NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19932
THIRD DIVISION Docket Number CL-19870

Benjamin Rubenstein, 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 System Committee of the Brotherhood (GL-7185) that:

1. The Carrier violated the understanding and provisions of the Clerks' Agreement, particularly, the Scope Rule Exception No. 4, Rules 2-A-9, 3-C-1, 6, 7-A-2, 9-A-1, 9-A-2, among others when it unfairly, unjustly and with coercion, removed the Supervisor-Ticket Refunds, Mrs. M. B. Pearson, from her regular assigned position, under protest, effective with the close of business on September 3, 1971.

2. The Carrier shall pay Claimant M. B. Pearson for all monetary losses, resulting from her unjust removal, between the rate of her regular assigned position of Supervisor-Ticket Refunds effective September 4, 1971, and whatever other incidents or positions she was required to work or bid under protest and for each day thereafter until the violations are corrected and Supervisor-Ticket Refunds, Claimant Pearson is reinstated to her regular assigned position.

3. The Carrier further violated the specific provisions of Rule 4-D-L of the Clerks' Agreement and Article V, Section 1 (a) of the National Agreement dated August 21, 1954, when it failed to render proper reason for disallowance and did not claim they were not in violation of the provisions of the Clerks' Agreement.

OPINION OF BOARD: The facts, as they appear from the record, are:

Claimant filled the position of Supervisor-Tickets Refunds, as Assistant Office Manager for a period of over eight years. This, admittedly, was considered a supervisory position, covered by Exception 4 of the Scope Rule, which excludes Rules 2-A-1, 2-A-2, 2-A-3, and 3-C-l of the Agreement. These Rules, respectively, deal with bulletining of positions; awards of positions; failure to qualify for positions; and reductions in working force.

On March 15, 1971 claimant was moved to the office of Treasurer's Department as Supervisor-Ticket Refunds. The transfer of her position from one department to another brought about increased responsibilities, and she demanded a reevaluation of the job and an increase in salary.

Several communications and conferences were had between claimant and her supervisors and her requests for reevaluation of the job and a salary adjustment were denied. Friction developed between claimant and her supervisor, resulting in her removal from the position as of September 3, 1971.

Claimant contends, that Carrier violated the provisions of Scope Rule Exception 4, Rules 2-A-9, 3-C-1, 6, 7-A-2, V-A-l, V-A-2, and 4-D-1, in that it failed to comply with the provisions involving notice and disciplinary procedure.

Carrier rejected the claim on the ground that the position was of a supervisory nature and not subject to the provisions of the Agreement, and that the removal of claimant from office was a prerogative of management.

The agreement between the parties is detailed as to coverage and exceptions. Under normal circumstances, management, in labor relations, has the sole prerogative of appointing or removing supervisory employees (17293, 17922 and numerous other awards). However, this right, as any other, may be limited or waived by agreement. Exception 4 of the Scope Rule is such a limi tion. By excluding only certain Rules, to wit: 2-A-1, Z-A-2, 2-A-3 and 3-C-1, it places all other Rules, not specifically excluded, within the scope of the agreement.

The disciplinary provisions of the Agreement are not part of the exclusions in Exception 4. They are, therefore, applicable.

We find, from the record, that the basic reason for removal of the claimant, was the fact of her pressing for an increase and her disagreements with the supervisor. It was a disciplinary action, rather than a mere change of personnel. It being a disciplinary measure, the procedure outlined in Rule 6 should have been followed. This, admittedly, was not done.

We must, therefore, find that the Carrier violated the provisions of the Agreement.

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

Carrier violated the agreement.

A W A R D

Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.

DISSENT OF CARRIER MEMBERS' TO AWARD NO. 19932
DOCKET NO. CL-19870

It is an admitted fact that the claimant was occupying an excepted position. Numerous Awards of this Board - and they were cited in this case - have recognized that an employe may be removed from an excepted position without resort to the disciplinary and appeals procedures of the Agreement.

Also, this Board lacks authority to restore claimant to an excepted position and many well-reasoned Awards have subscribed to this principle.

This is an erroneous Award and we vigorously dissent thereto.

