

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

J. S. Parker, Referee

PARTIES TO DISPUTE:

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

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement, when—

(1) On December 24, 1948, they unjustly removed Miss Kathryn McCarthy from position of boardman at LaGrande, Oregon.

(2) That Kathryn McCarthy now be returned to service with seniority, vacation and other rights unimpaired, and that she be compensated for all wage loss sustained because she was unjustly removed from service after having been denied the full cooperation of department heads and others in her efforts to qualify for the position of boardman.

OPINION OF BOARD: Notwithstanding the parties are not entirely in accord respecting them, we have been able, after a careful review of the record to harmonize the basic facts. They can be stated thus:

The claimant Miss Kathryn McCarthy, entered the carrier's service in a Clerical capacity in July, 1918. From that date until August 1948, she was assigned to and satisfactorily filled various positions in the carriers service, such as Revising Clerk, Cashier, Ticket Clerk, Freight House Clerk and Yard Clerk. So far as the record shows her record with the carrier as a loyal, cooperative and efficient employe during that period of time—more than thirty years—was excellent and had never been questioned.

On March 24, 1948, while claimant was occupying the position of Ticket Clerk in the carrier's passenger station at Le Grandge, Oregon, the position was abolished. Thereupon she took a leave of absence. When this leave expired on July 18, 1948, she filed proper notice to exercise her seniority rights to the position of Boardman, a clerical position, sometimes referred to as Crew Dispatcher. At the same time she asked for and received another leave of absence to familiarize herself, on her own time, with the duties of the position which, it can be said, were known to both her and the carrier to be more complex in nature than the duties of positions she had theretofore filled.

Thereupon claimant was granted another 30 day leave to qualify and instructions were issued by the carrier to employes handling the board work to cooperate with her in her efforts to learn the duties of the position of Boardman. Apparently, at the expiration of such leave both the carrier and Miss McCarthy considered that she had acquired sufficient fitness and ability to handle the position for which she had applied. At any rate, the carrier

assigned her to it and she accepted the assignment without indicating anything to the contrary. Within the space of a day it became evident she could not handle the work of the position satisfactorily. Within five hours the carrier found it necessary to call another Boardman to assist her. The next day the carrier noticed her to appear for a formal hearing on August 12, on charges of incompetency therein specifically described. At this hearing the carrier's Superintendent held the charges had been sustained and thereafter notified claimant she had been disqualified as a Boardman. This decision was appealed to the carrier's Assistant to the General Manager who, for reasons to which we shall presently refer, overruled the Superintendent and held that under the existing conditions and circumstances Miss McCarthy could not be denied the right to continue her efforts to learn the work of the position of Boardman if she saw fit to do so and that if and when she became qualified to fill it she would be entitled to the work of such position by virtue of her seniority. At the same time this official advised the Superintendent and the Assistant Superintendent that when Miss McCarthy reported at the Board office to familiarize herself with the work of the position it was the duty of the employees in that office to cooperate with her in her efforts to qualify and instructed them to cause the supervisors at Le Grand to issue the necessary instructions to the board office employees to that effect. This, we may add, was done.

On December 16, 1948, Miss McCarthy, advised the Carrier she desired to take over the Boardman's job on December 19th following. She was assigned to the position as requested and permitted to work it from December 19 to 24. Again it became apparent she did not possess the fitness and ability to handle the work of the position. On the date last named she was served with the following notice which, because it so clearly demonstrates the extent and results of her undisputed incompetency during that interim, and is explanatory of other matters to be presently mentioned, will be quoted *in toto*. It reads:

"Please report at the office of Assistant Superintendent, in the Depot Passenger Building, La Grande, Oregon, on Tuesday, December 28th, 1948, at 4:00 P.M., for hearing on general charges of incompetency and specific charges, that on December 19th, you mis-handled yardmasters at La Grande by failing to call extra man for the 7:00 A.M. shift on Shade's regular day off; when this discovered, you doubled junior relief yardmaster, resulting in claims from senior yardmasters. On December 20th, failed to place Engineer Hawn in pool freight when requested by him, after being relieved from temporary vacancy in helper service. Also failed to mark extra engineers board properly, placing Engineer Bunten ahead of Engineer Hanlen and Hanlen stood first out. On December 23rd, you failed to call extra switchman for 7:30 A.M. switch crew until 7:20 A.M., resulting in delay to this engine and to fruit train called for 8:30 A.M. December 24th, failed to call extra brakeman for Train 304 on Joseph Branch, also failed to call extra switchman for the 7:30 A.M. switch engine. When this called to your attention, called wrong man for 304, resulting in runaround. Called Engineer John Ward, a pool crew, for work train west as 6:05 A.M. resulting runarounds to three extra engineers. Also late calls for Joseph Branch Train 304 and short calls for men on fruit train called for 6:00 A.M.

"You will be withheld from service pending such hearing,

"Hearing will be conducted in conformity with Rule 45 of the Agreement effective April 1st, 1945, between the Company and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and you are entitled to representation as provided in that Article.

"You may produce such witnesses as you may desire at your expense."

