and in addition Referee John H. Dorsey when award was rendered.

DISPUTE: CLAIM OF EMPLOYES:

1. That under the current Agreement, Carman L. Taylor was unjustly dealt with them, after returning from his vacation on August 28, 1966, he was not permitted to work.

2. That accordingly the Cincinnati Union Terminal Company be ordered to compensate Mr. Taylor eight (8) hours pay at the pro rata rate of pay for Carmen, for the time he lost due to their actions.

EMPLOYES' STATEMENT OF FACTS: Carman L. Taylor hereinafter referred to as the Claimant, was employed at Cincinnati, Ohio by the Cincinnati Union Terminal Company, hereinafter referred to as the Carrier, as a Carman, with work week of Sunday through Thursday, rest days Friday and Saturday.

Claimant took two weeks vacation August 14, 1966 through August 25, 1966. On Friday August 26, 1966, before Claimant had returned from his vacation, the Carrier called Claimant at home and notified him that he had been dis-placed and would have to make a dis-placement in return. Claimant, not having a force statement before him and not knowing what abolishments or job advertisements had been posted in his absence, said that he would make his dis-placement on his return to work August 28, 1966.

On August 28, 1966, Claimant returned to work and made a dis-placement at 6:45 A.M., but he was not allowed to work the position he dis-placed, instead he was sent home and lost a days wages even though there was at least one vacant position and extra business, by way of baseball specials.

Claim was instituted with proper officer of the Carrier under date of October 26, 1966, contending that Claimant was entitled to eight (8) hours pay due to the action the Carrier took when they sent him home. This claim was subsequently handled up to and including the highest officer of the Carrier designated to handle such claims, all of whom declined to make a satisfactory settlement.

We wish to point out that the situation which arose on August 28 was not of Carrier's making. It came about because another employee laid off sick; Mr. Taylor asked to fill that vacancy; the sick employee properly followed Rule 15 (c) when he returned; Mr. Taylor was properly notified of his displacement; and it was only Mr. Taylor's failure and refusal to act on the information given him on August 26 which resulted in his loss of time on August 28.

All Mr. Taylor had to do on August 26 was to express his desire to return to his former Position R-502 and the chain of displacements which was finally made on August 28 would have been consummated on August 26. He, and he alone, caused his loss of time on August 28 and there was no agreement rule or, under the circumstances, any other obligation on the Carrier's part to rescue him on August 28 from the consequences of his deliberate actions.

CONCLUSION

Carrier believes it has shown that there is no basis in the Agreement for the claim of the Organization, that the Claimant was properly dealth with under the rules of the Agreement; that any loss of pay he sustained on August 28 was solely due to his own actions; that the Agreement was not violated and we respectfully request that this claim be denied in its entirety.

All data submitted in support of Carrier's position has been made known to the Employees and made a part of the particular question in dispute.

(Exhibits not reproduced)

FINDINGS: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant in response to a bulletin bid in the position of an employe, McGrath, who was on leave of absence account of illness.

Claimant was on vacation August 14 through 25, 1966. Friday, August 26 was a rest day.

On August 26, McGrath, having been released by the Medical Examiner to return to duty on August 28, presented the Return to Duty Notice to the Master Mechanic and signified his intention to return to the position which he held immediately prior to his leave of absence. Carrier on the same day, August 26, notified Claimant by telephone that he was being displaced by McGrath beginning with the tour of duty on August 28. Claimant was invited to exercise his displacement rights. Claimant objected to being informed of his displacement by telephone on his rest day, refused to elect

a displacement available to him by right of seniority and stated he would report for work on August 28 on the position from which he had been displaced by McGrath.

On August 28, Claimant arrived at the office at 6:45 A.M. He then proceeded to elect to displace the occupant of the position which he held prior to bidding in the McGrath position vacancy. His election was honored to become effective August 29. He was denied work on the date of the election. Petitioner claims that Carrier's refusal to permit Claimant to work the position on which he elected to displace on August 28 violated Claimant's contractual displacement right; and, the violation of the right caused Claimant to lose a day's pay which it seeks to recover as damages.

Carrier's defenses are that: (1) "Under no circumstances is an employe permitted to displace an employe on a day on which the employe to be displaced has already started working the shift; and (2) Claimant had failed to notify the foreman of his election to displace in sufficient time to permit release of the displaced employe without loss of time to that employe as required by the following provisions of the Agreement:

"RULE 15—LEAVE OF ABSENCE

(b) An employe who returns from leave of absence, illness or injury, may displace a junior man on a job bulletined during his absence, or may resume his former job if it has not been abolished or taken by a senior man in the exercise of displacement; in the latter event he will have displacement rights.

(c) Before returning he shall notify the foreman in sufficient time to permit release of a substitute employe without loss of time to the latter."

Petitioner's contentions are that: (1) it was not the practice on the property to give notice of displacement via telephone; (2) Claimant, being on his rest day, did not have available to him a whole force statement and seniority roster from which to elect a position in exercise of his displacement right; and (3) under the following provision of the Agreement Claimant had five days within which to make a displacement:

"RULE 20—REDUCTION OF FORCES

(c) In case of a reduction in force or the abolishment of a position employes affected shall within five (5) days exercise their seniority. Failing to exercise their option within the five-day period, they may be placed on any unassigned position. If there be no unassigned position, such employe will be considered furloughed, subject to recall, as provided for in the next succeeding paragraph."

Not at issue is that Claimant had the right upon being displaced by McGrath to displace in turn to the extent of his seniority entitlement. The issue is as to when Claimant's right to displace came into being timewise. Does the Agreement have time proscriptions relative to the exercise of the admitted right? Immaterial to the issue is whether Claimant was notified by telephone, on a rest day, of his being displaced.

In the resolution of the issue neither Rule 15(c), cited by Carrier; or, Rule 20(c), cited by Petitioner, are applicable.

Rule 15(c) applies to and is obligatory upon only an employe returning from a leave of absence. Other than as to employes in that status it has no application in the exercise of the right of displacement. Claimant was not in that status.

Rule 20(c) pertains only to Reduction of Forces—a situation not in evidence in this case.

As to past practice on the property relative to the time of effectuating displacement rights the record contains only conflicting assertions which leaves no probative value.

Inasmuch as: (1) Claimant had an admitted contractual right to exercise a displacement; (2) the Agreement does not circumscribe the effectuation of the right timewise, we find that Claimant had a vested contractual right to displace at a time of his choosing. We, therefore, will sustain the Claim.

Our findings in this case are not to be construed as our holding any brief for the arbitrary attitude and lack of consideration of fellow employes exhibited by Claimant. Such does not engender good labor relations. But, our function, by statutes, is confined to interpretation and application of existing agreements.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 27th day of June, 1969.

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