NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22059
THIRD DIVISION Docket Number CL-21916

James F. Scearce, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship Clerks. Freight Handlers. Express and Station Employes
(Chicago. Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood GL-8267, that:

1) Carrier violated the T-C Division BRAC Rules Agreement, and particularly Article VI of the Memorandum of Agreement dated April 5, 1974, when it failed and refused to grant G. A. Taylor, Minneapolis, Minn. separation allowance when he was affected by abolishment of permanent positions in the Twin City Terminal on July 2, 1975.

2) Carrier shall now be required to pay G. A. Taylor a lump sum separation allowance on the basis set forth in the Agreement.

OPINION OF BOARD: We are called upon to resolve a dispute arising over whether or not Claimant had "five (5) or more years of employment relationship" when, on July 5, 1975, he exercised his rights under Appendix 8, Article VI, Section 1 of the effective agreement.

Claimant, having been displaced from his position as relief telegrapher on July 2, 1975, and, being unable to secure a position within thirty miles of his residence, elected, in writing within the specified time period, to resign and accept a separation allowance in lieu of all other benefits as his choice under the terms of the agreement.

Carrier declined to pay Claimant his separation allowance and did not exercise its right to "retain said employe in service" under paragraph 3 of the May 23, 1974 Agreement, but, contrary thereto, advised Claimant that he would "be subject to recall for any position with /in/ that district pursuant to the schedule agreement and will be expected to protect whatever service you are recalled for." Carrier's

declination of the requested separation allowance was based on its assertion that Claimant did not have "five (5) or more years of employment relationship."

The pertinent agreement provisions read as follows:

> APPENDIX NO. 8 - MEMORANDUM OF AGREEMENT
> ARTICLE VI - Separation Allowances, Moving Expenses and Protection From Loss With Respect to Homes
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> Section 1. (a) In the case of abolishment of permanent positions as set forth in Article I hereof as result of any of the changes outlined in Article IV, Sections l(a), (b), (c) and (d), a protected employe whose permanent position is abolished as set forth in Article I hereof or is directly affected through related chain of displacements will have one of the following options, which must be exercised within seven (7) calendar days from date employe is affected by changes referred to above:
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> 1. Follow his position or work, seniority permitting.
> 2. Exercise seniority displacement rights in accordance with current Rules Agreement.
> 3. Any such protected employe who has five (5) years of employment relationship and who would be required to move his residence in order to follow his position or work to point of transfer may resign from Carrier's service and accept a lump-sum separation allowance on basis set forth in Section 3 of this Article.
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> (b) In the case of abolishment of permanent positions under conditions other than as specified in Article IV, Sections l(a), (b), (c) and (d), a protected employe whose permanent position is abolished who has five (5) or more years of employment relationship and who would be required to move his residence in order to obtain the nearest available position in his seniority district, may elect to resign from Carrier's service and accept a lump-sum separation allowance on basis set forth in Section 3 of this Article.

LETTER AGREEMENT OF MAY 23, 1974

. . . . . .

3. Carrier has the option of allowing a protected employe to resign and accept a lump-sum separation allowance under the provisions of Section 1 of Article VI of the Memorandum of Agreement dated April 5, 1974, as hereby amended, or retaining said employe in service with the understanding said employe will not be required to perform service on any position which is more than 30 normal route miles from his residence or which is further from his residence than was his former position.

Early in the handling of this claim on the property, Claimant advised Carrier that he had commenced working for the Carrier in June 1967 and that, through records and evidence, he could prove a continuous employment relationship back to "at least May of 1970." Carrier denied same on the allegation that "when you returned to school you were not available for all service your seniority, fitness and ability would have entitled you to and such unavailability resulted in a break in your employment relationship."

The preponderance of evidence shows that Claimant had not been a student since December 1969, was employed on June 20, 1967, and performed service under the agreement as follows:

Year	Days of Service	Status	Months of Service
1967	91	Extra	N/A (at least 3)
1968	123	Extra	11
1969	88	Extra	10
1970	120	Extra	11
1971	248	Regularly Assigned	12
1972	N/A	Regularly Assigned	12
1973	N/A	Regularly Assigned	12
1974	N/A	Regularly Assigned	12
(to July 2) 1975	N/A	Regularly Assigned	6

Under the facts of record Claimant had a contractual right to resign and accept a separation allowance as specified in Article VI of Appendix 8, supra, and the Carrier had the obligation to either grant the separation allowance or make its election then and there under paragraph 3 of the March 23, 1974 Agreement quoted above. Carrier did neither. Carrier denied, and continued to deny, Claimant's right to a separation allowance on its argument that he did not have five or more years of continuous employment relationship. Carrier's contention is that Claimant's employment relationship was broken, i.e., that he forfeited his seniority and was rehired a number of times but that the Carrier has "no record of just how many times Claimant chose to forfeit his seniority and, likewise, no record of the number of times Carrier chose to rehire him. A record of such action is not necessary in this type of situation."

As the agreement will show, "seniority" is not the proper criterion. The criterion is "continuous employment relationship" and the Board cannot agree with the Carrier that a record of such action (alleged severance of employment) is not necessary. Claimant made a prima facie *case* of *entitlement to a separation* allowance when he showed that he was employed on June 20, 1967 and continued in employment to and including the date of his election to accept separation July 5, 1975. The record clearly shows that as of July 2, 1975, when Claimant was displaced, he had enjoyed at least fifty-four (54) months of uninterrupted and uncontested service as a regularly assigned telegrapher since acquiring the regular assignment in January 1971, immediately prior to which he had performed service on 120 days, working in each of eleven different months during calendar year 1970, for which he received a vacation with pay in January 1971. The arguments Carrier raised to Claimant's prima facie case for separation allowance are in the nature of an affirmative defense which it is required to prove. See, e.g., Award 12363 (Dorsey), reading in *part:*

> "In the case before us Carrier argues that Claimant's work from March 27 to May 26 was not within the Scope of the Clerks' Agreement. This is an affirmative defense. The burden of proving it is Carrier's. Assuming arguendo, that this would be a defense, Carrier has failed to adduce, in the record, any evidence to support it."

Carrier here, on its arguments relative to rehiring and forfeiture of seniority causing a "break in service," is much like the Carrier in Award 18472 (Rimer) wherein a similar "argument" was advanced with the following result:

> "The record of the event which occurred on July 3, 1967, variously described as 'dismissal' or 'discharge' is too meager to be considered a break in service. The Carrier simply makes that assertion without offering sufficient evidence in its support."

Here, Claimant was hired once - June 20, 1967 - and there is simply no evidence of his termination, dismissal, discharge, separation, or, in fact, re-employment during that period up to and including July 5, 1975. Claimant did act timely to elect a separation allowance and Carrier refused to honor his request and, likewise, did not exercise its right to retain Claimant in service. Carrier does not now have that right. It chose, instead, to contest Claimant's continuous service.

Claimant effectively resigned on July 29, 1975, after his instant claim was disputed, and without prejudice thereto. We view this as did the Board in Award 4124 (Robertson):

> "In effect, the question presented to this Board in this submission is whether or not the employe, by submitting a resignation effective as of the date on which her vacation was scheduled to end, forfeited her right to a vacation with pay. We hold that it did not."

Here, we hold that Claimant's subsequent resignation did not forfeit his right to a separation allowance and will sustain the claim as presented.

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

The Agreement was violated.

A W A R D

Claim sustained.

NATIONALRAILROADADJLISTMENT BOARD
By Order of Third Division

ATTEST: C. W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 12th day of May 1978.