

Award No. 5793
Docket No. CL-5825

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

John W. Yeager, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**
LOUISVILLE AND NASHVILLE RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Agreement governing hours of service and working conditions between the Louisville & Nashville Railroad Company and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective January 1, 1938, and subsequent revisions, was violated by the Carrier at Louisville, Ky. on January 2, 1951, in the treatment accorded R. B. Robertson by refusing to permit him to exercise seniority to a position in the Auditor of Disbursement's office; and,

(b) Employee Robertson shall be restored to the service with all rights and privileges unimpaired and compensated for wage loss sustained on January 2, 1951, and subsequent thereto until restored to service.

EMPLOYEES' STATEMENT OF FACTS: On July 1, 1948 Mr. Robertson was notified by Mr. J. C. Willcox, Auditor of Disbursements, that Robertson would be 70 years of age July 3, 1949, and for that reason he would be retired effective on the day following his 70th birthday, and that his salary would cease as of the day preceding date of retirement (Employees' Exhibit "A"). At the time of this occurrence Mr. Robertson occupied position of Chief Clerk in the Auditor of Disbursement's office, an excepted position; a position that was excepted from all rules of the agreement, except those pertaining to the retention and exercise of seniority.

Mr. Robertson replied to Mr. Willcox, his letter March 30, 1949 requesting that consideration be given to continue in his work. Mr. Robertson pointed out to Mr. Willcox that he was blessed with good health and that he was able to continue to perform his work in a satisfactory manner. (Employees' Exhibit "B").

Mr. Willcox then replied to Mr. Robertson by letter, April 7, 1949 advising him that he had consulted Mr. Kennedy, the Comptroller, and he was advised that in view of the fact that Robertson was serving in a supervisory capacity and capably performing his duties, and further that his health appeared good, he would be permitted to continue in service if he would voluntarily retire December 31, 1950. (Employees' Exhibit "C").

Carrier's right to establish uniform regulations governing the retirement of officials and other supervisory personnel and would prescribe a rule which would defeat the purpose of such regulations. Such was not the intention of the agreement rules referred to and they should not be so construed.

2. Robertson made a valid agreement to retire on a specified date, which agreement he could not unilaterally revoke.

Robertson was notified on July 1, 1948, that as he would reach the age of seventy on July 3, 1949, he would be retired from service effective on the day following his 70th birthday. On March 30, 1949, he requested that he be permitted to continue in his work "for the present." On April 7, 1949, he was advised that if he retained his health and ability to perform his duties and would agree to voluntarily retire at that time, the date of his retirement would be postponed until close of December 31, 1950. Those terms were accepted by Robertson on April 9, 1949. (Carrier's Exhibit "A".)

In other words, on April 9, 1949, Robertson, while occupying a supervisory position excepted from the agreement, agreed to retire on December 31, 1950, or approximately twenty-one months later. On December 12, 1950, or nineteen days prior to the agreed date of retirement, he attempted to withdraw that part of his letter of April 9, 1949, agreeing to retire at the close of 1950. It may be contended for Robertson that this agreement was not binding upon him under board decisions denying the validity of individual contracts which serve to deprive the employee of some right or benefit under the agreement. But, that principle has no application here because Robertson voluntarily relinquished his rights under the agreement, as any employee may do, either upon demand of his employer or upon his own initiative, without violating either the Railway Labor Act or the agreement. When Robertson agreed to retire on a specified date, he made a valid agreement which he could not unilaterally revoke before that date, anymore than he could have so revoked it after that date.

Incidentally, the claimant in this case, Mr. Robertson, sailed for The Netherlands on August 31, 1951, in company with his wife, who the Carrier understands will teach school in The Netherlands for a period of at least one year.

The claim should be denied in its entirety.

All factual data in support of the Carrier's position has been presented to the duly authorized representatives of the employees.

(Exhibits not reproduced.)

OPINION OF BOARD: There is no substantial dispute as to the facts but it appears advisable to set them forth briefly and chronologically in order that the discussion herein may be understood.

