

Award No. 9457

Docket No. CL-11559

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William E. Grady, Referee

PARTIES TO DISPUTE:

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

MONON RAILROAD

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

(1) Carrier violated its Agreement with the Brotherhood, covering hours of service and working conditions, effective January 16, 1956, at its South Hammond, Indiana Freight House when on January 20, 1959, it unilaterally authorized and/or permitted Employee Mary E. Roche, an unassigned clerk under Rule 16, to displace Employee Hilda R. Vincent from her regularly assigned position of Notice Clerk—Position No. 5, and on the same date, authorized and/or permitted the latter to displace Marilyn I. Wilson from her regularly assigned position of Clerk to Chief Clerk—Position No. 3, and later removed Employee Wilson's name from the seniority roster on the contention that she failed to file her name and address in accordance with Rule 18, and

(2) That Carrier, by reason of the violation, shall now be required to:

(a) Remove Mary E. Roche from Notice Clerk—Position No. 5, and restore her to her former status as an unassigned employee under Rule 16, and

(b) Reinstate Hilda R. Vincent to her regularly assigned position of Notice Clerk—Position No. 5, to which she was assigned by Bulletin No. 2a of January 15, 1958, and from which she was illegally displaced on January 20, 1959, by Mary E. Roche.

(c) Reinstate Marilyn I. Wilson to the position of Clerk to Chief Clerk—Position No. 3, with all her accumulated seniority rights, the position to which she had been regularly assigned by Bulletin 1a of January 16, 1959, and from which she was illegally displaced on January 20, 1959.

(d) Compensate Marilyn I. Wilson for each day's loss of salary at the rate of position of Clerk to Chief Clerk—Position No. 3, on January 20, 1959, and subsequent dates thereafter until restored to her former status.

It is hereby affirmed that all data, statements and information contained herein has been submitted to the Organization in substance either by correspondence or in conference.

(Exhibits no reproduced.)

OPINION OF BOARD: This dispute involves seniority rights under the Agreement between the Carrier and the Organization dated January 16, 1956, as amended January 1, 1958.

The facts giving rise to the dispute are not controverted.

The job movements in question took place on January 20, 1959 and directly involved three employees: Mary E. Roche, seniority date 1954; Hilda R. Vincent, seniority date 1957; and Marilyn I. Wilson, seniority date 1958.

On January 16, Vincent, who had been working temporarily as Clerk to Chief Clerk — Position No. 3, was succeeded by Wilson who bid in the job on a permanent basis. Vincent then returned to her permanent job, Notice Clerk — Position No. 5, bumping Roche who, after bid, was filling Vincent's job temporarily. Roche previously had disqualified herself from the job of Account Clerk.

On January 20, Roche bumped Vincent out of Notice Clerk — Position No. 5. Vincent then bumped Wilson out of Clerk to Chief Clerk — Position No. 3 and Wilson was furloughed.

For convenience we shall refer to Notice Clerk — Position No. 5 as "Notice 5" and to Clerk to Chief Clerk — Position No. 3, as "Clerk 3". The particulars of the job moves are set forth below.

More particularly, on January 15, 1958, Vincent, seniority date 1957, after bid, was awarded Notice 5 on a permanent basis. On April 24, 1958 Vincent, after bid, was awarded Clerk 3 "pending return of regularly assigned employee" Lubs, who was on leave of absence because of illness.

On May 2, 1958, Roche, seniority date 1954, after bid, was awarded Notice 5 "pending return of regularly assigned employee" Vincent, who was working as Clerk 3, on a temporary basis during Lubs absence. Roche previously, on March 24, 1958, had disqualified herself from the job of Account Clerk.

On January 9, 1959, Clerk 3, then held by Vincent on a temporary basis, was bulletined on a permanent basis, Lubs having resigned. It was successfully bid in by Wilson, seniority date 1958, on January 16, 1959. Wilson previously had bid successfully for the job of Clerk 3 on a temporary basis while Vincent was on leave of absence from September 8 to November 8, 1958, and, upon Vincent's return, had been furloughed.

