Award No. 9854
Docket No. CL-8773

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

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

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD

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

1. Carrier violated and continues to violate the provisions of the Clerks' Rules Agreement when it failed to assign employe Mary Ethel Carpenter to Position No. 20, Steno-Clerk, in the office of Superintendent, Milwaukee, Wisconsin.

2. Carrier shall therefore assign Employe Carpenter to Position No. 20, Steno-Clerk, Seniority District No. 36.

3. Carrier shall establish a seniority date for Employe Carpenter in Seniority District No. 36 as of March 17, 1955.

4. Carrier shall compensate Employe Carpenter at the rate of $14.296 per day for each regularly assigned day subsequent to March 17, 1955 that she is denied an opportunity to work Position No. 20 until the violation is corrected.

EMPLOYES' STATEMENT OF FACTS: Employe Mary Ethel Carpenter holds a clerical seniority date of June 30, 1925 in the Car Department, Seniority District No. 58.

For many years prior to July 19, 1954, Employe Carpenter occupied Steno-Clerk Position No. 35 in the Office of Superintendent Car Department, Seniority District No. 58.

Steno-Clerk Position No. 35 was abolished effective July 19, 1954 and Employe Carpenter subsequently became a furloughed employe.

On March 9th, Position No. 20, Steno-Clerk in the Office of Superintendent, Milwaukee, Wisconsin, Seniority District No. 36, was bulletined for bids as a temporary vacancy. On March 10, 1955 Employe Mary Ethel

OPINION OF BOARD: Claimant Mary Ethel Carpenter, with a seniority date of June 30, 1925, in the Car Department, Seniority District No. 58, occupied Steno-Clerk Position No. 35 in the office of the Superintendent of the Car Department for many years prior to the date this position was abolished, July 19, 1954. She then became a furloughed employe.

On March 9, 1955, Position No. 20, (Steno-Clerk in the office of the Superintendent, Milwaukee, Wisconsin, in Seniority District No. 36, was bulletined for bids. No bids came from employes with seniority in District 36. However, Claimant Carpenter bid for the position. On March 17, Superintendent Garelick addressed a letter to Claimant Carpenter in which he explained that the position required the services of an able bodied male employe, who in addition to going out with the Superintendent to the scene of accidents to make transcripts at investigations, also was required to perform such duties as going into the men's locker room to post bulletins, taking the division inspection car to the garage for servicing and moving large packages of office supplies and cases of files to the third floor file room in the depot.

On March 31, the Organization's Vice General Chairman, H. C. Hopper, addressed a letter of protest to Superintendent Garelick, calling his attention to Rule 9, which requires the issuance of a bulletin listing all applicants and the designations of the successful applicant. Since Claimant Carpenter had applied and apparently was the only applicant, he insisted that she be assigned to Steno-Clerk Position No. 20 in the Superintendent's office.

However, since Superintendent Garelick was having some difficulty in finding a capable male employe, he decided to remove this requirement, temporarily, and notified Miss Carpenter to report for the position. She replied that she was ill and under a doctor's care and could not report. She finally reported on May 23, 1955 and was assigned to the position.

For approximately three weeks Claimant Carpenter was in Steno-Clerk Position No. 20. However, the employe responsible for instructing her in the performance of her new duties decided she would not be able to learn to use a comptomter and to perform other duties of the position. On June 10, 1955, Superintendent Garelick sent the following communication to Miss Carpenter:

"MILWAUKEE, June 10, 1955
File: 137-Milwaukee

"Miss Mary Ethel Carpenter,
Superintendent's Office,
Milwaukee, Wisconsin.

"Since May 23, 1955, when you were assigned to Position No. 20 in my office, even though you have been furnished with almost constant assistance and instruction, you have not been able to satisfactorily perform that portion of the work of the position on which you have received detailed instructions.

"Your slowness with the work and your many inaccuracies have not left time to permit you being given instruction on other work which is part of the position.

"Your performance while assigned to the position has clearly demonstrated that you do not have sufficient fitness and ability to

perform the work of the position and I regret it is necessary to advise you that you are disqualified from the position effective June 13th, 1955.

/s/ M. Garelick

Superintendent"

Rule 8 (a) provides that an employe may be disqualified before the completion of a thirty-day trial period if found to be "manifestly incompetent".

"(a) When an employe bids for and is assigned to a permanent vacancy or new position he will be allowed thirty (30) days in which to qualify and will be given full cooperation of department heads and others in his efforts to do so. However, this will not prohibit an employe being removed prior to thirty (30) days when manifestly incompetent. If an employe fails to qualify he shall retain all seniority rights but cannot displace a regularly assigned employe. He will be considered furloughed as of date of disqualification and if he desires to protect his seniority rights he must comply with the provisions of Rule 12 (b)."

Following receipt of Superintendent Garelick's letter of June 10, 1955, Claimant made a timely request for an investigation according to the provisions of Rule 22 (g).

"(g) An employe, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation, hearing and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within thirty (30) days from cause of complaint."