R. B. Robertson in whose behalf the claim is made by the Organization was first employed by the Carrier in April 1902. At that time there was no collective Agreement with the Organization. He never at any time occupied a position under the first of any succeeding Agreement, however, he was given seniority by the first Agreement which seniority has been protected through each succeeding Agreement. During all of the intervening time he held a supervisory and excepted position.

The Carrier has a policy of retiring officials and those holding supervisory positions at the age of 70. On July 1, 1948 Robertson was notified that he would be retired when he reached the age of 70, which would be July 3, 1949. On March 30, 1949, Robertson requested that the Carrier give consideration to allowing him to continue in his employment beyond the age of 70 years. On April 7, 1949 the Carrier advised him: " * * * that if you retain your good health and ability to perform your duties and agree to voluntarily retire at

that date, that the date of your retirement will become effective at the close of December 31, 1950." On April 9, 1949, in a letter in response to this offer of the Carrier, Robertson wrote: "The terms stipulated by Mr. Kennedy as contained in your letter of April 7, 1949 are acceptable to me, and I shall continue to discharge my duties as I have always tried to do."

On December 12, 1950 Robertson wrote a letter requesting a further extension of employment in his position. In the letter he declared that for failure to grant the further extension he had no recourse other than to exercise his seniority to a daily rated position. No further extension was granted and he was retired as of December 31, 1950. He duly gave the Carrier notice of his intention and desire to exercise his seniority under the Agreement. The right to do so was denied by the Carrier.

His claim is for restoration to service under the Agreement with privileges unimpaired and for compensation for time lost.

The Carrier contends that the Agreement to accept retirement and the established policy with reference to those holding official and supervisory positions are binding on Robertson and hence his claim has no validity.

There is little question that the parties had the right to contract with regard to the termination of Robertsons employment as a supervisory employe not covered by the Agreement as they saw fit, subject only to the exception that any such contract should not contravene law or public policy. That right, however, does not extend to such rights as Robertson had, and had the right to protect, and had not forfeited under the collective Agreement between the Carrier and the Organization.

Robertson could surrender his rights by failure or refusal to perform under his contract of employment or waive them if he did so in the manner provided in the Agreement. He could not, however, enter into an enforceable agreement the effect of which was to deny to him the rights which flowed from and were guaranteed to him and to the other employes under the Agreement.

The right which Robertson sought to exercise on being relieved in his supervisory position was one which was common to every other employe occupying a supervisory position who held seniority rights under the Agreement. He gave notice of his intention to exercise the right in conformity with the requirements of the Agreement. The Railway Labor Act contains no requirement for retirement of employes at the age of 70 and neither does the Agreement under which Robertson holds seniority.

The effect of the Agreement with the Carrier that he would retire on December 31, 1950 was to take away a right which he held along with all others similarly situated under the Agreement. In the light of the reasoning contained herein and the following supporting precedents the Agreement was invalid and unenforceable.

Awards 2217 and 2636 involve a situation where the Carrier had a prescribed custom that women on marriage would leave the service. The women in the respective situations subscribed to the custom. The subject was not covered by the collective Agreement. The Division in these Awards held that such agreements were private agreements contrary to the rights which the women had under the collective Agreement and in consequence not enforceable.

In Award 2941 the Division found that dismissal from an excepted position did not destroy any rights under the collective Agreement.

In *The Order of Railroad Telegraphers vs. Railway Express Agency, Incorporated*, 321 U. S. 342, in discussing whether or not individual agreements of a Carrier with an employe might be allowed to destroy the rights of an employe, under the collective Agreement, it was said:

"The Company contends that special voluntary individual contracts as to rates of pay, rules, and conditions of employment may validly be made notwithstanding the existence of a collective Agreement, and that the terms of the individual agreements supersede those of the collectively bargained one. If this were true, statutes requiring collective bargaining would have little substance, for what was made collectively could be promptly unmade individually.
* * *"

It follows that the Carrier erroneously failed to allow Robertson to exercise his seniority under the Agreement.

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

The claimant shall be restored to service with his seniority rights and privileges unimpaired and that he be compensated for wages lost which he would not have lost had he been allowed to exercise his seniority.

AWARD

Claim sustained per Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of May, 1952.