Award No. 2217
Docket No. CL-2255

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

THE ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the Erie Railroad that Mrs. Irmgarde Bliss Selby (Miss Irmgarde E. Bliss), was improperly dismissed from the service of the Carrier, September 23, 1942, account marrying while in the service, and

That she shall be reinstated to her former position of Comptometer Operator in the office of the Freight Claim Adjuster, Cleveland, Ohio, with seniority unimpaired and compensated for wage loss suffered retroactive to September 23, 1942.

EMPLOYES' STATEMENT OF FACTS: An agreement bearing effective date of September 1, 1936 as to Rules and Regulations for the Government of Clerks and other Station and Storehouse Employes is in effect between the parties to this dispute.

Mrs. Selby was employed in the regular manner on April 8th, 1942, and remained in continuous service until removed therefrom by the carrier on September 23, 1942 account having married, while in the service on June 26, 1942, an individual who was at that time serving in the armed forces of the United States.

Mrs. Selby advised the carrier in writing on September 16, 1942 that she was married and on September 23rd she was notified at 2:00 P. M. of a hearing and investigation to be held at 2:30 P. M. that day. Notice made reference to Question No. 20 on her application for employment, but did not make reference to any specific charge against her. Hearing was held in the presence of four officers and one secretary of the Carrier, and after such hearing she was dismissed from the service.

POSITION OF EMPLOYES: There is in effect between the parties an agreement bearing effective date of September 1, 1936 which contains the following rules:

Rule 1 (Scope) reads as follows:

"These rules shall govern the hours of service and working conditions of the following employes of the Erie Railroad System Lines, subject to the exceptions noted below:

Group 1. Clerks as defined in Rule 2, including baggage agents, foremen, assistant foremen, receiving clerks, delivery clerks, checkers, flag clerks, ballot collectors, icing inspectors, sectional storekeepers,

1. Miss Bliss was employed April 8, 1942; the employment regulations concerning female employes were explained to and fully understood by her.

2. The standard employment application, form 2187, (photostatic copy shown) was completed by Miss Bliss. It confirms fact that she knew of and understood the employment regulations concerning female employes.

3. Miss Bliss failed to notify the railroad when she married June 26, 1942, and continued to work and be reported on payroll as a single girl in violation of her understanding of the employment regulations. She was married within 90 day probationary period and failed to report to her supervisory officer. (See item 4, page 4, of form 2187.)

4. On September 16, 1942 she notified the Railroad of her marriage on June 26, 1942, and asked that consideration be given to permitting her to remain in the service, which was another indication that she fully understood that she had violated the employment regulations.

5. In statement September 23, 1942 she again acknowledged full understanding of the employment regulations and said that she realized she had waived right to continue in the service, and then she requested that services be discontinued as of that date (September 23, 1942).

6. The case of Miss Bliss was no different than many others in the same office and in other departments on the railroad and there were no extenuating circumstances warranting retention in face of fact that at the time single girls were available.

7. Rules and Regulations for Clerks, etc. effective September 1, 1936 did not abrogate or cancel the employment regulations.

8. Miss Bliss in signing and agreeing to the employment policies did so on a purely voluntary basis. She fully understood them and agreed to abide by them.

9. The National Railroad Adjustment Board recognizes such regulations. See Award 689, Second Division, and Third Division's ruling 11/6/40 in the Donovan case.

10. Such regulations respecting females who marry while in the service are not unusual.

OPINION OF BOARD: On April 7, 1942, the petitioner, then unmarried, applied to the Cleveland, Ohio, office of the Carrier for a clerical position, and was employed as a comptometer operator on the day following. She signed and filed a written application for work in her maiden name, Irmgarde E. Bliss. That application contained the following statement and agreement:

> "The policy of this Company regarding female employes who marry while in service has been explained to me. If I am permitted to enter service and at a later date I should marry, I will, upon request, tender my resignation."

to which the petitioner affixed the word "Yes."

The petitioner, on June 26, 1942, married one Selby, and her claim is filed in the name of Irmgarde Bliss Selby. She did not advise her employer of her marriage until September 16, 1942, and thereafter, on September 23, 1942, she was notified of a hearing and investigation on her case, the notice referring to the statement and answer quoted above, but making no specific charge against her. The hearing was held, and was fairly conducted. Petitioner was confronted with her statement, quoted above, and admitted signing the same; her letter to the carrier giving information of her marriage was referred to, whereupon, Mr. Pasman, who was conducting the hearing, after some explanation of the Company's policy said:

"In the circumstances, I am left with no alternative but to inform you that we will have to dispense with your services." He added, "I assume you would desire to fill out the present payroll period which would permit you to continue until September 30 and that would give you an opportunity to look for some other position in the meantime. Do you desire to do that?" To which the petitioner replied, "No." Then, Mr. Pasman said: "Then I take it you desire your services discontinued as of the present date, is that right?" To which the reply was, "That is right."

