



Award Number 17293  
Docket Number CL-18008

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION  
Louis Yagoda, Referee

**PARTIES TO DISPUTE:**

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

**THE LONG ISLAND RAIL ROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the Systems Committee of the Brotherhood (GL-6529) that:

1. The Carrier violated the provisions and understanding of the Clerks' Agreement, particularly, the Scope Rule Exception No. 4, Rules 2-A-9, 3-C-1, Rule 6, 7-A-1, 7-A-2, 9-A-1, 9-A-2, among others, when it unjustly, unfairly and with coercion removed Secretary Day from her regular assigned position and ordered her under protest to exercise her seniority to another position effective April 16, 1968.
2. The Carrier shall pay claimant Day, a day's pay at the rate of the Secretary position (her regular assigned position) in addition to the position she was forced to displace unjustly and illegally effective April 16, 1968 and for each day thereafter until the violations are corrected and Secretary Day is reinstated to her regular assigned position.
3. The Carrier shall further pay all other employees affected by the illegally ordered displacement of Clerk Day by Carrier, a day's pay for the regular position they were wrongfully displaced from, in addition to the position they were forced to displace in violation of the Clerks' Agreement, effective April 16, 1968 for each day thereafter until the violations are corrected and the affected employees are all reinstated to their regular positions prior to displacement. (List of affected employees will be given to the Carrier at a later date.)

**EMPLOYEES' STATEMENT OF FACTS:** There is in effect a Rules Agreement effective July 1, 1945 and a revised Agreement effective January 1, 1965, which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, as amended, and also with the National Railroad Adjustment Board, covering clerical, other office, station and storehouse employees, between this Carrier and this Brotherhood. The Rules Agreements will be considered a part of this statement of facts. Various Rules and Memorandums therefore shall be referred to from time to time without quoting in full.

**OPINION OF BOARD:** Claimant held the position of Secretary to General Manager, Property and Purchases. Exception 4 of the Clerks' Agreement exempts said position, among others, from Rules 2-A-2 (bulletining and bidding procedures for filling vacancies), 2-A-2 (fitness, ability and seniority criteria for filling positions), 2-A-3 (procedures for qualifying period in filling vacancies), 3-C-2 (provisions for exercise of seniority by displaced and rescheduled employees).

On March 15, 1968, Claimant forwarded to her Organization's General Chairman a claim that she had been required to perform work for one hour and forty-five minutes not within the scope of her job duties, in violation of Agreement. Said claim was submitted by Organization on March 29, 1968 and thereafter paid by Carrier.

General Manager, Property and Purchases notified Claimant on April 3, 1968:

"Please exercise your seniority. I would like to re-fill the Secretary job on Tuesday, April 16, 1968."

Claimant advised General Manager, Property and Purchases that she was exercising her seniority under protest and displacing a clerk in the Property and Purchases Department.

Thereafter—on April 19, 1968—Organization submitted the subject claim.

Organization contends that General Manager, Property and Purchases acted in an "injurious, unfair and unjust manner" in dismissing Claimant. It alleges that said action was in reprisal for Claimant's protest against performing the work of another employee covered by rules and regulations of Clerks' Agreement.

Organization further contends that Carrier violated Claimant's rights by refusing to afford her a fair and impartial trial in response to protest against removal.

In the Organization's view, this action was "coercion" to discourage employees from submitting claims.

Reference is made by Organization to Rule 2-A-9:

"When conditions develop so that an employe cannot satisfactorily perform the work of a position to which he is regularly assigned, he will be permitted to exercise seniority under Rule 3-C-1, subject to agreement between the Management and the General Chairman."

Organization contends that in the instant situation, (a) it had not been established that Claimant could not perform the work satisfactorily, (b) she was not "permitted" to exercise seniority, but ordered to, against her wishes and (c) no attempt was made to secure agreement on this subject with General Chairman and none gotten.

Violation is also claimed of Rule 3-C-1 (covering displaced and rescheduled employees), Rule 6 (discipline procedure), Rule 7-A-1 (appeals in discipline matters), Rule 7-A-2 (appeals other than discipline), Rule 9-A-1 (exceptions to rules) and Rule 9-A-2 (term of Agreement and procedure for changes).

Carrier's position is that it exercised its permissible managerial prerogative when it transferred Claimant from her position as Secretary to Carrier official. It contends that Exception 4 expressly exempts this position from Agreement promotion, assignment and displacement rules.

In Carrier's view, the only obligations put on Carrier for appointment and retention of employees in this position are those contained in Rule 1-A-1. This rule is as follows:

"1-A-1 (a) Employees will be considered for promotion to excepted, supervisory or official position as opportunity may offer.

(b) Future appointments to the following positions will be made from the ranks of clerical employees covered by this agreement,

Secretary-General Manager, Property and Purchases  
Secretary to Comptroller  
Supervisor, Service Builder  
Collector Sheet Clerk  
Budget Supervisor

(c) Employees will be considered for promotion to other excepted positions.

(d) Employees declining promotion shall not lose their seniority."

Carrier contends that it met its obligations with respect to Rule 1-A-1 by appointing Claimant's successor from the ranks of clerical employees covered by the Agreement.

It is further contended that under this rule Carrier may make its own selection from the ranks of covered employees and "it therefore stands to reason that since the Carrier has the unilateral right of appointment, it also has the same unilateral right to terminate such appointments."

Carrier contends that Rule 2-A-9 is not applicable to this fact situation in that its reference to employees unable to "satisfactorily perform the work" of an assigned position is intended for employees who are physically unable to perform said duties; they are, in consequence enabled to exercise their seniority in a position more favorable to their physical condition.