Following the hearing the carrier found all charges set forth in the foregoing notice have been sustained by evidence and on January 5, 1948, notified Miss McCarthy that by reason thereof she was discharged from its service.

The foregoing factual statement, long and tedious as it may be is essential to a proper understanding of the issues involved.

Strange as it may see claimant does not insist she had the necessary fitness and ability, contemplated by Rule 8 or the current agreement to fill the position of Boardman on either of the dates here in question. By way of confession and avoidance she states that if she had received the full cooperation of department heads and others she could have qualified. The others to whom she refers are members of her own craft who, it can be said were everything but cooperative in assisting her in her efforts to qualify for the position. Even so, by inference, she seeks to place responsibility for that situation upon the carrier. Conceding sub paragraph C of Rule 20 provides employees will be given full cooperation of department heads and others in their efforts to qualify, we are unwilling to subscribe to any such view. The carrier reversed the first action to which we have referred because of the incooperative attitude of her fellow employees. It gave her a second chance and issued instructions to its employees to assist her in every way possible. The fact is the record discloses the major portion of the blame for her failure to qualify rests squarely upon the Clerical employees in the Board office and the claimant herself, who, by reason of temperament and other idiosyncrasies on which we need not dwell, was far from tactful or resourceful in attempting to obtain the help of her fellow craftsmen.

The real meat of the claimant's position depends upon the construction to be given two pertinent rules of the current agreement. The first of these is subsection (a) of Rule 20 which reads:

"An employee who is assigned to a bulletined position or displaces another employee and fails within a reasonable time to demonstrate his fitness and ability, shall vacate the position on which disqualified and will displace either the junior assigned employee, if there is one in the bureau (if no bureau, the office) or station in which the position on which the employee fails to qualify is located, or displace the junior assigned employee in the seniority district. - - -".

The next is Rule 45 (a), dealing with adjustment procedure. It reads:

"No employee will be disciplined or dismissed without a fair hearing by his supervising officer. Suspension in proper cases pending a hearing, which will be held within seven days of the time charge is made or employee suspended, will not be considered a violation of this principle. At a reasonable time prior to the hearing the employee will be apprised of the precise charge against him; in cases of unsatisfactory service or incompetency all charges to be investigated will be stated. The employee will have reasonable opportunity to secure the presence of witnesses and the right to be represented by one or more employees of his choice, and/or duly accredited representative."

It is argued the provisions of Rule 20, when an employee is endeavoring to qualify for a position even though he fails to demonstrate his fitness and ability within a reasonable time, preclude disciplinary procedure under Rule 45. We note the latter by express terms has application "in cases of unsatisfactory service or incompetency." In that situation our view is the two rules must be construed together. So construed, in a case of unsatisfactory service or incompetency—as is true in the instant case—the Carrier may proceed under Rule 45 for the purpose of vacating the position held by an employee under the provisions of Rule 20, as well as for the purpose of assessing discipline if the conditions warrant. How else, we inquire, could the carrier vacate the position if the employee assigned thereto insists he had not failed to demonstrate his fitness and ability to perform the work thereof and on that account refuses to vacate it.

The record in the instant case convinces us claimant's insistence upon filling the position of Boardman at a time when she knew she did not possess the

required fitness and ability necessary to enable her to perform its work not only justified the Carrier in removing her from the position but warranted the assessment of discipline for loss and injury resulting from her own known incompetence.

Thus we come to the final question whether the discipline assessed, namely, permanent dismissal from service, was out of all proportion to the gravity of claimant's offense. If the record disclosed intentional disregard of duty or misconduct we would say no. As it is, particularly where the carrier was forewarned and should have given special attention to claimant's fitness and ability, after her repeated efforts to qualify herself for the position, before assigning her to the position of Boardman for a second time, we have reached the conclusion she was not guilty of any offense of misconduct which justified her dismissal from the service. This conclusion we believe is inescapable in view of her faithful and long continued service, especially where it is not denied there are other clerical positions which she could fill with justice to the carrier and to herself. However, as we have indicated, her persistent conduct with knowledge of her limitations, merited discipline. We think a suspension of 70 days for her transgression was warranted. The carrier offered to put her back to work on any position she was qualified to fill within that period of time. She and she alone is to blame for not having a regular assignment from March 3, 1949, up to the present time. Therefore, we are constrained to hold that, if she accepts it, claimant be immediately restored to service with the carrier in whatever position, consistent with her seniority rights, she is qualified and able to fill, with seniority, vacation and other rights unimpaired. However, due to her refusal to accept the carrier's offer on March 13, 1949, to reinstate her provided she would take a position she was capable of filling, reparation for time lost while she is out of service will be denied. In the event of claimant's refusal to accept the conditions of this Award, her claim is to be regarded as denied from and after the date of such refusal.

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 Employee involved in this dispute are respectively carrier and employee 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 Claim should be and is sustained to the extent indicated in the Opinion. If claimant fails to accept the conditions of the Award within 20 days from the date of its adoption then her claim is to be regarded as denied.

AWARD

Claim sustained in part and denied in part all as set forth in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. TUMMON
Acting Secretary

Dated at Chicago, Illinois, this 15th day of September, 1950.