Award No. 9200

Docket No. CL-9932

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Harold M. Weston, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Rules of the applicable Agreement when:

(a) It dismissed Mrs. Viola Jenkins from the service for being absent from duty without permission and without good and sufficient reasons therefor, and, insubordination. Such charges were not proven in investigation held at Savannah, Georgia, on June 8, 1956. (Attached hereto as Employes' Exhibit A.)

(b) That Claimant should be restored to service with all rights unimpaired and compensated for wage loss on P.B.X. Operator's position beginning January 19, 1956, and subsequent thereto until restored to service.

OPINION OF BOARD: The Claimant was dismissed from the Carrier's service on June 25, 1956, for insubordination in ignoring written instructions to protect her assignment and for absenting herself from duty without permission. There is no question but that she refused to report to a yard clerk position at Cooper Yard, Charleston, S. C., that had been awarded her, although on April 2 and 4, as well as May 5, 1956, she had received written instructions from the Superintendent to protect that position. In assessing the significanie of her refusal, it is important to review the events leading up to her dismissal.

The Claimant, who had held several office positions during a period of some 4½ years in Carrier's employ, became ill on July 23, 1955, was hospitalized and underwent major abdominal surgery. At the time, she had both Class 1 and Class 2 seniority. About six months later, in mid-January 1956, she reported back to work and was informed by her immediate superior, the Chief Clerk, that there were no positions held by junior Class 1 employes on which she could qualify. She thereupon, by letter dated January 19, 1956, notified the Superintendent as follows:

"I have been on sick leave from my job which was clerk at Savannah Yard Office since 25th, July, 1955. On or about 15th January 1956 I contacted Mr. J. A. Pratt, Chief Clerk, and requested to be returned to work. At this time I was informed that there was no position on which I could bid. I am most anxious to return to work now, or at any time in the future. In view of the above, it is requested that I be granted a 90 (ninety) day leave of absense, so that I may protect my seniority."

In his reply letter of February 1, 1956, the Superintendent pointed out that "Since there are no positions on which you can qualify and exercise your seniority, you are automatically out under what is known as the twelve months' rule and your seniority is protected during that period provided you bid on such jobs as may become open during that period."

As a matter of fact, the statements by the Chief Clerk and Superintendent were erroneous in a very material respect, since at the time they were made an employe junior to Claimant in point of seniority was holding a Class 1 position for which Claimant was qualified. Relying on these statements, Claimant made no attempt to displace the junior employe. Some point has been made by Carrier that Claimant lost all her seniority rights when she failed to seek to displace the junior employe within the designated time. Apparently, this argument was not made on the property; quite apart from that consideration, however, we find it untenable. While it may be that the Chief Clerk and Superintendent are not responsible for rule interpretations, it would be plainly incompatible with elementary principles of fair play to permit Carrier to take advantage, by argument or otherwise, of a situation which its own supervisory representatives had caused. Moreover, it is clear that these supervisors' conclusions as to the Claimant's qualifications for a given position would be highly important, if not completely determinative, factors in adjudging her right to displace a junior employe. Claimant's reliance on the statements of her immediate supervisor and Superintendent was reasonable and proper; she cannot be held to have lost her seniority or any other rights when she accepted their assurances that there was no position held by Class 1 junior employes on which she could qualify, and depending on these assurances, made no effort to displace the junior employe who was in fact occupying a Class 1 position for which Claimant was qualified.

Further in compliance with the Superintendent's instructions, she bid for all 19 positions that were thereafter bulletined. The first position bulletined was assigned to an employe who was senior to Claimant, but the second, a Class 2 P. B. X. Operator position, was awarded to a junior employe who had never acquired seniority. Claimant had prior experience in that Class 2 position and the award by the Carrier to a junior employe was in flagrant disregard of its contract commitments.

Claimant filed a protest with respect to that assignment but continued, pursuant to the Superintendent's instructions, to bid on all bulletined Class 1 and 2 positions, even though she believed herself unqualified to fill them. In each instance, she indicated in her written bid that she was unqualified but was applying only to protect her seniority. Some of these vacancies were filled by junior employes.

The position in question—that of Yard Clerk at Cooper Yard, Charleston, S. C.—was advertised on March 23, 1956. Claimant bid for this vacancy but again stated in her bid that she was "bidding on this Bulletin

to protect my seniority, although I am not qualified to hold this position." This time Claimant was awarded the position and notified by the Superintendent to "advise promptly date on which you will report for work in Charleston."