As for Rule 3-C-1, Carrier points out that Exception 4 expressly exempts positions listed therein from coverage by this rule. Rule 6 is also regarded by Carrier as inapplicable since it deals with suspensions or dismissals from service, not involved here. For the same reason, Rule 7-A-1, the appeal procedure for discipline, is regarded as not applicable.

As for Rule 7-A-2, also invoked by Claimant, Carrier contends that it did not violate said rule, inasmuch as claim was permitted to be presented and was reacted to within the time limits referred to therein (i.e. those of Rule 4-D-1).

Carrier contends that Rules 9-A-1 and 9-A-2, dealing with duration of agreement and procedures for changes are not applicable to the instant dispute.

Finally, Carrier asks that the claim be dismissed in that it does not identify the individuals for whom the claim is made.

We agree with Carrier that the circumstances involved do not come within the purview of Rule 6. The subjects of that rule are expressly identified therein as suspensions and dismissals from service, not involved here. It follows that Rule 7-A-1, providing appeal procedures from discipline is also not applicable, since no discipline was involved, as that term is defined in the Agreement (e.i. in Rule 6).

As for Rule 3-C-1, is it specifically listed in Exception 4 as among those not applicable to subject position.

Rules 9-A-1 and 9-A-2, also invoked by Organization, are also inapplicable to the instant dispute. These rules deal with duration of Agreement and the procedures to be followed in effecting changes, irrelevant to the given fact situation.

However, Rules 2-A-9 and 7-A-2 have not been excepted from coverage on this position. We believe that they have applicability to the issue presented.

Carrier contends that Rule 2-A-9 (quoted above) has been applied over the years to permit employees who are physically unable to perform the duties of a position to exercise their seniority to a position more favorable to their physical position. That may well be, but there is no evidence in the language of this rule to compel its limitation to such situations only.

Some uncertainty exists in the record concerning whether the removal and transfer were made on the grounds that the Claimant "cannot satisfactorily perform the work". Carrier avoids making such a claim. It bases its actions on its alleged own unqualified discretion to act unilaterally in such situations without the necessity to give reason. We have only the statement from Claimant herself that the General Manager, Property and Purchases gave her as his reasons: "we do not 'click' and he wants a man in the job".

We are thus not able to make a probative determination from the record concerning whether the action taken was on the basis of Claimant's alleged inability to "satisfactorily perform the work" of the position.

We are satisfied, however, that when Rule 2-A-9 is considered together with Rule 7-A-2, there survives in the Agreement an intent that Carrier must furnish a reason for removal and transfer of an incumbent from this position and be prepared to defend it.

Rule 7-A-2 states:

"When it is considered that an injustice has been done with respect to any matter other than discipline, the employee affected or the 'duly accredited representative' as that term is defined in this Agreement, on his behalf, may within sixty (60) days present the case in writing in the same manner as prescribed in Rule 4-D-1."

(Rule 4-D-1 states procedures and time-limits for proceeding with claims.)

By its refusal to probatively defend the reason for removal and transfer of the Claimant, Carrier has not met its obligations under Rules 2-A-9 and Rule 7-A-2. We must conclude therefore that its actions have been in violation of the Agreement.

We agree, however, with Carrier that the record of exchanges on the property, does not establish monetary losses claimed either for Claimant or for "other employees" referred to in Paragraph 3 of the Organization's claim to this Board.

Consequently, we shall limit remedy to restoration of Claimant to her former position.

**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; and

That the Agreement was violated.

#### **A W A R D**

Claimant shall be restored to position of Secretary to General Manager, Property and Purchases.

**NATIONAL RAILROAD ADJUSTMENT BOARD**  
By Order of Third Division

**ATTEST: S. H. Schulty**  
Executive Secretary

Dated at Chicago, Illinois, this 10th day of July 1969.

#### **CARRIER MEMBERS' DISSENT TO AWARD 17293, DOCKET CL-18008**

One basic error in Award 17293 is the failure of the Majority to recognize the fact that Petitioner was unable to point to any rule in the Agreement as requiring the Carrier to furnish the employee with a reason for removal from the position. Since nothing in the Agreement required the giving of reason for removal there could be no violation of the Agreement in such respect. The Majority could only reach a far-fetched conclusion that "there survives in the Agreement an intent that Carrier must furnish a reason for removal and transfer of an incumbent from this position and be prepared to defend it."

The right of Carrier to make an appointment to this position has not been questioned. The right of appointment carries with it the right of re-appointment. From this it follows that the right of removal must necessarily be retained by Carrier. The Majority, for some unknown reason, elected to ignore prior awards of this Division upholding Carrier's right to displace employees from appointive positions. See Awards 8426, 11165 and 13632 among others cited to the Referee.

Award 17293 is also in error in awarding that Claimant shall be restored to position of Secretary to General Manager, Property and Purchases. Such

award exceeds that which is requested by Petitioner in the Statement of Claim. No specific request was made for restoration to position. But even if such request had been made it was not within the power of the Board to appoint or reappoint the Claimant to the position in question since that right was exclusively reserved to the Carrier under the terms of the Agreement. The Board has exceeded its jurisdiction and the award consequently is invalid.

/s/ G. C. WHITE  
G. C. White

/s/ P. C. CARTER  
P. C. Carter

/s/ R. E. BLACK  
R. E. Black

/s/ W. B. JONES  
W. B. Jones

/s/ G. L. NAYLOR  
G. L. Naylor