

The Second Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

Parties to Dispute: ( Sheet Metal Workers' International  
( Association  
(  
( St. Louis Southwestern Railway Company

Dispute: Claim of Employees:

1. That the St. Louis Southwestern Railway Company violated the controlling Agreement, particularly Rules 12-5, 23, 24-1, 24-2 and 24-4, when they unjustly dismissed Sheet Metal Worker James A. Burr from service effective January 8, 1976.
2. That accordingly, the St. Louis Southwestern Railway Company be ordered to compensate Sheet Metal Worker James A. Burr as follows:
  1. Restore Claimant to service with all service rights unimpaired.
  2. Compensate Claimant for all time lost.
  3. Make Claimant whole for all vacation rights.
  4. Pay the premium (or Hospital Association dues) for hospital, surgical and medical benefits for all time held out of service.
  5. Pay the premiums for Group Life Insurance for all time held out of service.
  6. Pay Claimant for all holidays lost.
  7. Pay Claimant for all sick pay.
  8. Pay Claimant for all Jury Duty lost while held out of service.
  9. Make Claimant whole for all Insurance Premiums.

Findings:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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, James A. Burr, entered service of Carrier in June 1967 as a yardman at Pine Bluff, Arkansas. An opportunity arose for Claimant to move to the Car Department and on September 29, 1967 he formally resigned his position as yardman and waived all seniority rights as yardman. He worked thereafter as a Carman Apprentice at Pine Bluff until he formally resigned all employment with Carrier on March 1, 1968. Mr. Burr again made application for employment in July 1974 and was hired anew as bridgeman in the B&B Department. Effective October 16, 1974 he was assigned by bulletin to a Water Service Repairman Helper position in the Water Department. Thereafter, on February 27, 1975 he was promoted to Water Service Repairman at Texarkana, Texas. In September 1975 Claimant voluntarily transferred back to Pine Bluff as a Water Service Repairman Helper and formally waived his seniority rights as a Repairman on the Southern District. It should be noted that throughout his time of employment in the Water Department (October 1974 - November 1975) Claimant was represented by the Brotherhood of Maintenance of Way Employees under an Agreement between Carrier and that Organization.

On November 6, 1975 Claimant requested permission from Carrier to transfer out of the Water Department into a position of Sheet Metal Worker in the Locomotive Maintenance Plant - Mechanical Department at Pine Bluff. Carrier approved this request and effective November 10, 1975 Claimant moved to the Mechanical Department position. It should be noted that Sheet Metal Worker employees in the Locomotive Plant are represented by the Sheet Metal Workers' International Association under an Agreement between Carrier and that Organization. After working in the Sheet Metal Worker position for nearly two months Claimant, on January 8, 1976, received a letter from the Locomotive Plant Manager reading, in pertinent part, as follows:

"This is to advise that effective January 8, 1976, at the end of your tour of duty, your services with the St. Louis Southwestern Railway Company is hereby terminated."

Thereafter the instant claim was filed alleging that Carrier had violated Rules 12-5 and 24 of the Agreements. The cited rules read, in pertinent part, as follows:

"12-5. Employees transferred from one point to another with a view of accepting a permanent transfer will, after thirty (30) days lose their seniority at the point they left, and their new seniority will begin on the date of transfer."

"Rule 24  
"Discipline"

"24-1. No employee shall be disciplined without a fair hearing by a designated officer of the Carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this rule.

24-2. At a reasonable time prior to the hearing such employee will be apprized of the precise charge against him.

24-3. The employee shall have reasonable opportunity to secure the presence of necessary witnesses, and if he desires representation, said representation shall be by the duly authorized local committee or their representative.

NOTE: Rule 24 does not attempt to obligate the Carrier to refuse or grant permission to an individual employee to present his own grievance or, in hearing involving charges against him, to present his own case personally. The effect of these rules, when an individual employee presents his own grievance or case personally, is to require that the duly authorized committee, or its accredited representative, if it or they in each instance so request, be permitted to be a party to all conferences, hearings or negotiations between the aggrieved or accused employee and the representatives of the Carrier.

