Award No. 18710

Docket No. TE-19161

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert A. Franden, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION DIVISION, BRAC

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Transportation-Communication Division, BRAC, on the Missouri-Pacific Railroad Company, T-C 5804, that:

1. Carrier violated the Telegraphers' Agreement, and especially Rule 16, contained therein, when on July 1, 1970 at 1:30 P.M., without notice or benefit of hearing, Mrs. Hazel I. Moore, Agent-Telegrapher, Westphalia, Kansas, was removed from service for her alleged physical disability.

2. Carrier shall now compensate Mrs. Hazel I. Moore for eight hours per day, five days per week, at the pro rata rate of the Westphalia, Kansas Agent-Telegrapher Position beginning July 2, 1970 and continuing until Mrs. Moore is returned to her position at Westphalia, Kansas.

EMPLOYES' STATEMENT OF FACTS: On January 4, 1971 Mrs. Hazel I. Moore, Claimant, had completed 30 years of service for Carrier and was 64 years of age. She was, until July 1, 1970, the Agent-Telegrapher at Westphalia, Kansas. On July 1, 1970 Trainmaster McCoy visited Mrs. Moore at her place of employment at 1:30 P. M. and handed her a notice reading as follows:

"I have been advised by Dr. Earnest T. Rouse, MD, that as a result of your physical examination by Dr. W. Appenfeller that you are not physically capable of performing service and you must be hereby removed from service." (T-C Exhibit 1)

Mrs. Moore was summarily removed from service upon receipt of said notice. On July 10, 1970 the claim, supra, was filed by District Chairman R. L. McCoy. (T-C Exhibit 2).

The affirmative defense offered by Superintendent Shaver in declining the claim on July 16, 1970 was that Mrs. Moore was removed from service on the instruction of Dr. E. T. Rouse, Chief Medical Officer, who advised that she was physically unable to perform all the duties in connection with her position. (T-C Exhibit 3).

her behalf for such a hearing. Furthermore, this is not the proper procedure in cases of physical disability.

It is, of course, the Carrier's responsibility and right to determine whether or not any employe is physically qualified to perform all the duties of the position to which assigned and in the instant case Mrs. Moore was found not qualified to continue in service by reason of her poor physical condition.

For these reasons this is to advise you that monetary claim filed in her behalf and your request that she be reinstated to active service are hereby declined.

Yours truly,

/s/O. B. Sayers"

6. At the request of the General Chairman the dispute was discussed in conference on October 13, 1970, in which the General Chairman was advised that the Carrier could find no justification for changing the decision given to him in its letter of September 28, 1970, quoted in paragraph 6 above. The Carrier's decision was, apparently, not acceptable to the General Chairman, and under date of January 20, 1971, advice was received of written notice from the President of the TC Division—BRAC that the instant dispute would be filed with your Board for decision.

OPINION OF BOARD: On the advice of the Chief Medical officer Dr. E. T. Rouse the Carrier removed the Claimant from service on the grounds that she was physically unable to perform all of the duties connected with her position.

The Organization alleges that the Claimant could not be removed from service without an investigation held in accordance with Rule 16(a) which reads as follows:

"DISCIPLINE AND GRIEVANCES: Rule 16. (a) An employe who has been in the service more than 60 days, or whose application has been formally approved, shall not be disciplined or dismissed from the service without first being given an investigation."

We are obviously confronted here with the question of whether a removal from service because the employe does not meet the health requirements of the Carrier is a "dismissal" so as to be covered by Rule 16 (a).

This Board has held many times that the discipline rule is not applicable to physical disqualifications. See Award 11909 (Coburn):

"Claimant was not charged with an offense under which he might have been dismissed or discharged from the Carrier's service. He was withheld from further service solely because of failure to meet the physical requirements of a job. * * * "

See also Awards 18396 and 18512.

The Organization has cited Award 11256 in support of its contention that a disqualification and a removal from service for health reasons is a dismissal within the terms of Rule 16(a). We have carefully examined Award

11256 and the persuasive brief filed by the Organization. It must be concluded, however, that Rule 16 (a) is not applicable to disqualifications for health reasons. We do not find the Carrier's action here to be arbitrary or capricious. We will deny the claim.

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 Employes involved in this dispute are respectively Carrier and Employes 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 24th day of September 1971.

DISSENT TO AWARD 18710, DOCKET TE-19161

This Award is seriously in error, the majority having clearly exceeded the authority of this Board to interpret and apply agreements as made by the parties.

It is well settled by a long line of awards of this and other Divisions that the Board has no authority to alter, by interpretation, any part of the collective bargaining agreement in controversy. Its authority is limited to interpreting and applying such agreements as made. See, for example, Award 14594 where this Division citing prior Awards 13491, 13178, 12358, 12246, 12100 and 12099, said:

> "It is well established that this Board is without authority to add to, take from, or otherwise rewrite the agreement made by the parties."

It is equally well established that when a rule is interpreted by an award of this Board, such interpretation becomes a part of the agreement unless and until the parties negotiate a change. On this principle, Award 5133 held that:

> "* * * It does not admit of dispute that the Board's interpretation of rules becomes a part of the Agreement to all intents and purposes as though written into the rule book."

See, also, Awards 11790, 13660, 14407, 15358, 16489 and 16532, among many others, where this principle has been reaffirmed.

A related principle is that re-adoption of a rule which has been interpreted by an award of this Board manifests an intent by the parties to ratify such interpretation. Award 11790 contains this pertinent language:

> "* * * The Board interpreted the rules pleaded in Award 6487, which interpretation became a part of the contract between the parties. Those same rules were carried forward, in identical language, into the new agreement. Thus, the parties ratified the interpretation of Award 6487, and they may not now be heard to complain."

With these principles in mind, we point out that the present case involved a contention by the General Chairman that Rule 16(a) prohibits the dismissal by physical disqualification of an employe without a hearing; and a contrary contention by the Carrier.

Thus, the sole question to be decided was whether the General Chairman's contention had any support.

Award 11256, rendered by this Board on March 28, 1963, involved a dispute between these same parties concerning the dismissal of an employe for "inefficiency," which the Carrier argued was merely a physical disqualification. Among other things, the Board held that Rule 16(a) is not limited to disciplinary actions, but applies to dismissal as well; and that total physical disqualification is a "dismissal" within the intent of hte rule. It was noted that a hearing was held in that case, signifying Carrier's understanding of the rule.

In conformity with the principle discussed above, this interpretation became a part of the agreement "as though written into the rule book." (Award 5133).

Another interpretation of Award 11256 related to Rule 16(e). The Carrier did not like this interpretation and sought a modification — thus showing its knowledge of the effect of interpretations by this Board.

Negotiations were held, and a modification of Rule 16(e) was agreed to. **But no change was made in Rule 16(a), which was readopted in identical language.** Thus the parties ratified the interpreation of Rule 16(a) which this Board made in Award 11256.

All of these facts were made clear to the Referee. His failure to observe controlling principles discolses a disregard for contractual rights and obligations of disputant parties quite unseemly in a "neutral person" as contemplated by the Railway Labor Act.

The Railway Labor Act, as amended, provides an avenue of relief to a party where, by an award, the Board exceeds its jurisdiction. Here, the Board exceeded its jurisdiction when it deleted from Rule 16(a) the interpretation placed thereon by Award 11256 and which was thereafter ratified by the parties in a normal collective bargaining process.

I dissent.

J. C. Fletcher
Labor Member

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