Upon the award to Wilson of Clerk 3 on January 16, Vincent returned to her permanent job, Notice 5 and worked on January 16, and the next work day, January 19.

Roche did not work on January 16 or 19. On January 20, she bumped Vincent out of Notice 5, Vincent bumped Wilson out of Clerk #3, and Wilson was furloughed.

The Organization, in effect, contends that the moves should be reversed; that Roche should be ousted from Notice 5, Vincent returned to Notice 5, and Wilson reinstated to Clerk 3 and reimbursed. The Carrier contends that the moves should not be reversed and that, in any event, Wilson should not be reinstated or reimbursed because she failed, upon being furloughed, to meet the filing requirements necessary to preserve seniority rights.

Rules 16 (a), 17 and 18 (c) have been principally discussed.

Rule 16 (a) provides that employees who are disqualified, such as Roche, "retain all seniority rights and may bid on any bulletined position, but may not displace any regularly assigned employee". On this, the Organization places chief reliance, as barring Roche from bumping Vincent.

Rule 17, referred to by both the Organization and the Carrier, says that an employee returning from leave of absence, may go back to her former position, unless it has been abolished or filled by a senior employee. Rule 17 further provides that the employee bumped by the returning employee, has derivative bumping rights, of the same scope.

Rule 18 (c) provides, among other things, that "Employees displaced or whose positions are abolished may exercise their seniority rights over junior employees holding permanent positions . . .". The Carrier places major emphasis on this Rule, as permitting Roche to bump Vincent.

We first shall look at Rule 17. It is suggested by the Carrier that the resignation of Lubs, whom Vincent was temporarily replacing in Clerk 3, constituted a return by Lubs from leave, at least in a technical sense, and that consequently, Rule 17 created a chain of derivative rights running from Lubs, to Vincent, to Roche. In other words, Lubs ousted Vincent, Vincent ousted Roche and Roche, could then counter-assert bumping rights against Vincent having been ousted by Vincent. The fact is however, that Lubs did not return, technically or otherwise. Lubs quit. The permanent vacancy created by Lubs resignation was bulletined as required by Rule 9, and awarded to Wilson. The award to Wilson, not Lubs' resignation, was the proximate cause of Vincent's ouster from Clerk 3 and Vincent's return to Notice 5.

Further, Vincent, when she served temporarily on Clerk 3, was not on leave of absence from Notice 5. Leave of absence, assumes, for our purposes, inactive status (Rule 37). True, Vincent, while working as Clerk 3, had had a leave of absence, but she had returned to work on November 8, 1958. Thus Vincent did not return on January 16, 1959 to Notice 5 from leave of absence. Vincent's return to Notice 5 did not depend upon Rule 17. Consequently Roche, upon ouster from Notice 5 by Vincent, did not succeed to Vincent's rights under Rule 17, because Vincent had none under Rule 17.

Putting aside Rule 17 as inapplicable, we come to Rules 16 (a) and 18 (c).

We first apply Rule 16 (a). Vincent was the "regularly assigned employee" on Notice 5. It had been awarded to Vincent on January 15. When Vincent moved to Clerk 3, Notice 5 was bulletined. Roche, who had been disqualified from another job, was entitled to bid for the Notice 5 vacancy, but Roche could not displace Vincent, the regularly assigned employee. Roche took the job of Notice 5, subject to the express temporal limitation, instint in Rule 16 (a) and set forth in the bulletin, which, pursuant to Rule 9, stated that Notice 5 was only available "pending return of regularly assigned em-

ploye", Vincent. Nothing in Rule 16 (a), therefore, gave Roche the right to bump Vincent out of Notice 5 while Vincent was on Clerk 3, or to prevent Vincent's return to Notice 5.

