

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Fay R. Einson, Clerk, Philadelphia Terminal Division, Philadelphia, Pennsylvania, was improperly denied the right to exercise his seniority to a position on the Philadelphia Terminal Division Seniority District on January 6, 1947, after being absent because of illness.

(b) Fay R. Einson shall be compensated in full for monetary loss sustained as a result of such improper action by the Carrier retroactive to January 6, 1947, until adjusted. (Docket E-437.)

EMPLOYEE'S STATEMENT OF FACTS: There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act. This Rules Agreement will be considered as a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

This dispute was progressed to the highest designated officers of the Carrier by means of a Joint Submission. This Joint Submission is attached as Employees' Exhibit "A" and will be considered as part of this Statement of Facts.

The Claimant, Fay R. Einson, held a seniority date on the Seniority Roster of the Philadelphia Terminal Division Seniority District, Philadelphia, Pennsylvania.

On November 15, 1945, the Claimant was displaced from Clerical position Symbol F-1761, located at Walnut Street Freight Station, Philadelphia Terminal Division by a senior employee.

On November 24, 1945, the Claimant's mother, Mrs. Bertha Einson, telephoned the office of the Agent, Mr. Fred C. Thompson, and talked with Mr. Thompson's Secretary, Miss Ross, advising Miss Ross that the Claimant, Fay R. Einson, was ill and unable to report for duty and, at the same time, requested that that office mail her her pay check. A sworn statement made by Mrs. Bertha Einson, mother of the Claimant, Ray R. Einson, verifying the fact that the Agency was notified of Miss Einson's illness is made a part of these facts and shown as Employees' Exhibit "B."

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

(Exhibit not reproduced.)

OPINION OF BOARD: The Brotherhood contends that Claimant, Fay R. Einson, a Clerk in the Philadelphia Terminal Division, was improperly denied the right to exercise her seniority on January 6, 1947, after being absent because of illness, and asks that she be given that right with compensation in full for any monetary loss sustained as a result thereof, retroactive to January 6, 1947.

The record discloses that on November 15, 1945, Claimant, who held seniority rights in the Philadelphia Terminal Division, was displaced from the position she then held with the Carrier, being position Symbol F-1761 located at Walnut Street Freight Station.

Rule 3-C-1 (a) of parties' effective Agreement provides in part:

"(a) An employe displaced from his regular position shall exercise seniority within twenty-nine days or forfeit all seniority, except as provided in Rules 2-A-7 and 3-G-1, or in cases of personal illness, unavoidable causes or inability to exercise seniority due to the fact that no position is available. In case of absence due to personal illness or unavoidable causes, the twenty-nine day period will be extended proportionately to the extent of such absence."

The first question presented is one of fact, that is, did Claimant report her condition to the Agent at Walnut Street as suggested in the letter of Superintendent Gillum dated December 15, 1945? Therein Superintendent Gillum advised:

"If Miss Einson's physical condition is of such nature to prohibit her from performing the normal routine duties of a position she should report same to the Agent at Walnut Street (last place of employment), * * *."

That claimant was ill and unable to work is fully established by the statement of Dr. Louis H. Weiner, dated November 21, 1945, who was treating her for neurasthenia, of which statement Carrier received a copy.

Contrary to Carrier's contention and its statement that Mrs. Helen S. Ross had advised that she did not receive a telephone call from Claimant's mother, we are of the opinion that the evidence in the record established that Claimant's mother, Bertha Einson, did call the office of Agent Fred Thompson, at the Walnut Street Freight Station, the last place where Claimant worked, on November 24, 1945 and, in the absence of the Agent, advised his Secretary, Mrs. Helen S. Ross, that Claimant was ill and not in condition to exercise her seniority.

This fact finds support not only by the affidavit of Bertha Einson but by the following facts: that Carrier sent Claimant her last pay check by registered letter, which was in accordance with the request which Claimant's mother said she made when she talked with Mrs. Ross on November 24, 1945; that after Carrier, in its letter dated December 15, 1945 denying Claimant's request for an indefinite leave of absence made by letter dated December 8, 1945, advised what course to pursue to protect her rights under Rule 3-C-1 (a), no action was taken with reference thereto for the apparent reason that that had already been done; and that when Carrier notified Claimant by letter of its Agent, Fred Thompson, dated March 2, 1946, that she had been dropped from the service, due to her failure to comply with Rule 3-C-1 (a), she replied on April 10, 1946 advising of her mother's telephone call to his office on November 24, 1945, and the information given to his Secretary of her illness.

We find that Claimant did report to the Agent at Walnut Street within 29 days after she was displaced on November 15, 1945, and advised his Secretary that she was ill and unable to exercise her seniority and that by reason thereof, the time for her to do so was, by the terms of Rule 3-C-1 (a), extended proportionately.

On January 4, 1947 Claimant reported to the Carrier's Medical Examiner's office and requested a certificate of ability that she might resume her duties. Dr. A. T. Harrison, the Medical Examiner, did on that date issue to her a Certificate of Ability advising she would be able to resume duty on January 6, 1947. Accordingly, on January 6, 1947 she reported to the Labor and Wage Bureau, Philadelphia Terminal Division, to exercise her seniority. There she was advised she had no seniority as she had forfeited it on December 20, 1945. In this we find the Carrier in error for unless there are other reasons for so holding we find, by her action, Claimant's time for exercising her seniority had, under Rule 3-C-1 (a), been extended to that date.

Carrier further contends that Claimant, by her conduct in making application for the benefits of unemployment insurance from the Railroad Retirement Board, for which Carrier acts as agent, is estopped to make this claim for the reason that in making that application she certified to the Railroad Retirement Board that she had been able to work since June 17, 1946 and had not failed to apply for work or report to an Unemployment Office within thirty days prior thereto, whereas the record shows she did not attempt to exercise her seniority within twenty-nine days after she became able to work, as required by Rule 3-C-1 (a). No affirmative proof of what Claimant certified to in obtaining such benefits, if she did, appears in this record other than the statements of the Carrier. If Claimant made false statements in obtaining such benefit payments proper remedy can be taken by that Board. If Carrier desired to use that record as proof here it should have offered it in this proceeding for as far as this record is concerned the evidence establishes Claimant was unable to work on November 21, 1945, because of her then condition as shown by the statement of Dr. Weiner, her doctor, and that she was not able to resume such duties until January 6, 1947, as shown by the Certificate of Dr. A. T. Harrison, Medical Examiner dated January 4, 1947.

Contention is made that Claimant, after being notified by the Agent's letter dated March 2, 1946 that she had been dropped from the service of the Carrier due to her failure to comply with Rule 3-C-1 (a) after being displaced on November 15, 1945, failed to exercise her rights under Rule 7-A-2 within the time as therein provided and because thereof is now prevented from making this claim. The record discloses that Claimant, after receiving the Agent's letter dated March 2, 1946, did, by letter dated April 10, 1946, advise the Agent as to what had been done to comply with said rule. The Agent, in reply to this letter, advised Claimant by letter dated June 12, 1946 that:

"In the event that there are any changes in the developments in your case, you will, no doubt be further notified."

By this letter Claimant was, in effect, notified that Carrier would consider the matter further and advise her in regard thereto. This apparently for the purpose of checking the information in Claimant's letter of April 10, 1946. No further reply was made and final action was not taken by Carrier until January 6, 1947 when it refused Claimant's right to return to work. Appeal has been properly taken from this order and until then we do not find any action taken by the Carrier which required Claimant to act under Rule 7-A-2 or lose her rights by failing to do so.

For the reasons stated we find the claim to be meritorious and that it should be allowed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 12th day of July, 1949.