

Award No. 11074
Docket No. DC-10859

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES LOCAL 848
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employees Local 848 on the property of Chicago, Burlington & Quincy Railroad Company for and on behalf of Walter C. Smiley and all other employees similarly affected, that they be compensated for all time lost account Carrier removing Claimants from regular assignment on the California Zephyr on November 23, 1957, in violation of agreement.

EMPLOYEES' STATEMENT OF FACTS: On November 26, 1957, Organization filed the claim on behalf of claimant for 79 hours and 30 minutes being \$222.97 at claimant's established rate of pay (Employees Exhibit A). The claim was denied by Carrier's Supervisor Crew Personnel under date of December 30, 1957 (Employees Exhibit B).

Within the time allowed by Rule 25(a) of the effective agreement, Organization appealed the claim to Carrier's Superintendent Dining Car Department (Employees Exhibit C). That Official of the Carrier declined the claim under date of January 29, 1958 (Employees Exhibit D). On February 7, 1958, the denial of the claim was appealed by Organization to the office of Carrier's Vice President-Personnel, the highest officer designated on the property of Carrier to consider such appeals (Employees Exhibit E).

On August 22, 1958, Carrier declined this claim on appeal (Employees Exhibit F).

On November 14, 1957, Carrier issued its notice No. 100 effective November 15, 1957, canceling assignment for four Waiters No. 4 working Trains 17 and 18 upon departure Chicago (Employees Exhibit G). Carrier admits that claimant was working as Waiter No. 3 on this assignment and not as Waiter No. 4 and M. F. Norwood was employed as waiter No. 4 and that Notice No. 100 (Employees Exhibit G) involved only No. 4 waiters (Employees Exhibit F). Carrier wired Steward on Train No. 18, November 15, 1957, that Claimant would be relieved on arrival Train No. 18 in Chicago on November 16, 1957 and claimant was relieved from his assignment (Employees Exhibit F).

Upon arrival of Train 18 on November 16, 1957, claimant and M. F. Norwood contacted Carrier's Acting Supervisor Crew Personnel and advised

The claimant's repeated refusal to work during this period is further proof that he expected to be paid for not working. Certainly an employe should not be permitted to refuse work of his craft, at the expense of his employer. The Adjustment Boards have recognized that an employe has certain obligations under a collective bargaining agreement which must be fulfilled in order to protect his rights to claim a monetary loss. The Board's attention is directed to Special Board of Adjustment No. 221 between the Trainmen and the Western Pacific Railroad. In Docket No. 44 that Board had a claim by a conductor who missed a trip because he failed to sign the train register in violation of instructions. The Board held —

Docket No. 44, SBA-221, BRT v. WP, A. Langley Coffey, Chairman

"One object of sustaining or denying claims in these disputes is to foster and promote a proper regard for working rules and implementing instructions that govern in an industrial society. The monetary loss suffered and sustained by claimant as a result of his non-observance of proper instructions is now calculated to accomplish the same purpose as does the allowance of claims against Carrier when it is at fault."

Here the monetary loss was sustained by Waiter Carl Smiley because he failed to fill out the proper form (Carrier's Exhibit No. 1) in seeking to exercise seniority. Had he done this and reported to the office on Saturday, November 16, 1957, he would have made money rather than lost it. In such circumstances the Carrier should not be penalized.

In a First Division case the Board decided, without a referee, that where some switchmen's jobs had been abolished and new ones created, claimants who took a few days off in between jobs could not recover the pay they lost. The Board held —

First Division Award 18312, SUNA v. CRI&P, no referee

"The uncontradicted record discloses the here named claimants could have exercised their seniority and avoided the loss of earnings here complained of. This they elected not to do. Therefore, the loss of earnings was of their own choosing and claims are not supported by the Articles of Agreement relied upon."

Claimant Waiter Carl Smiley could also have exercised his seniority and avoided any loss of earnings. Having elected not to do so, his claims cannot be supported.

In view of all the evidence contained in this docket, there should be no other possible result than an award denying the contentions of the Organization in their entirety.

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All data herein and herewith submitted have been previously submitted to the Employes.

(Exhibits not reproduced).

OPINION OF BOARD: Carrier admits that it violated the Agreement when it, on November 16, 1957, removed Claimant, a waiter, from the Dining Car Crew of Trains Nos. 17 and 18. Claimant was returned to the Crew on those trains on December 11, 1957.

After arrival at Chicago on November 16, the Crew from which Claimant was wrongfully removed was not due out until November 23.

Claimant prays for loss of wages from November 16 to December 11, 1957.

It is undisputed that Carrier, on November 22, offered Claimant a four-day job as a waiter on the Twin Zephyrs, Trains Nos. 22 and 23; and, on December 1, a waiter assignment on the Denver Zephyr. Claimant refused in the first instance and failed to respond in the second.

It is firmly established that one who seeks damages for a breach of an employment agreement is obligated to mitigate such damages by seeking and accepting comparable employment. See, for example, **First Division Award 15765** (Carter). We will, therefore, order Carrier to pay to Claimant such wages as he would have earned as a waiter on Trains Nos. 17 and 18, absent the violation of the Agreement, in the period from November 16 to December 11, 1957, less such wages as he would have earned had he accepted the offers of employment set forth above.

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 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; and

That the Carrier violated the Agreement.

AWARD

Claim sustained. Monetary award to be computed as prescribed in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of January 1963.