That being so, did Rule 18, as the Carrier contends, permit Roche to bump Vincent from Notice 5, after Vincent returned to it, a right which Roche did not have prior to Vincent's return to Notice 5.

The Carrier contends that once Roche was awarded Notice 5, Roche was no longer subject to the restriction in Rule 16 (a) prohibiting displacement of a regularly assigned employe, namely, Vincent; that Vincent's return to Notice 5 displaced Roche under Rule 18 (c) and that Roche thereupon, under Rule 18 (c), had the right to displace Vincent from Notice 5.

The Organization contends that the award of Notice 5 to Roche "pending return of regularly assigned employe", Vincent, reaffirmed and continued the restriction imposed by Rule 16 (a) upon Roche; that Rule 18 (c) refers to abolition of jobs and reduction in force, neither of which occurred; that the "displacement" contemplated is displacement of junior employes by senior employes and not displacement of Roche by her junior Vincent, and that therefore Roche's displacement by Vincent could not create a counter-right in Roche to displace Vincent.

The basic question then, is whether Rule 18 (c) changed the plain prohibition of Rule 16 (a).

Rule 18, including subdivision (c) was revised effective January 1, 1958. The parties, as their contentions indicate, are not in agreement as to the impact of the revised Rule nor as to some of its internal implications. It is not necessary for purposes of this decision to explore these differences at length.

The Carrier has cited instances in which disqualified employes have bid under Rule 16 (a) and then have been accorded bumping rights under Rule 18, thus analogizing their movements to that of Roche. But, except in the case of Roche, the bids appear to have been for permanent vacancies which had no regularly assigned employe and therefore, did not fall within the prohibition of Rule 16 (a).

The dispositive point is that Rule 16 (a), in its current form and plain terms antedates the revision of Rule 18. Had the parties intended to alter the restriction placed by Rule 16 (a) upon a disqualified employe (Roche) bumping a regularly assigned employe (Vincent), the parties could and would have said so. Either the terms of Rule 16 (a) would have been revised, or Rule 18 would have been so constructed upon revision, that its impact upon Rule 16 (a) would be compellingly disclosed, and this particularly in view of the substantial consequences that a change in Rule 16 (a) would entail. Yet Rule 16 (a) was not revised and Rule 18 (c) does not, in terms, or by clear inference, repeal any portion of Rule 16 (a), nor does Rule 18 (c) clearly authorize what Rule 16 (a) prohibits. It is elementary that a change in a section of a collective bargaining agreement involving substantial rights or restrictions, is not to be lightly inferred.

When Rules 16 and 18 are read together as above, they harmonize and preserve the application of the vital seniority principle. In general outline, an employee who bids on a job and is disqualified can bid another job subject to the return rights of the incumbent and the incumbent has secured return rights. If a disqualified bidder is awarded a permanent vacancy, he establishes

normal displacement rights. And an employee, displaced by abolition of a temporary or permanent job, or by reduction in force is protected

We conclude that Rule 18 (c) worked no change in the prohibition in Rule 16 (a), and therefore, did not create in Roche a right to counter-bump Vincent out of Notice 5, when Vincent returned to that job from her temporary assignment as Clerk 3.

It follows that Roche and Vincent should be restored with full seniority rights to their respective situations as those existed on January 19, 1959, and should now be given an opportunity to exercise seniority rights in accordance with events (other than those which caused this dispute) as they have occurred since January 19. More particularly, so that there be no misunderstanding, Roche should now have a chance to bid under Rule 16 (a) on any position bulletined since January 19, and if awarded a position not held by a regularly assigned employee, Roche should now have the further opportunity to exercise seniority, under Rule 18, or any other Rule, in accordance with events subsequent to January 19.

As to Wilson, a different situation is presented.

