



Award No. 14329
Docket No. CL-15184

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
THE CINCINNATI UNION TERMINAL COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5678) that:

(1) Carrier violated the rules of the current Clerks' Agreement when on or about October 23, 1963 it denied Mrs. E. E. Manning the right to assume the duties of Machine Operator Position in the Auditor's office.

(2) Carrier further violated the rules of the Agreement when on or about November 2, 1963 it denied Mrs. Manning the right to exercise her displacement rights to the position of Relief Crew Dispatcher.

(3) Carrier further violated the rules of the Agreement when it removed Mrs. E. E. Manning's name from the seniority roster.

(4) That Carrier shall now be required to pay Mrs. E. E. Manning one day's pay each date for October 23, 24 and 25, 1963, at the rate of pay of Machine Operator position in the Auditor's office, account denied the right to work this position on such dates.

(5) That Carrier shall now be required to pay Mrs. E. E. Manning one day's pay at the Crew Dispatcher's rate each date for November 2, 1963 and each and every work day thereafter until such time as she is assigned to this position account denied the right to exercise her displacement rights to the position of Relief Crew Dispatcher.

(6) That Mrs. E. E. Manning's name shall now be restored to its proper standing on the seniority roster.

EMPLOYEES' STATEMENT OF FACTS: The claimant, Mrs. E. E. Manning, held a regular assigned position as Crew Dispatcher with the Cincinnati Union Terminal Company. Mrs. Manning was displaced from this position by a senior employe on October 16, 1963.

Under date of October 15, 1963, Claimant Manning addressed a letter to Mr. Hartman, Auditor, advising him of her displacement by a senior employe and of her desire to displace the junior employe then holding the Machine Operator position in the Auditor's office, such displacement to be effective **October 23, 1963.**

On October 16, 1963, the Personnel Supervisor of the Cincinnati Union Terminal Company telephoned the Claimant's home and left a message with her husband to the effect that an employe senior to her had come in and

the date actually reduced to the furlough list, she had forfeited all seniority rights.

CARRIER'S STATEMENT OF FACTS: There is an Agreement in effect between The Cincinnati Union Terminal Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees with effective date of July 1, 1946, amended September 1, 1949, amended February 1, 1956, with amendments up to date, which is controlling in the present dispute and which is hereby made a part of this dispute.

The Organization's Statement of Claim consists of six items, of which Items 4, 5 and 6 are the relief requested because of the claimed violations of the agreement alleged in Items 1, 2 and 3. Items 1, 2 and 3 were first handled as three separate claims on the property but were discussed together during the final conferences.

Carrier's Exhibit No. 30 is a copy of a notice placed on all bulletin boards as a result of telephone request from Division Chairman E. E. Manning. Prior to Mrs. Manning's telephone request of January 31, 1964 all letters, bulletins, bids, displacements, etc. were sent to her through company mail.

(Exhibits not reproduced)

OPINION OF THE BOARD: Claimant duly served Carrier and the affected employee with the following notice to displace:

"Cincinnati, Ohio
October 15, 1963

Mr. E. Hartman
Treasurer

Due to being displaced from my position by Mr. R. Westerkamp,
I wish to displace on the position of Machine Operator in your office.

"This displacement to be effective October 23, 1963.

Sgd/ Edith E. Manning
Seniority 11-8-43

CC: G. Zerhusen"

Carrier, in its Rebuttal Submission, sets forth the practice in displacements:

"There is no requirement or practice that a displacement request be acknowledged or accepted in writing to the employee. If this displacement is acceptable to the Department Head, nothing is said and the displacing employee is expected to report for work at the starting time and location of the position prepared to assume the duties. If he does not report on the date shown in his displacement he is considered absent without leave subject to disciplinary action if his absence is not satisfactorily explained. Carrier upon receipt of a displacement request, verbally notifies the displaced employee, as soon as possible, so that he may exercise his seniority rights. The process is repeated until the chain to displace a junior employee who then, according to Rule 17, is considered as furloughed." (Emphasis supplied.)

Also, in its Rebuttal Submission, Carrier stipulates that the following are "true statements:"

"On October 16, 1963, Mr. H. W. Wright telephoned Mrs. Manning's home and advised that a senior employe had exercised displacement rights to the Machine Operator position."

* * * * *

"On October 16, 1963, Mrs. Manning was notified that a senior employe had exercised rights to this Machine Operator Position."

On October 16, 1963, Carrier was in receipt of the following notice to displace on the same position designated in Claimant's notice of October 15, 1963.

"Cincinnati, Ohio
October 16, 1963

Mr. E. C. Hartman
Auditor

Being displaced by Marie Koch I wish to exercise my seniority rights on the position of Machine Operator now held by Mr. George Zerhusen, effective on November 1st, 1963.