24-4. If it is found that an employee has been unjustly suspended or dismissed from the service, such employee shall be reinstated with his seniority rights unimpaired, and compensated for the wage loss, if any, resulting from said suspension or dismissal."

Carrier defended against the claim on the property with the position that neither Rule 12-5 nor Rule 24 applied to Claimant's situation. Specifically Carrier contends that Rule 12-5 applies only to transfers from one geographic point to another and only to intra-craft transfers. Carrier argued that Rule 24 applies to discipline of employees and stated that the

reason for his termination was not discipline, but rather was because during November and December of 1975 Claimant's "attitude became very bad, he began to lay off frequently and he became an unsatisfactory employee". In addition to the foregoing Carrier also asserted the affirmative defense that it had the contractual right to terminate Claimant without any reason at all under Rule 23 of the Agreement. Rule 23 reads as follows:

"Application for Employment: Employment shall be considered temporary for sixty (60) days pending approval or disapproval of application. If the applicant is not notified of the disapproval of application within sixty (60) days from date thereof, application will be considered approved. An employee who has been in service of the Carrier sixty (60) days shall not be dismissed for incompetency."

In this latter connection Carrier maintains that Claimant was an applicant for employment with the same status as a "new hire off the streets" pursuant to Rule 23 and that his "application" for employment as a Sheet Metal Worker was "disapproved" by the Manager of the Locomotive Plant on the 59th day, all in compliance with Rule 23.

We turn first to the question whether Rule 23 governs this case. Upon careful consideration of the clear language of that Rule and the facts of record, it is plain that it does not. The Rule deals with "Application for Employment" and makes employment temporary for 60 days conditioned upon approval or disapproval of the application. (Emphasis added). It is patent that Rule 23 applies to people newly hired as a result of an application for employment. The personnel transaction which resulted in Claimant's placement on the Sheet Metal Worker job was not an application for employment but rather a request to transfer by an employee who had already established an employment relationship with the Carrier. Claimant was an applicant for employment on July 10, 1974 and Carrier could have disapproved his application under Rule 23 for 60 days thereafter but it cannot use Rule 23 in January 1976 to justify his termination for alleged "bad attitude and excessive layoffs". All but one of the Awards cited by Carrier dealt with disapproval of applications for employment, but Claimant was not an applicant and those Awards therefore, are not relevant in this case. To the extent that Award No. 1 of Public Law Board 1707 suggests that a transferee is the same as an applicant for employment, we deem it to be in error, and without precedent value in the case before us.

Having disposed of the affirmative defense based upon Rule 23, the question remains whether the Organization has carried its burden of proof that Carrier violated Rule 12-5 and/or 24. By its express terms, Rule 12-5 applies to transfers from one point (geographic location) to another point (geographic location). The Water Department job which Claimant transferred from and the Mechanical Department job which he transferred to, both were

at the same point, Pine Bluff, Arkansas. Therefore, Rule 12-5 has no application in this case. Rule 24 however, clearly does apply and is dispositive of the case. That this was a disciplinary discharge is proven beyond cavil on the record before us. The assertion that a termination for "bad attitude and excessive layoffs" was not for disciplinary reasons is utterly unpersuasive. It is not contested that Carrier failed to follow Rule 24 in discharging Claimant.

Based upon all of the foregoing we find that Carrier violated Rule 24 in the discharge of Mr. Burr. Consistent with Rule 24-4 the remedy for that violation is restricted to reinstatement to the position from which he was discharged, with seniority rights unimpaired; together with compensation for back pay, less any earnings from outside sources.

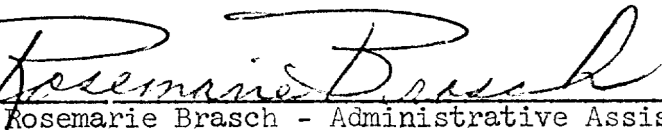
A W A R D

Claim sustained to the extent indicated in the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By

  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 30th day of May, 1978.