When Wilson was displaced from Clerk 3 on January 20, 1959, by Vincent, Wilson was placed on the furloughed list. The term "furloughed" appears in Rule 18. Although Rules 16 and 17 do not make express reference to furlough, employees separated from active service under Rules 16 and 17 are placed on the furloughed list (e.g. Roche, when disqualified under Rule 16 from Account Clerk; and Wilson when displaced under Rule 17 from a temporary assignment as Clerk 3, by Vincent's return from leave on November 8, 1958. Both filed under Rule 18 (f)).

Rule 18 (f) provides, that employees "must within five (5) days from date actually reduced to the furloughed list, file their names and addresses (with the Carrier and the Organization) or forfeit all seniority rights, except in cases of personal illness or other unavoidable causes".

The Carrier contends that Wilson, who concedely did not file under Rule 18 (f), forfeited seniority rights and therefore is not entitled to reinstatement or compensation. The Organization contends that since Wilson was improperly furloughed, she was not required to file.

The respective contentions have been vigorously presented. The parties have stated frankly that precedent does not come in hand and reasonable diligence has not discovered any. Four Awards have been cited, Nos. 3840, 4535, 5905, and 6462, but none involved improper separation from service.

We are of the opinion that the Carrier's contention is correct.

Furloughed status does not equate with loss of seniority. Furloughed employees, who comply with Rule (f), have recall rights, preference for extra work and the like.

When Vincent displaced Wilson, Wilson had no choice but to accept furloughed status, subject of course to the grievance procedure. The proximate cause of Vincent being furloughed, was her ouster by Vincent. That was the Carriers doing. The proximate cause of Wilson's loss of seniority was her failure to file. That was her own doing.

Rules requiring furloughed employees to take action to preserve status are widely in effect, and have an intensely practical basis. For example, the employer must know the availability of people and skills and the extent of its continuing liabilities to persons not in active service; and the employees and their Organizations must know an employee's status not only in relationship to the employer but in relationship to other employees. One of the important purposes of such rules therefore, is to establish a sharp line of demarkation by which status can be determined.

That is the case here. The language of Rule 18 (f) is explicit. It says that an employee who fails to file forfeits "all" seniority rights. It excuses failure to file only in two situations, personal illness or unavoidable cause, neither of which is present. It does not distinguish between furloughed employees who have filed a grievance and those who have not.

The filing requirement is not unduly onerous or unreasonable and was communicated to the employees by the Agreement. It was readily within Wilson's power to comply. She did not do so. She therefore relinquished her employee status under the Agreement.

We conclude that it was incumbent upon Wilson to file and that she is *not now entitled to reinstatement or compensation.*

We add that our holding is confined to Rule 18 (f) and the facts presented. Loss of seniority under Rule 18 (h), as a result of failure to return to service after notification to report might present different problems.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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;

That the Carrier violated the Agreement when on January 20, 1959, it authorized or permitted Mary E. Roche to displace Hilda R. Vincent from Notice Clerk-Position No. 5, authorized or permitted Hilda R. Vincent to displace Marilyn I. Wilson from Clerk to Chief Clerk-Position No. 3, and placed Marilyn I. Wilson on the furloughed list; and

That the Carrier did not violate the Agreement when it removed Marilyn I. Wilson from the furloughed list.

AWARD

Claim sustained to the extent that, not later than the thirtieth calendar day following the date of this Award,

(a) Mary E. Roche shall be returned to her status as of January 19, 1959 with all seniority rights which she then had and which have accrued to the date of such return, and shall be entitled to exercise all such rights in accordance with events, other than those of January 20, 1959, as they have occurred from January 20, 1959 to the date of such return.

(b) Hilda R. Vincent shall be returned to the position of Notice Clerk-Position No. 5 which she held on January 19, 1959, with all seniority rights which she then had and which have accrued to the date of such return, and shall be entitled to exercise all such rights in accordance with events, other than those of January 20, 1959, as they have occurred from January 20, 1959 to the date of such return.

Claim otherwise denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of June 1960.