Claimant immediately called upon the Assistant Superintendent and explained that she could not accept the position because of her physical condition and on advice from her personal physician. She then advised the Superintendent to the same effect by her letter of April 4, 1956. Claimant was examined by Dr. Wilson, the Carrier doctor, on April 12, 1956, and was thereafter informed by the Superintendent's letter of April 24, 1956, that "Dr. Wilson has accepted you for service which has been concurred in by our Chief Surgeon, therefore, it will be necessary for you to immediately report" to the assigned Yard Clerk position.

Claimant did not report to Cooper Yard and the situation remained unchanged, notwithstanding further interchange of correspondence and an additional warning by the Superintendent. On June 25, 1956, Claimant was dismissed as aforesaid, after having been accorded an investigation on due notice.

It is difficult to appreciate the pressing considerations that prompted Carrier to insist that Claimant accept the Yard Clerk position, particularly when there was at least some question concerning her physical condition and she had, through the Carrier's own errors, lost two prior opportunities—just a short time before—to be placed in vacancies that were more in line with her experience and the condition of a lady who had just recovered from not a superficial illness but a serious operation. We are satisfied that the Yard Clerk work involves considerably more climbing, bending and walking than do the office positions in which Claimant formerly had been employed. We note that Claimant never had worked in the yard.

The only direct medical evidence contained in the record is a statement by Claimant's personal physician to the effect that during a period of about 3 years terminating in December 1955, Claimant had been subjected to two major abdominal operations as well as a back injury. The only evidence regarding Dr. Wilson's examination consists of Claimant's testimony that it was brief and cursory and the Chief Surgeon's written comment that he had received the report of the Claimant's examiantion by Dr. Wilson "who accepted her subject to my final decision. After thorough consideration I am concurring in her acceptance." It does not appear that the Chief Surgeon ever examined the Claimant.

Under these circumstances and in the light of the entire record, we perceive no basis for the findings of insubordination and dismissal. Carrier's supervisors set a force in motion by their material misstatements to Claimant that caused the latter to rely on them to her detriment. She had lost the opportunity to displace a junior employe in a Class 1 position in January 1956 because of misinformation received from her supervisors; she had lost the Class 2 P. B. X. position in February 1956 to a junior employe because of Carrier's erroneous action; and it ill behooved Carrier to insist soon thereafter that she accept a non-office assignment, in which she had no experience, that might involve risk to her physical condition, according to the member of the medical profession most familiar with her medical history.

All in all, we consider Carrier's action in dismissing Claimant arbitrary and capricious. We will sustain the claims to the extent that she will be restored to service with all seniority and other rights unimpaired and will be compensated for the wage loss she sustained beginning June 25, 1956, the date of her dismissal. We will not direct that Claimant receive compensation for the additional period from January 19, to June 25, 1956, since the claim covering those weeks was duly processed to a final declination on the property on July 24, 1956 and was not further progressed to this Division until June 26, 1957, well beyond the nine month limitation period prescribed by Section 1 (c) of Article V of the August 21, 1954 National Agreement.

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 the Carrier violated the controlling Agreement.

AWARD

Claim sustained to the extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January, 1960.

DISSENT TO AWARD NO. 9200, DOCKET NO. CL-9932

The claim in this case was that the Claimant Class 1 Clerk, discharged on June 25, 1956 for admitted guilt of absenting herself from duty without permission and of insubordination for failure to do as instructed, had been dismissed in violation of the provisions of the governing Agreement and should be restored to service on a Class 2 position effective January 19, 1956.

The Majority, after properly finding that the claim for the Class 2 position, and for pay loss incident to not being awarded it, had been outlawed by application of the time limit provisions of Article V of the August 21, 1954 National Agreement, erroneously found that the Carrier's dismissal action had been arbitrary and capricious and restored her to service effective June 25, 1956 (date of her dismissal) with pay for time lost from that date. In so doing, the Majority erred because—

(1) Claim for restoration to service with pay for time lost was out of time, and was otherwise invalid account—

(a) Claimant had Class 1 rights upon her return to service from sick leave;

(b) Claimant did not then assume her individual responsibility of electing to exercise displacement rights and thereby forfeited her seniority;

(c) Claimant could not then exercise her Class 2 rights as she had Class 1 rights and had not repudiated them.

(2) Claimant admittedly failed to accept the Class 1 position upon which she had bid and was awarded, and the rules provide for forfeiture of seniority in such event.