Sgd/ Eileen Jeter

CC: Mrs. Edith Manning
Mr. H. W. Wright"

It is significant that: (1) Claimant's notice to displace on the Machine Operator position was to be effective on October 23, while that of the senior employe, Jeter, was not to become effective until November 1; (2) by admission, Personnel Supervisor Wright's message to Claimant, on October 16, did not inform Claimant that Jeter's displacement was not to be effective until November 1. From the substance of Wright's admitted message, Claimant could only conclude that the position would be held by senior employe Jeter on October 23; and, therefore, Claimant had no contractual right to displace on the position on that date. A reading of the record as a whole convinces us that this was the impression which Carrier, for reasons of its own, meant to and did create in the mind of Claimant.

It cannot be challenged that under Rules 10, 11 and 16 of the Agreement and Carrier's own description of practice on the property that Claimant had the contractual right to occupy the position on October 23 and to hold it until *de facto* displacement by senior employe Jeter. Jeter displaced on the position on October 28. Working days of the position, in the period in which Claimant had the right to hold it, were, October 23, 24 and 25; and, for all purposes of the contract giving rise to displacement rights, Claimant would have been displaced on October 28.

Having been misled by Carrier, and we find deliberately, Claimant sought to find a position to which she could exercise her displacement rights. On October 17 she filed notice to displace on the position of Material Man in the Office of Engineer of Maintenance—it was rejected by Carrier, on October 18, for the given reason that Claimant lacked fitness and ability. Then on October 22 she filed notice to displace on the position of Ticket Clerk-Stenographer in the Ticket Agent's Office—this she withdrew on October 28 as not being a proper displacement. There is much confusion in the record concerning the Ticket Clerk-Stenographer position—it will serve no purpose to dwell on it. On October 28 Claimant filed notice to displace on a Relief Crew Dispatcher position—on October 31 this was rejected by Carrier for the given reason it was not timely filed as prescribed in:

"RULE 17—REDUCTION IN FORCE

When reducing forces, seniority rights shall govern. At least forty-eight (48) hours' notice will be given employees affected in reduction of forces or in abolishing positions. Employees whose positions are abolished, may exercise their seniority rights over junior employees; other employees affected may exercise their seniority rights in the same manner. Employees displaced, whose seniority rights entitle them to regular positions, shall assert such rights within five (5) days. Employees who do not possess sufficient seniority to displace a junior employee or who do not assert their displacement rights within the prescribed time limit, will be considered as furloughed. A list of employees furloughed under this rule will be supplied by the management to the duly accredited representative."

Finally, Carrier delivered the *coup de grace*. It held, on November 25, that since Claimant had not displaced a junior employee within 5 days of October 16—the date she had been displaced on her regular position—she was a furloughed employee (see Rule 17, *supra*); and, because, she had not filed her name and address, as prescribed in the following paragraph of Rule 17, she had forfeited her seniority rights:

"Employees desiring to protect their seniority rights and to avail themselves of this rule, must, within five (5) days from the date actually reduced to the furloughed list, file their names and addresses in duplicate in writing, both with the proper official (the officer authorized to bulletin and award positions) and the duly accredited representative, advise promptly of any change in address and renew names and addresses in November of each year, or forfeit all seniority rights, except in cases of personal illness or unavoidable causes."

Carrier submits and argues as defenses: (1) Claimant did not possess the qualifications for the Machine Operator position designated in her October 15 notice to displace; (2) when after receiving Wright's message of October 16, she filed notices to displace on other positions, she "abandoned" her displacement rights relative to the Machine Operator position; (3) Claimant had knowledge that Jeter's displacement on the Machine Operator position was not to take effect until November 1, therefore she should have reported for work on the Machine Operator position on October 23. The first defense is without merit because it was not timely raised in accordance with Carrier's practice, quoted *supra*; and, further Rule 16 (a) vested Claimant with "thirty (30) working days in which to qualify"—compare with Carrier's timely notice of lack of fitness and ability in rejecting Claimant's notice to displace on the Material Man position. The second defense fails because it was brought into being by Carrier's violation of the Agreement in scheming to avoid Claimant displacing on the Machine Operator position on October 23—Carrier cannot find succor in conditions and actions brought into being by its breach of the Agreement. The third defense is destroyed by the Carrier in its Rebuttal Submission wherein it states:

"The record shows that General Chairman Lynch appeared alone in the Auditor's Office on October 23 and requested that Auditor Hartman immediately notify Mrs. Manning to report for work on the position of Machine Operator or he would file a claim."

That admission, coupled with denial of the demand, removes any doubt that Carrier was intent on evading the Agreement.

An employee injured by a violation of a collective bargaining agreement is entitled to be made whole and be restored to the status he would have enjoyed absent the violation. Applying that principle, Claimant's status was that of ownership of the Machine Operator position in the period from October 23 to 28 with five days thereafter in which to displace a junior employee. That being so, her notice of October 28 to displace on the Crew Dispatcher Relief position was timely filed and should have been honored. Consequently, she at no time became a furloughed employee and subject to the Rules applying to that status. It follows that Carrier's stripping Claimant of her seniority rights on November 25 violated the Agreement. We will sustain the Claim.

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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of April 1966.