NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24127
THIRD DIVISION Docket Number CL-24042

Gilbert H. Vernon, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9401) that:

1. Carrier removed Mr. D. A. Robitaille from seniority district employment and roster in an illegal manner and denied him his seniority date of December 19, 1978; and

2. Carrier shall now restore Mr. Robitaille to Seniority District No. 26 roster with date of December 19, 1978 and all other rights unimpaired, recall him to work in this district before any junior is employed and pay him for all time lost commencing February 15, 1979 until so restored, and pay him for any losses under any insurance policies covering the employes' represented by BRAC in Seniority District No. 26.

OPINION OF BOARD: The basic facts in this case are relatively undisputed. The Claimant was hired as Trackman, a position which falls under the jurisdiction of the Brotherhood of Maintenance of Way Employees, on September 26, 1978. On December 18, 1978, the Claimant was furloughed from the Trackman's craft. On December 19, 1978, he was employed at the Carrier's Ore Dock at Escanaba, Michigan. It is further undisputed that on February 14, 1979, the Claimant was given a letter signed by the Maintenance Superintendent of the Ore Docks which read as follows:

> "The temporary position which you have been filling has been abolished, tonights shift will be your last.
>
> When we receive permission to put on additional permanent employees, you may re-apply."

On February 24, 1979, the Organization requested a hearing under Rule 21 (Discipline) and Rule 22 (Unjust Treatment-Grievances) which was denied by the Carrier on February 27, 1979.

The Organization argues that the Carrier's actions violated Rule 21 because they failed to give him a hearing in accordance with the Rule before dismissal. They direct attention to the first sentence of Rule 21 A which states:

"An employee who has been in the service 60 calendar days or more or whose application has been formally approved shall not be disciplined or dismissed without a fair and impartial investigation, and prior thereto will be notified in writing of the precise charge."

They assert in this connection that the Claimant had been in the service of the Carrier for more than 60 calendar days. Inasmuch as the Claimant transferred from one craft to another, he was not a new employe and the time that the 60 days begins to toll would be his initial employment date in the trackman's craft. This was September 26, 1978, therefore, the Organization argues that he had been in service approximately 120 days. The Organization, in support of their contention that in the case of a transferred employe the 60 days for purpose of Rule 21 begins from the date of initial employment, directs attention to Second Division Award 7544 (Eischen). Attention is directed to the following quoted portion of that award:

"The personnel transaction which resulted in Claimant's placement on the Sheet Metal Worker job was not an application for employment but rather a request to transfer by an employee who had already established an employment relationship with the Carrier. Claimant was an applicant for employment on July 10, 1974 and Carrier could have disapproved his application under Rule 23 for 60 days thereafter but it cannot use Rule 23 in January 1976 to justify his termination for alleged 'bad attitude and excessive layoffs'. -- To the extent that Award No. 1 PL No. 1707 suggests that a transferee is the same as an applicant for employment, we deem it to be in error and without precedent value in the case before us. -- It is not contested that Carrier failed to follow Rule 24 (Discipline) in discharging Claimant. -- Claimant to be reinstated to position from which he was discharged, with seniority rights unimpaired; together with compensation for back pay, less any earnings from outside sources."

The Organization argues that under the circumstances the Carrier was obligated to treat the abolishment of the Claimant's position by applying the provisions of Rule 12 (Reducing Forces and Return to Service - Reinstated Positions) which the Board notes states in pertinent part:

"Employes whose positions have been abolished or who are displaced through exercise of seniority (fitness and ability being sufficient) must exercise seniority to a permanent assignment (or to the extra board if permissible under Rule 40(m)) within fifteen calendar days from date actually affected. (See note below.) They may, if

qualified, assume the duties of any temporary (unbulletined or pending assignment) assignment or a 'pending return' assignment held by a junior employe and when released or displaced from such temporary or 'pending return' assignment shall be afforded the right to exercise seniority to another temporary or 'pending return' assignment. Such action will not be considered as extending the fifteen day period or voiding the exercise of seniority rights granted by this rule. If under application of this agreement, it is not necessary to exercise seniority, the employe, upon filing his name and address in duplicate within FIFTEEN CALENDAR DAYS FROM THE DATE AFFECTED with employing officer (the official authorized to bulletin and award positions) WILL BE CONSIDERED AS FURLOUGHED and will be recalled to service as per Section (d) hereof.

* * *

(e) Furloughed employes desiring to waive their rights to return to service on positions or vacancies of thirty calendar days or less duration or to a bulletined 'pending return' assignment may do so by filing written notice with the proper officer as defined above with copy to division chairman. Such notice may be cancelled or terminated in the same manner.

* * *

Understandings applicable to Iron Ore Dock Employes:

Employes entitled to listing on seniority roster will be returned to service in the order of their seniority and will not be required to file their names and addresses as indicated in this rule. Present practice in respect to returning employes to service will be continued."

Moreover, they suggest that the Carrier arbitrarily severed the Claimant's employment and seniority relationship without the benefit of any rule support. The only rule which is applicable to the rights of an employe whose position is abolished is Rule 12, which would only allow the Carrier to furlough the Claimant and in that case he would be entitled to recall rights. They state there are no rules in the Agreement to permit the elimination of the Claimant as an employe except the Discipline Rule which was not followed.

