

Award No. 1313
Docket No. CL-1290

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

James H. Wolfe, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that Myrtle Welch Bishoff be restored to the Memphis, Tenn. District Accounting Bureau Seniority Roster with seniority rights unimpaired."

There is in evidence an agreement between the parties bearing effective date of June 23, 1922.

JOINT STATEMENT OF FACTS: "The seniority date of Mrs. Myrtle Welch Bishoff in the Memphis Tennessee District Accounting Bureau was shown on the 1939 and previous seniority rosters as of March 27, 1934.

"Prior to March 27, 1939 Mrs. Bishoff was laid off in reduction of force and had complied with provisions of Rule 18 by filing her name and address with proper officer. On March 27, 1939 a vacancy bulletin (No. 8) was posted in the Memphis District Accounting Bureau advertising position No. 75, title Accountant, rate \$5.50 per day to fill temporary vacancy.

"On the same date (March 27, 1939) District Accountant Mr. J. N. Concklin addressed a communication to Mrs. Bishoff enclosing copy of bulletin No. 8 and notified her to return to service within seven (7) days of that date or be considered out of service. His letter reads as follows:

'Copy is attached of Bulletin No. 8 covering vacancy in this office becoming effective this date, and in accordance with Rule 18 of the Schedule of Rules and Working Conditions of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, you are hereby notified to return to service within seven days from this date or you will be considered out of service.'

"The following day (March 28, 1939) the employee's local representative addressed a communication to Mr. Concklin, District Accountant, confirming 'phone conversation had with Mr. Collier in Mr. Concklin's absence, which reads as follows:

'Confirming 'phone conversation with Mr. Collier today I am protesting the letter written to Miss Myrtle Welsh (Mrs. Myrtle Welsh Bishoff), in which she was notified that unless she reported for work on position No. 75 in seven days, she would be dropped from Roster of the Memphis Accounting Bureau.'

"Under the conditions set forth in Rule 10 of the Clerk's Schedule which reads, "Employes declining promotion or declining to bid on

regular position to voluntarily give up the position and go on the extra board is not covered by the schedule agreement, and, so far as we know now, it has not heretofore been ruled upon. It is our conclusion that an employe filling a position within the scope of the clerks' schedule may be permitted to give up his regular position voluntarily and take such extra work as may be available to him which he is qualified to perform on his seniority territory or at designated points when mutually agreed upon in writing between the employing officer and the division chairman. In such cases the employe will be restricted to extra work on his seniority territory or at designated points until he has been awarded and assigned a position bulletined subsequent to the date he elected to give up his regular position.' (Emphasis by carrier.)

"No agreement was reached so providing in the instant case and Mrs. Bishoff was obligated under the provisions of rule 18 to return to service within seven days. This she did not do and arbitrarily removed herself from the service. It was then the obligation of the carrier to remove her name from the seniority roster, which has been done in compliance with existing rules.

"This case is an attempt on the part of the employes to place an interpretation on the rules of the agreement not intended by its makers or write a new rule which, in our opinion, the clerks would not want if proper consideration were to be given to the effect of such rule. If the employes were to be sustained in their position it would be possible for a furloughed employe to remain off just as long as he saw fit—all he would have to do upon being called would be to decline to accept the position and he would be carried on the furloughed list until occasion again arose to call furloughed employes. It would be necessary in each case for the carrier to call this individual or individuals and invite them to return to work. If they desired they would return; if not, they would so state. We all know this was not the intent of rule 10 and it is definitely not the intent of rule 18. Again we say we are sure, if the clerks will but weigh their request they will not want such a rule.

"It is the carrier's position, therefore, that none of the rules of the clerks' agreement have been violated; on the contrary, the provisions of rule 18 provide for just such handling as was given the case, and in all fairness to the employes junior to Mrs. Bishoff and to the carrier, we request that the claim be denied, without qualification."

OPINION OF BOARD: Mrs. Bishoff with seniority date of March 27th, 1934 was, prior to March 27th, 1939, off on account of reduction in force. On account of vacancy effective March 27th, 1939 in the Accounting Bureau, Bulletin No. 8 was posted March 27th advertising Position 75, Accountant at \$5.50 per day, as a temporary vacancy. Mrs. Bishoff was notified by letter dated March 27th to return under Rule 18 within seven days and take the temporary vacancy or be considered out of service. The local representative of the employes by telephone and letter protested the dropping of Mrs. Bishoff from the seniority roster unless she took the position within seven days on the ground (1) that by Rule 10 an employe by reason of failure to bid or accept a position does not lose seniority (2) that the work was too heavy for a woman according to Rule 52, and that Mrs. Bishoff could refuse on that ground.

Rule No. 10 of the agreement revised September 1st, 1927 reads:

"Employes declining promotion or declining to bid on bulletined position shall not lose their seniority rights."

