

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(CSX Transportation, Inc. (former Chesapeake and Ohio
Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10536) that:

(a) The Carrier violated the provisions of Rule 20, 60 and others by having a hearing December 12, 1985 to determine the material facts as to why Robert A. McNeil failed to report for duty on November 1, 1985. The facts as presented in the transcript will only prove that there was a definite problem on the night of November 1, 1985 because Robert A. McNeil had an apparent heart attack while enroute to report for duty. He was rushed to the nearest hospital and couldn't even breath (sic) properly. He didn't try to hide the reasons that might have led to this temporary health problem and, in fact presented evidence to prove that he had taken the necessary precautions to correct this problem. For some apparent reason, the facts as presented were not considered because Robert A. McNeil was removed from his Chief Clerk position which is unjust, unwarranted and certainly not fair.

(b) Robert A. McNeil should be allowed the pro rata rate of position Chief Clerk E-46, rate \$2,899.29 per month, for eight hours on December 25, 1985 and every date subsequent to December 25, 1985 until this claim is allowed or he is placed back on Position E-46. Any overtime that he might be paid should be paid at the Chief clerk rate. When and if the new company CCSI is formed, his guarantee should be \$2,899.29 per month, not the Console AEO rate of Position A-60, rate \$2,767.14 per month.

(c) Robert A. McNeil should not be assessed the (10) days overhead suspension for a period of six months."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The operative facts of this case are reasonably clear. Claimant was assigned to a partially excepted Chief Clerk position in the Computer Center at Baltimore, Maryland. While enroute by taxicab to his assigned position, which was scheduled to begin at Midnight on November 1, 1985, Claimant apparently experienced chest pains and was transported to a nearby hospital for emergency room examination and treatment. Claimant allegedly asked the taxi driver to call a telephone number given to him by Claimant and inform the Carrier of Claimant's inability to report for work. There is no record of this call having been received by Carrier. There is, however, testimony to suggest that, at times, difficulty is experienced when attempting to contact Carrier's office.

Subsequently, Claimant was charged with failure to protect his assignment and failing to report for duty on November 1, 1985. The Hearing was postponed by mutual consent of the parties to December 12, 1985, at which time Claimant was present, was represented and testified on his own behalf. Following the completion of the Hearing, Claimant was disciplined by assessment of a 10-day overhead suspension and by removal from the partially excepted Chief Clerk position.

From our examination of the record in this case, we find that Claimant has been accorded all of the due process rights to which he is entitled under the provisions of the negotiated Rules Agreement. We further find that there is substantial evidence to support the conclusion that Claimant failed to properly protect his assignment on the date in question. Claimant's reliance on the taxi driver to mark him off sick was misplaced in the first instance and Claimant's failure to attempt to verify that the taxi driver had, in fact, marked him off was negligent on his part. We do not find that the 10-day overhead suspension was excessive for this negligence. We do not, however, believe that the additional discipline of permanent demotion from the partially excepted position was justified by the relative convincing force of testimony and evidence in this case.


Therefore, it is our conclusion that Claimant should not be compensated for any of the wage demands made in the Statement of Claim, but he should be reinstated to a partially excepted position consistent with his qualifications and the availability of such a position.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 24th day of July 1992.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION Serial No. 352

INTERPRETATION NO. 1 TO AWARD NO. 29318

DOCKET NO. CL-29711

NAME OF ORGANIZATION: Transportation Communications
 International Union

NAME OF CARRIER: CSX Transportation, Inc. (former
 Chesapeake and Ohio Railway Company)

On January 10, 1994, the Organization through its General Chairman, requested that the Board issue an Interpretation of the above cited Award which was adopted on July 24, 1992. The Award held, in pertinent part, as follows:

"Therefore, it is our conclusion that Claimant should not be compensated for any of the wage demands made in the Statement of Claim, but he should be reinstated to a partially excepted position consistent with his qualifications and the availability of such a position."

In its request for an Interpretation of Award 29318, the Organization argued as follows:

"The Organization contends that to fully comply with Award 29318 the Carrier must:

- (a) Reinstatement Claimant to the CCSI operation consistent with his fitness and ability, inasmuch as this is the venue in which the claim arose, and if necessary, retrain him due to the changes in technology over the last 8 years.
- (b) In the alternative, place Claimant on a partially excepted position on the Baltimore General Office Roster, District No. 3, consistent with his fitness and ability and if necessary, train him under the training provisions of Rule 10.

The Carrier refused to:

- (a) Reinstatement Claimant to the CCSI operation maintaining that since the effective date of the Award there have been no available partially excepted positions consistent with Claimant's qualifications.

- (b) Place Claimant on a partially excepted position on the Baltimore General Office Roster maintaining that since the effective date of the Award there have been no available partially excepted positions consistent with Claimant's qualifications."

The Carrier, in its reply to the requested Interpretation, contended as follows:

"It is the Carrier's position that the language used by the Board in the above referenced passage is simple and not subject to misinterpretation. It simply means that the Claimant should be elevated to the next partially excepted position that his seniority avails to him and that he is qualified to perform."

Both parties involved in this dispute are aware of the fact that the so-called "excepted" positions such as are in question here are exempt from coverage of certain Agreement Rules, -- including Rule 4 which is relied on in this instance by the Organization. Carrier has the unfettered right to select the individual it chooses to assign to "excepted" positions without regard to or consideration of seniority standing. The Carrier also has the right to determine qualifications, fitness and ability of its appointee to these "excepted" positions.

On the other hand, the Organization has considerable control over the number and location of "excepted" positions which may exist in a seniority district and over the creation of new or additional "excepted" positions.

In the Board's determination of this case when making its Award, consideration was given to the fact that the Claimant had apparently met Carrier's criteria when he was initially selected for appointment to an "excepted" position. His dereliction which caused the imposition of discipline was not, in the Board's judgment, of sufficient degree to support a permanent disqualification from the preferential "excepted" status.

The Board, however, does not possess the authority to order the creation of positions or to order the parties to agree on the designation of an "excepted" position. Neither did the Board intend by its Award 29318 that Claimant should or would immediately return to an "excepted" position UNLESS such a position was available for Claimant consistent with his qualifications.

Apparently, from the arguments of the parties in this requested Interpretation, there are not now and have been no available "excepted" positions for Claimant since the adoption of the Award.

The Organization's contention that Claimant would have transferred to the newly created Chessie Computer Systems Incorporated is pure speculation on which the Board cannot and will not comment.

It is noted, however, that the Organization has within its power the ability to cooperate with the Carrier in the settlement of this situation by agreement on an "excepted" position on which Claimant possibly could be reinstated to "excepted" status. This dicta, however, is offered only for whatever salutary effect it may achieve.

The Award as issued means that Claimant's reinstatement to an "excepted" position can occur only if there is an available "excepted" position for which Claimant is qualified. Nothing more! Nothing less!

Referee James E. Mason, who sat with the Division as a neutral member when Award 29318 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of the Third Division

Attest:



Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.