The Carrier defends its actions based on Rule 13 which states in part:

"The applications of new employees shall be approved or disapproved within 60 calendar days after the applicant starts work ..."

Inasmuch as the February 14 letter disapproved his application within 60 days of the date of his employment in the craft, he was not entitled to the hearing under Rule 21 or Rule 22. In addition, the Carrier's right to dismiss employes within probationary periods without being subject to review is well established. Moreover, in regard to the Organization's contention that Rule 21 -

Discipline was violated the Carrier suggests that there is no evidence of a disciplinary intent as there was in Second Division Award 7544. This provides an adequate basis for distinguishing Award 7544 from the instant case. Also, at several points in the record, the Carrier suggests that the Claimant's application was rejected because he was unqualified as evidenced by his alleged failure to pass a welding test. The Carrier also defends its actions based on an argument that the Carrier and the Claimant had entered into a parol contract to work on the ore docks on a temporary basis only. It is further contended that when this parol contract was made both parties knew the employment would last no more than 60 days and the Claimant had no reasonable expectation of further employment on the ore dock. Such a contract did not interfere with the collective bargaining agreement because during this period of temporary employment he worked in accordance with the terms of the collective bargaining agreement. By working less than 60 days it was understood that the Claimant would not attain full seniority rights as a permanent employe.

The claim in general contends that the Claimant was improperly removed from service via a misapplication of Rule 13. The Organization contends that Rule 12 and Rule 21 are controlling while the Carrier contends Rule 13 is controlling. It is the conclusion of the Board that Rule 13 does not apply in this case for two reasons.

First, the Board takes notice of the fact that the February 14 letter did not invoke Rule 13 or seek to terminate the Claimant under Rule 13. Assuming arguendo that Rule 13 does apply it cannot be said, as the record is before the Board, that it was invoked. It cannot be said to apply if the Carrier failed to spell out in the letter that they were seeking to separate the Claimant under this provision. The meaning of the letter must be considered in evaluating the Organization's contention that Rule 12 applies. The Board takes the February 14 letter at its face value. The letter indicated in plain language that the Claimant's position was "abolished" and it did not make any reference to the Claimant, his application for employment or his qualifications. In this respect the letter is indicative that Rule 12 applies. If the Carrier wished to exercise their right under Rule 13 to disqualify the Claimant within 60 days of the date of employment, then they should have clearly stated so in their communication to him. Inasmuch as the Claimant's position was "abolished", he has a clear right under Rule 12 to remain in a furloughed status with recall rights. It is equally clear he was denied this furlough status and was denied the right to be recalled to employment on the ore dock when such employment became available. The Board must give controlling weight to the reasons used by the Carrier at the time of termination, namely the reason cited in the February 14 letter. Not as much weight can be given to the later proferred defense that the employment application was disapproved because he was unqualified. We believe the original letter is more indicative of their intent at the time. We also note that the Carrier's contention that the Claimant was unqualified is somewhat inconsistent with the fact that they asked him to reapply at a later date in the February 14 letter. If, in fact, the Claimant was being released because he was unqualified, it seems unlikely that he would be invited to reapply at a later date.

Second, even assuming that the February 14 letter did invoke Rule 13, it is concluded that Rule 13 still would not apply and Rule 21 would. Rule 21 states in part, "an employee who has been in the service sixty calendar days or more or whose application had been formally approved..." Rule 21 can be said to apply because the Claimant had been in the service of the Carrier for more than sixty days and his initial application for employment with the Carrier had previously been accepted. Rule 13 cannot be said to apply because it refers to "applications of new employees..." Mr. Robitaille within the plain and ordinary meaning of the word was neither a "new employee" of the Carrier nor had he made an "application" for employment within the sixty days prior to February 14. In this respect we direct attention to Second Division Award 7544 (Eischen). The personnel transaction in the instant case was, as in 7544, a verbal request for transfer, not a formal application for employment.

In arriving at the above conclusion, the Board is rejecting the Carrier's argument that they were within their right to terminate the Claimant's employment within the terms of an individual parol employment contract. We agree with the Carrier that under certain circumstances employers and individual employes can enter into agreements outside the collective bargaining agreement. However, it is also well established that these individual agreements are only valid when the subject of the agreement is outside the scope of the collective bargaining agreement or the terms of those agreements do not abrogate, subtract from or are inconsistent with the collective bargaining agreement. In this case, the individual agreement was inconsistent with the collective bargaining agreement. The agreement does not make a distinction between temporary or permanent employes in respect to the rights of recall or in respect to the right to a hearing under Rule 21 or 22.

In summary it is the conclusion of the Board that the Claimant was improperly severed from the employment of the Carrier. Rule 13 does not apply in this case in any respect, and the Carrier was obligated to proceed under Rule 21. Inasmuch as the Carrier failed to do so, the Claimant is entitled to reinstatement, seniority rights unimpaired, and is entitled to be compensated in accordance with the procedures of Rule 21(C).

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 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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of January 1983.