H. F. M. Braidwood

P. C. Carter

W. B. Jones

G. L. Maylor

G. M. Youhn

Serial NO. 274

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 19932

DOCKET NO. CL-19870

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: The Long Island Rail Road Company

Upon application of the representatives of the Employes involved in the above Award, that this Division interpret the same in light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

On September 7, 1973 this Board made and issued an Award in the above matter sustaining the claim of the organization, which read in part as follows:

> "2. The carrier shall pay claimant M. B. Pearson for all monetary losses, resulting from her unjust removal, between the rate of her regular assigned position of Supervisor-Ticket Refunds effective September 4, 1971, and whatever other incidents or positions she was required to work or bid under protest and for each day thereafter until the violations are corrected and Supervisor-Ticket Refunds, claimant Pearson is reinstated to her regular assigned position".

A dispute developed between the parties as to Interpretation of the Award, and on August 1, 1974 the Organization requested the Third Division, National Railroad Adjustment Board to issue an official Interpretation of the Award.

A hearing was duly held before this Board with the participation of the referee herein. Both parties appeared and presented their respective positions.

Positions of the parties.

The parties disagree on the Interpretation of Paragraph 2 of the Statement of Claim, hereinabove set forth. The carrier contends that the wording of the paragraph limited the claim to the difference in regular day pay between the assigned position of the claimant and the wages she

was getting after her removal. That the claimant did not ask for overtime *or* other benefits lost by her. If the organization intended to claim overtime and other benefits it should have so specifically stated in the claim. In line with its interpretation the carrier paid the claimant the difference in the daily wages, but refused to pay for overtime worked at the position between Claimant's removal and reinstatement.

The organization opposes this interpretation and asserts that its claim, as stated, contemplated all monetary losses sustained by claimant, inclusive of overtime, as a result of the violation by the carrier.

We agree with the interpretation of the organization. The phrase "all monetary losses" is all inclusive. If by reason of the violation, she Lost overtime income, which she would have received. had the violation not occurred, this was a monetary loss to her. The phrase "rate of her regular assigned position" does not limit her recovery only to the day-rates, and day work. Had she worked overtime at her regular assigned position, her "rate" for the overtime work would have been the "rate of her regular assigned position". Had she continued working in her regular assigned position, she would, undoubtedly, have gotten the overtime work required in that position. Having failed to get said overtime, she sustained a "monetary loss". The assumption that she might not have worked overtime, may not be taken into consideration in determining her "monetary losses". She might also not have worked regularly in her assignment.

The cases cited by the carrier in support of *its* position are differentiated from the one before us. In Award No. 2144 (Docket CL-2170) the award specifically limited the compensation to "time lost at the scheduled rate of pay". In the instant case the claim and the Award is for "all monetary losses".

In Award No. 6179 the issue involved a "position that has been abolished". In the instant case the position continued in existence.

Interpretation No. 1 to Award No. 18047, is also differentiated from the case before us.

Aside from the differences pointed out above, the cases cited date as far back as 1943, 1944, the latest being, 1965. We agree with the recent interpretation of the "make whole" doctrine as enunciated in Interpretation No. 1 to Award No. 19679.

The Award contemplated that the claimant be made whole for the difference in earnings she had during the period of the violation and the earnings she would have had on the basis of the rate of pay of her regular assigned position had she continued working it, inclusive of the overtime involved.

The overtime actually worked during the period involved is sufficient evidence that Claimant would have worked it, unless carrier can show that she would not have worked overtime. But this, of course, may involve the parties in another dispute.

Referee Benjamin Rubenstein who sat with the Division, as a neutral member, when Award No. 19932 was adopted, also participated with the division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of March 1975.

NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19932
THIRD DIVISION Docket Number CL-19870

Benjamin Rubenstein, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employer.
(The Long Island Rail Road Company

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Claimant contends, that Carrier violated the provisions of Scope Rule Exception 4, Rules 2-A-9, 3-C-1, 6, 7-A-2, 9-A-1, 9-A-2, and 4-D-1, in that it failed to comply with the provisions involving notice and disciplinary procedure.

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Claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order *of* Third Division

ATTEST: A. W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 7th day of September 1973.

DISSENT OF CARRIER MEMBERS' TO AWARD NO. 19932
DOCKET NO. CL-19370

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This is an erroneous Award and we vigorously dissent thereto.

H. F. M. Braidwood

P. C. Carter

W. B. Jones

G. L. Naylor

G. M. Youhn

Serial No. 274

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWAW NO. 19932

DOCKET NO. CL-19870

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, *Express* and *Station* Employes

NAME OF CARRIER: The Long Island Rail Road Company

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By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 7th day of March 1975.