Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD SECOND DIVISION

Award No. 10746
Docket No. 10592
2-C&NW-CM-'85

The Second Division consisted of the regular members and in addition Referee Jonathan Klein when award was rendered.

Parties to Dispute: (Brotherhood Railway Carmen of the United States and Canada
(
(Chicago and North Western Transportation Company

Dispute: Claim of Employes:

1. Carman P. A. Miller was unjustly dismissed from service on October 22, 1982 without benefit of a fair and impartial investigation, because of an alleged conflict with Carrier's Policy No. 17.

2. That the Chicago & North Western Transportation Company be ordered to make whole Carman P. A. Miller, restore him to service with all seniority rights, vaction rights, holidays and all other benefits that are a condition of employment unimpaired, with compensation for all times lost from the date of dismissal plus 15% annual interest, reimbursement of all losses sustained account loss of coverage under health and welfare and life insurance agreements, during the time held out of service, in accordance with Rule 35.

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 employes 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.

The Claimant was employed by the Carrier under the provisions of the agreement commonly referred to as the Miami Accord. Under this Agreement the Carrier took over the operation of portions of the bankrupt Chicago, Rock Island and Pacific Railroad in April, 1980. Claimant was employed by Carrier to perform pipefitting work under the classification of Sheet Metal Worker at the Des Moines Diesel Shop. Due to a reduction in force, Claimant was furloughed as a Sheet Metal Worker on July 23, 1982.

On September 11, 1982, the Claimant wrote the Carrier of his intent to request a temporary transfer into the Carrier's Des Moines Car Department pursuant to General Rule 26 of the Joint Agreement. Rule 26 states:

> "When forces are reduced and men are needed at other points they will, at their request, be given preference to nearest point, with privilege of returning to home station when force is increased, such transfer to be made without expense to the railway company. Seniority to govern all cases."

On September 15, 1982, the Local Chairman of the Carmen at Des Moines wrote Carrier's Assistant Division Manager notifying him that he had no objection to Claimant transferring into the Car Department. By letter dated September 23, 1982, Carrier's Assistant Division Manager replied that he had no objections to Claimant exercising his rights at Des Moines, Iowa, as long as the transfer was within the scope of the existing Agreement between the Carrier and the Carmen. On October 4, 1982, the Claimant formally requested and completed his permanent transfer to the Car Department at Des Moines per General Rule 18. Rule 18 states as follows:

> "Employes transferred from one point to another, with a view of accepting a permanent transfer, will, after thirty days, lose their seniority at the point they left, and their seniority at the point to which transferred will begin on date of transfer, seniority to govern. Employes will not be compelled to accept a permanent transfer to another point."

On October 22, 1982, the Carrier provided the Claimant with the following notice:

> "Des Moines, Iowa
> October 22, 1982
>
> Mr. P. A. Miller
>
> Because of your family relationship with carman K. E. Reed, a violation of Chicago and North Western Transportation Company Policy No. Seventeen (17) has occurred, therefore, your application for employment as carman has been rejected.
>
> Effective close of shift October 22, 1982, you are hereby relieved of your assignment as carman. You will retain no rights or privileges associated with your tenure as carman.

Your employment status will revert to that of sheetmetal worker on furlough.

/s/ J. T. Siebert
Assistant Division Manger
Mechanical"

The central and preliminary issue raised by the record before this Board is whether Claimant was entitled to a formal investigation in accordance with Rule 35, as amended. Rule 35 provides in pertinent part:

> "(a) Except as provided in section (f) hereof, an employee in service more than sixty (60) days will not be disciplined or dismissed without a fair and impartial investigation." (Emphasis supplied).

The evidence suggests that Claimant met all the Carmen's qualifications set forth in Carmen's Special Rule 123. Claimant had held a Carmen's position with the former Chicago, Rock Island and Pacific Railroad Company effective April 6, 1967. The Carrier's own Assistant Vice President and Division Manager wrote as of November 23, 1982, the Claimant's record and qualifications as a Carman were admirable; however, Policy #17 pertaining to the employment of relatives precluded his continued employment in the Car Department.

The Carrier contends that Claimant was not entitled to an investigation based upon his alleged status as a probationary employee in the Car Department regardless of his qualification to perform Carmen's work.

A "probationary employee" is generally a new employee whose performance with the employer is on trial, and who is attempting to establish his right to permanent status. The Carrier does not suggest that were the Claimant to be disciplined or discharged while working in the capacity of a Sheet Metal Worker that the due process right to a fair and impartial investigation contained in Rule 35, as amended, would not apply. Rather, the Carrier argues that upon his transfer into the Car Department the Claimant assumed probationary status which precluded the need for a formal investigation. The Carrier argues, in effect, that the intent of Rule 35's contractual language, "an employee in service," as quoted above, should be read to mean "an employee in service [in his craft]."

The Board fails to find Carrier's well-argued position to be an accurate reading of this Rule. In argument to the Board, the parties were in agreement that Claimant's transfer into a new craft did not result in a carry-over of his 1980 seniority date for purposes of seniority status as a Carmen. Therefore, the Board finds based upon the parties' position and Rule 28's mandate of common seniority between employees at each point in their respective craft, that when Claimant was permitted by the Carrier to transfer to the Car Department within the Carrier's Des Moines shop on October 4, 1982, his Carmen's seniority began on that date. Nevertheless, Claimant retained his initial date of hire under the Miami Accord for purposes of determining his contractual right as an employee to an investigation pursuant to Rule 35.

The Board is of the considered opinion that Claimant was an employee in the Carrier's service for more than sixty days at the date of his transfer to the Car Department. The Board finds that the words "in-service" cannot reasonably be construed to preclude the application of Rule 35 to the removal from service of an employee in a separate craft. Award No. 7904, Second Division, cited by the Carrier, is distinguishable based upon the fact that both crafts in the instant appeal are governed by the same General Rules of the Joint Agreement.

There is no contractual language or other evidence of record to suggest that the parties intended "seniority" to be the functional or definitional equivalent to "in-service." As this case demonstrates, an employee's particular craft seniority may be of virtually no protection or value after an authorized cross-craft transfer. The Board finds no merit in Carrier's argument that cross-craft transfers are prohibited. The fact that such transfers are not expressly permitted by the contract does not mean that the parties have intended to preclude them. The Board's examination of the parties' actual practice and behavior in this instance lends no credence to the Carrier's position. The fact remains that the Carrier's Assistant Division Manager authorized Claimant's transfer to the Car Department. The Notice of Discharge itself makes no mention of a contractual prohibition against cross-craft transfer; but only a violation of Policy No. 17.

This act of transfer, however, absent contractual language to the contrary, cannot diminish the length of an employee's employment relationship with the Carrier, nor the corresponding period of "in service." The Board remands this case to the Carrier's property for a fair and impartial investigation to resolve the issue of whether Claimant's transfer to the Car Department was a violation of Policy No. 17.

A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of February 1986.