Rule No. 18 as far as material here reads:

"When positions are abolished or forces are reduced seniority rights shall govern. When forces are again increased employes dis-

placed will be returned to the service in the order of their seniority rights. Employes desiring to avail themselves of this privilege must file their address with proper officers at time of reduction, advise promptly any change in address and renew same each ninety (90) days. Those failing to renew their address each ninety (90) days or return to the service within seven (7) days after being notified verbally or otherwise (if by mail or telegram, letter or telegram directed to the last address given will constitute notice) will be considered out of the service. The exercise of seniority rights under this rule will apply to any position; subject to the provisions of Rules 6 and 9."

The contention of the employes before the Board is substantially that taken throughout the negotiations and above outlined.

The carrier contends that Rule No. 10 applies only to those in the service and not to those on furlough; that when a vacancy occurs and a furloughed employe is called he must "return to the service" within seven days or be considered out of the service.

The employes urge the additional defense to carrier's position that Mrs. Bishoff by reporting to the office and giving reasons why she could not take the job (too strenuous for a woman) did return to the service. At least it is urged her refusal was not arbitrary. We think return to the service does not mean return to the office but return to the work offered. Only in that way does a furloughed employe return to the service. Nor do we think Mrs. Bishoff had it within her sole discretion to determine whether the job was unfit for performance by a woman. Certain work would clearly fall in or out of that which could ordinarily be performed by a woman. That which is in the twilight zone should be subject to conference and factual determination. In this case the carrier twice passed Mrs. Bishoff by otherwise filling two vacancies because it thought she should not be asked to perform the duties attendant to those positions. As to those Mrs. Bishoff is making claim. If she can in one case have the sole right to determine whether the position is unfit for a woman and refuse to take it, by implication she would have the sole right to say when a position was fit for a female, which would result in a one sided determination and require the carrier in each case to offer the position or fail to do so at its peril. In order to take advantage of such point Mrs. Bishoff should have assumed the position and then protested at work she believed to be unsuitable for a woman. However, there is evidence that other women filled this same position and that the asserted heavy work of carrying mail from the office could have been done in such number of trips as not to be overburdensome to a woman. Having disposed of those points we come to the major point in issue: How are Rules 10 and 18 to be reconciled. The answer lies in a strict reading of Rule 18. It applies to a situation where "forces are again increased" pursuant to a previous situation where forces were reduced. Thus, where employes are furloughed according to inverse seniority they must on a subsequent force increase be taken on according to seniority. In the instant case there seems to have been no increase in force, but only a substitution of incumbents. A position was vacant. There had been no increase. In such case the furloughed employe could pass the opportunity of temporarily or permanently filling the position without loss of seniority. She was in regard to filling a vacancy in an existing position subject to Rule 10. Rule 18 deals only with the ebb and flow of positions due to force reduction and to force increase. We have no disposition to enlarge the severity of the consequences of a failure to return to service within seven days after call beyond the situation to which it appears applicable. There appears to be foundation in reason for this interpretation. When furloughs occur by force reduction such employes are given first right to be taken back according to seniority when the forces are again increased. It is doubtful in such case whether the furloughed employe need bid when the abolished positions are reestablished. The carrier asserts there need be no bidding for such reestablished position; the employes assert that there must be. We need not so decide that question. All we need now do is to call

attention to the difference between a furloughed employee's relation to a vacancy in an established position not produced by increase in force and his relation toward a reestablished position formerly abolished when that abolition was the event which directly or indirectly resulted in his being furloughed.

It may be admitted that there is little reason why a furloughed employee should not have the duty to respond in case of a vacancy as well as in case of a reestablishment of positions due to an increase of force consequent on a former reduction, especially in the light of Award 105 which imposed on the carrier the duty to fill temporary vacancies from furloughed employees in order of seniority. The direct answer is that Rule 18 does not require the employees to return to service within seven days after being called or be considered out of service except under the conditions specified by Rule 18. Award 105 arrived at its result by the fitting together of several rules and by giving the words "promotion" and "increase" meanings which were somewhat exotic. The fact that the Rule in that case corresponding to Rule 18 in this case had the additional clause reading "Employees who, on account of reduction in force, have performed no service for the railway company for a period of one year, will be dropped from the seniority roster" may have prompted the widening of the meanings of "promotion" and "increase" as used in rules similar to 10 and 18 respectively under discussion. The ability to pass a furloughed employee by until a year elapsed and thus work his ouster from the seniority roster seems to have been a potent factor in the holding that employees even for temporary positions must be called back in order of seniority. If the net result of that award and this one is to require the carrier to call from the furloughed lists in order of seniority, both in a situation where there is no increase in force but only a vacancy, as well as a situation where there is an increase in force consequent on a prior reduction with only a corresponding duty of the furloughed employee to return to service in the latter case—the result cannot be avoided. The remedy is by negotiation. The result of our holding is that Mrs. Bishoff remains a furloughed employee without loss of seniority.

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 employee involved in this dispute are respectively carrier and employee 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 there was no obligation in the circumstances of this particular case for Mrs. Bishoff to return to service or be considered out of service because Rule No. 10 governs.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of January, 1941.