(3) Claimant admittedly did not report on the position when ordered so to do, hence she admittedly was both absent from duty without permission and insubordinate.

(4) Even should Claimant have been properly restored to Carrier's service, with pay for time lost, which cannot be conceded, this Award is utterly confusing in that it fails to indicate to what position she should be restored; hence there is no basis upon which the awarded wage loss can be computed.

(5) This Award places the Carrier in an untenable position when it,—

(a) Grants to the Claimant the generally recognized prerogative of Carrier to judge as to an employe's qualifications for a given position;

(b) Condones an employe's refusal to comply with Carrier instructions (insubordination), contrary to the oft-repeated principle that employes should do as instructed and seek redress later under Agreement rules;

(c) Ignored report of Carrier's Chief Surgeon holding he may not rely upon the physical examination, and resulting report thereon, of an employe by a Doctor on his staff.

(6) The Majority has obviously rendered its Opinion in this case based on assumed equitable considerations, rather than on the negotiated Agreement rules.

For these principal reasons the undersigned Carrier Members dissent to the conclusions of the Majority in their Award 9200.

/s/ C. P. Dugan
/s/ J. E. Kemp
/s/ R. A. Carroll
/s/ W. H. Castle
/s/ J. F. Mullen

SUPPORTING OPINION TO AWARD NO. 9200, DOCKET CL-9932

This Award is proper and in full accord with the relevant facts and controlling rules of the Agreement, which is evidenced by the well reasoned "Opinion of Board". No sophistical, equivocal, or specious argument can change the record. For that reason, Carrier Members' Dissent is absurd and ridiculous. The supercilious attitude displayed by Carrier Members here, brings into focus the same attitude manifested by Carrier on the property in its precipitant dismissal of claimant, thereby making it clear why the Board held such action to be arbitrary and capricious.

The restoration of claimant to service with all seniority and other rights unimpaired and compensation for wage loss she sustained beginning June 25, 1956, should not be confusing, as it is in conformity with Rule 40, reading:

> "If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the employe shall be reinstated and paid for all time lost, less any amounts which he may have earned."

Surely, Carrier Members cannot consistently object to the application of this pertinent provision upon the exoneration of claimant by the Board, in view of their oft expressed contention that the "entire agreement is before the Board for consideration", even though it may be necessary to assume and speculate as to certain facts in order to apply the agreement or rules upon which they rely in support of their defense. See my Dissent to Award 9189, Docket CL-8708, and the many awards cited therein.

Items 1(a), (b) and (c) of the Dissent, cover irrelevant and immaterial matters that were never put in issue on the property before submitting the dispute to the Board and for that reason was inadmissible. See Dissent to Award 9189, supra, also, Carrier Members' Dissent to Award 8299, Docket MW-8176, wherein they stated in part:

> "Award 8299 is in error because it is based solely upon assumption, speculation and conjecture **about issues which were not presented at the hearing** held at the request of the Employes, **and which issues were never handled on the property;** * * *
>
> * * *. This Board has consistently refused to consider issues which were not raised at investigations or **handled on the property.**" (Emphasis supplied.)

It is apparent from Items 2 and 3 that Carrier Members take the untenable position that an employe who does not follow instruction, regardless of how arbitrary or capricious, is guilty of insubordination. No just and fair minded person, in these modern times, would expect an employe to follow instructions that would be detrimental to her health. The contention that carrier has the unalterable right to judge as to an employe's qualifications for a given position is patently absurd. Any judgment exercised by an official of a carrier involving an employe's vested rights under the agreement, is subject to review by this Board. Award 5835.

It should be remembered that company physicians are under the control and influence of the carrier. Consequently, any medical report issued by them at Carrier's request, is subject to suspicion and careful scrutiny. That is particularly true where, as here, the doctor does not examine the patient before reaching his conclusions.

In the instant dispute, Carrier's Chief Surgeon's report was not presented to the accused or her representative before the investigation, nor, was he present thereat for cross-examination. Consequently, his report was inadmissible as evidence and was entitled to no consideration whatever. Third Division Awards 2162, 2613, 2634, 2797, 3288, 4295 and 4325.

Although no consideration was given to "equitable considerations" by the majority in adopting this award, as charged, the fact that Carrier Members recognized that equitable considerations were present, conclusively shows that they realize that an injustice resulted from Carrier's action in dismissing claimant. "Equitable" being defined in Black's Law Dictionary as: "Just, fair, and right, in consideration of the facts and circumstances of the individual case."

J. B. Haines
Labor Member