Superintendent Garelick wrote to Vice General Chairman Hopper on June 27, 1955, stating that every assistance had been given to Miss Carpenter, that she acknowledged this in conversations with her, and that in spite of all efforts to help her, she was unable to perform the elementary clerical duties. In conclusion he stated that Claimant had been properly disqualified under Rule 8, and that there "is no provision in the Schedule Rules requiring investigation in a case of that kind * * *". The request for an investigation was respectfully declined. The claim now before us was filed.

There have been other matters before this Board involving the same parties and the same rules, but with factual situations which have varied from one case to another. In fact, Mary Ellen Carpenter, whose claim is now before us, filed a similar one a few weeks after the instant claim was initially filed. For some reason the later claim came before the Board ahead of this earlier one and was denied in Award 8422. We are now asked to consider the earlier claim as having been, in effect, disposed of in Award 8422, since the same parties, the same rules and the same Claimant were involved.

We are in accord with the many previous decisions of this and the other divisions of the Board which have held that claims disposed of in one Award are to be "barred from further Board consideration, and must be denied on jurisdictional grounds". Award 6935. As Referee Coffey has so well stated,

"there must be an end some time to one and the same dispute or we settle nothing, and invite endless controversy instead".

However, this matter was not settled in Award 8422. It could not have been. The claim which is now before us is not a subsequent claim but a prior one. Even though the same parties and the same rules are involved, the claim is for a different position, at a different time and in a different office. This is not a case of **res judicata.**

Nor is Award 8422 our final word of interpretation of Rules 8 (a) and 22 (g). In Award 9415 we again considered the porper use of this language by the same parties, but there the facts were also different. In the latter case the Claimant alleged he had been threatened with disqualification if he did not withdraw certain time claims. In speaking for the Board in Award 9415, Referee Bernstein had the following to say:

> "There is no inconsistency between Rules 8 (a) and 22 (g). They can compliment each other without conflict. Under Rule 8 (a) the Carrier has the right to disqualify an employe. If an employe feels he has been 'treated unjustly' by the disqualification he may seek a Section 22 (g) investigation. It is no answer that he may have the burden of proof or that his claim may be transparently groundless. It was stated in Award 8233 (Lynch), 'The only qualification necessary was that the employe consider himself unjustly treated'. The contention was made that because the employe's claim was so obviously baseless there was no right to an investigation. 'This [apparent baselessness] does not, however, relieve Carrier from the obligations of Rule 22 (g) of this Agreement', the Board ruled."

Rule 22 deals with both "discipline and grievances", and as noted in Award 9415, Rule 22 (a) pertains to employes with established seniority. Paragraphs (b), (c) and (d) provide for the investigations and for the review by "the next higher officer". Then paragraph (g) provides that "An employe, irrespective of period employed, who considers himself **unjustly treated,** other than covered by these rules, **shall have the same right of investigation, hearing and appeal,** in accordance with preceding sections of this rule . . ." (Emphasis added). This is a general rule, not limited to discipline and dismissal cases. If it had been meant to be so limited, different language should have been used.

The phrase "other than covered by these rules" causes us some confusion because of its ambiguity. Carrier contends that, since Claimant Carpenter's disqualification for the position in question was handled in accordance with the provisions of Rule 8 (a), this precludes any further consideration under Rule 22 (g). Referee Lynch accepted this Rule 8 (a) as the "specific" rule and held that it should be applied in preference to the more "general" Rule 22 (g), (Award 8422). But we agree with Referee Bernstein in that the two rules are not in conflict, but actually compliment each other (Award 9415). The Carrier may disqualify an employe under Rule 8 (a), but if that disqualification was carried out in such a manner as to leave the employe with the feeling that he had been treated unfairly, regardless of whether he can prove unfairness, he has a right to ask for an investigation. Rule 22 (g) affords some protection to all employes who think they have been mistreated.

Therefore, regardless of Claimant Carpenter's age or relative competence, she had nearly thirty years seniority in Carrier's service. If she was con-

sidered incompetent, she was at least entitled under Rule 22 (g) to an investigation and a chance to disprove the contentions of the one who alleged her incompetence. Without this opportunity Rule 22 (g) would seem to have no meaning.

This claim must be sustained in accordance with our Award 9415.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Agreement was violated.

AWARD

Claims (1), (2) and (3) sustained. With respect to Paragraph (4) of the claim, Carrier shall compensate Claimant Carpenter at the rate of $14.296 per day for each regularly assigned day from March 17, 1955 until the date of her retirement.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois this 16th day of March, 1961.

DISSENT TO AWARD NUMBER 9854, DOCKET NUMBER CL-8773

The rules of the Agreement are numbered and sectioned into paragraphs and the expression "These rules" appearing at the very beginning of Rule 1, paragraph (a) and elsewhere in the Agreement, including Rule 22, paragraph (g), refers to all of the rules, while the expression "this rule" also appearing in Rule 22 (g) refers only to Rule 22. When the words and phrases involved here are given their ordinary meaning there is no cause for confusion, nor for finding ambiguity.

Award 9854 attempts to justify sustaining the claim which on the record and rules should have been denied.

For these reasons and those expressed in Dissent to Award 9415, we dissent.

/s/ J. F. Mullen

/s/ R. A. Carroll

/s/ P. C. Carter

/s/ W. H. Castle

/s/ D. S. Dugan