In these circumstances, the petitioner ceased to be an employe of the Carrier, and it is contended that she was not, in fact, dismissed, but voluntarily left her employment. We cannot agree with this contention. The hearing was held for the sole purpose of passing on petitioner's status as an employe. In view of her marriage, and that marriage being admitted, and petitioner's knowledge of the Company's policy being also admitted, she was told that her services would have to be dispensed with, but that, if she desired, she could continue to work another week, to the end of the current payroll period. This concession did nothing to affect the basic fact that she was then and there notified that after September 30, she could no longer work for the carrier. Therefore, the Carrier should not be heard to say that what was there done was anything less than to dismiss petitioner from its service, for what it considered good cause, under its policy, which at that time it took the pains to explain.

Another contention of the Carrier is that, had petitioner promptly notified the carrier of her marriage, her application for employment could have been rejected under Rule 50, which provides:

"Applications for employment, if not satisfactory, will be rejected within ninety (90) days after first service, otherwise applicant will be considered accepted, except that application need not be approved until after forty-five (45) days' work has been completed."

If this Rule, properly interpreted, means, as we think it does, that within the prescribed period mentioned therein, the carrier has the absolute right to reject any application, with or without reason other than "not satisfactory," the contention of the carrier is plausible, but loses sight of realities, as applied to this case. The Carrier admits, in effect, that, but for her marriage petitioner would have been retained. It says, "She was a good employe and there were no charges against her otherwise." The ninety days from her first service expired on July 7, 1942, and her application was not rejected. Believing her to be unmarried, the Carrier accepted petitioner as an employe, and her seniority and other rights, under the agreement, existed from that time on. So it is, that if the petitioner had promptly reported her marriage, she would have probably been dismissed, not under terms of Rule 50, but because of her marriage. We do not think petitioner's failure to promptly report her marriage should be permitted to influence our judgment on the important and far-reaching questions which we are called upon to decide.

The first of these questions concerns the right of the Carrier to adopt and follow the policy of not employing married women. That it has that right, we have no doubt. Nothing in the agreement limits, in any way, the right of the Carrier to select its employes. Rule 50, in effect, gives that right.

But once having accepted an employe, married or unmarried, a different proposition is presented. By that acceptance the employe becomes entitled to certain rights under the agreement, among which are seniority rights under Rule 3, and the right not to be dismissed without cause, and without a fair investigation and hearing, as provided by Rule 44.

Admittedly there is nothing in the agreement which justifies the dismissal of the petitioner by reason of her marriage. That this is true, is attested by the fact that the Carrier, on November 2, 1937, more than one year after the

effective date of the agreement, sought an agreement with the Brotherhood in respect to the company policy as to the employment or retention of married women, which agreement the Brotherhood declined to execute. This declination put the Carrier on notice that the Brotherhood did not choose to approve the Carrier's policy in that regard. Therefore, the right of the Carrier to dismiss the petitioner from its employ must rest on something other than the agreement.

The Carrier states the crucial question in its own submission of this case. It says:

> "The question to be decided in this case concerns the right to make an individual employment contract with an employe."

Due recognition of the principles of collective bargaining requires a negative answer to that question, as to all cases where the individual employment contract serves to deprive the employe of some right or benefit accruing to him under the collective agreement. This Board has followed this principle in many cases—Awards Nos. 522, 524, 732, 946 and 1214. The contention of the Carrier in this case is that it has the right to enforce an individual contract with an employe, which deprives that employe of rights which she could have asserted under the collective agreement, had the individual contract not been entered into. If this can be done in cases involving the marriage of a female employe, what prevents it from being done in other cases, and what becomes of the collective agreement?

The case must be decided on the cold legal question presented. If we enter the domain of morals, it may be said that petitioner should have kept her agreement to tender her resignation, but she was not asked to resign. On the other hand we know that had the petitioner substituted the word "No" for "Yes" in her statement made at the time of her employment, she would not have been employed. Assuming that she was anxious for the employment, the very situation with which she was confronted compelled her to make the statement now sought to be used against her. We are not disposed to criticize or condemn either the Carrier or the petitioner.

While, as stated above, the Carrier has the right to select its employes, and may accept or reject any application for employment, within the terms of Rule 50; yet, once an applicant is accepted, or is not rejected within the period prescribed by Rule 50, certain rights accrue to the employe of which he may not be divested through arbitrary action, or other methods not in themselves legal. This raises the question of whether, on grounds of public policy, the contract provision sought to be enforced against the petitioner is legal and enforcible. It only needs to be said that agreements in unreasonable restraint of marriage are universally held to be void or voidable, as against public policy. When, as in this case, a contract is sought to be enforced which, it is contended, gives the Carrier the right to dismiss an employe on the sole ground of her marriage, thus depriving her of employment and other valuable rights appertaining thereto, it is obvious that it tends to create an unreasonable restraint on marriage, and is, therefore, entitled to no force or effect.

For reasons stated above, petitioner's claim will be sustained, but her compensation for time lost will be limited to the difference, if any, between what she would have received had she not been dismissed, and amounts received by her from other employment.

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 employe involved in this dispute are respectively carrier and employe 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 petitioner be reinstated in her former position as comptometer operator in the office of the Freight Claim Adjuster, Cleveland, Ohio, with seniority unimpaired, and compensated for loss of wages, retroactive to September 23, 1942, limited to the difference, if any, between the wages she would have earned had she not been dismissed, and amounts received by her from other employment.

AWARD

Claim sustained as limited by findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of June, 1943.