

Award No. 6868
Docket No. CLX-6851

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

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

RAILWAY EXPRESS AGENCY, INC.

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

(a) The Agreement governing hours of service and working conditions between Railway Express Agency, Inc., and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, effective September 1, 1949, was violated at the Boston, Massachusetts Agency, in the treatment accorded Arthur H. Roberts in dismissing him from service on March 21, 1953 without an investigation; and

(b) He shall now be restored to service with seniority (and vacation) rights unimpaired and compensated for wage loss sustained, retroactive to and including March 22, 1953.

EMPLOYEES' STATEMENT OF FACTS: Arthur H. Roberts, with a seniority date of March 14, 1914, while the occupant of an excepted position titled "Assistant Superintendent" was notified orally by General Manager P. T. Webber on March 21, 1953 that Carrier was removing him from its service. He was not given an investigation. His name is carried on the Boston District One Seniority Roster of January, 1953, with an "E" after his name denoting that he is an excepted employee. (Exhibit "A")

March 26, 1953, Roberts recognizing Carrier's right to remove him from an excepted position sought to exercise displacement rights on position titled "Chief Money Clerk," Group 61, Position 1, salary \$79.18 basic per week.

April 22, 1953, Local Chairman W. A. O'Brien registered protest and filed claim with Superintendent B. F. Weedon that (1) Carrier violated the Agreement in dismissing Roberts from service without an investigation; and (2) that he be restored to service and compensated for all wage loss sustained, retroactive to and including March 22, 1953. (Exhibit "B") May 7, 1953, the Superintendent denied the claim. (Exhibit "C").

May 8, 1953, General Chairman G. W. Hurley appealed the Superintendent's decision to General Manager P. T. Webber, the highest official designated by Carrier to whom appeals for redress of grievances may be made and

which your Organization would have the right to pursue in behalf of Mr. Roberts under the terms of the collective Agreement between the parties.

"The dismissal of Mr. Roberts was a matter solely between him and the representatives of Agency's management and, accordingly, I am unable to entertain any claim fostered in his behalf for violation of the Agreement. The action taken by Superintendent Weedon is, accordingly, affirmed by the undersigned."

On May 26, 1953, Mr. Hurley indicated his intention to progress the case to the Third Division. The case now comes to the Board under Statement of Claim set forth in Grand President Harrison's notice to the Board dated October 5, 1953.

POSITION OF CARRIER: The claim of Employees that Mr. Roberts be restored to service with seniority unimpaired amounts to a nullity since, as pointed out in Carrier's Statement of Facts, Mr. Roberts' seniority has not been disturbed for he was restored to an appointive position on July 1, 1953. His claim for vacation rights and wage loss sustained retroactive to and including March 22, 1953, has no standing before this Board.

Mr. Roberts at the time of his removal from his former official position was not an employe or subordinate official as those terms are used in Section 1., Fifth, of the Railway Labor Act, but an "official" of the Carrier in fact, vested with responsibilities, duties and authority not exercised by "subordinate officials." The removal of Mr. Roberts, for cause, from such "official" position was a matter solely between him and the Management, as was his appointment to the position of Agent at Glens Falls, New York.

In the circumstances, the removal of Mr. Roberts from his official position of Assistant Superintendent does not constitute a dispute growing out of the interpretation or application of Agreement for which relief would be available under the Railway Labor Act through application to the National Railroad Adjustment Board. The dispute, if any exists, has been resolved, and a denial of the claim advanced to the Board is in order.

All evidence and data set forth have been considered by the parties in correspondence and in conference.

(Exhibits not reproduced.)

OPINION OF BOARD: The following factual statement is based upon our version of what is disclosed by an incomplete, conflicting and unsatisfactory record.

Claimant Roberts entered the service of Carrier in 1914, acquiring a seniority date on March 14th of that year. Subsequently on some undisclosed date, but at a time when he was an employe subject to the rules of the then current Agreement, he was promoted to a position, at Boston, Mass., titled Assistant Superintendent, which, according to Carrier's own record, was thereafter recognized as an excepted position although it is now claimed to be an official position. For purposes of this opinion it may be stated it makes little difference whether such position be regarded as excepted or official.

On March 21, 1953, for some reason, which both parties have studiously refrained from disclosing Carrier without formal investigation or hearing, removed Claimant from his position of Assistant Superintendent for cause. There is some quibbling in the record as to the force and effect sought to be placed on that action. However, Carrier clarifies the subject in its answer to Employees' ex parte submission, purportedly prepared and signed by its Vice President, where the following statement appears:

"Since Roberts was an official, the remedies under the collective agreements and the Railway Labor Act were not available to him and he was properly dismissed for cause by order of his superior officer.

"That termination of his employment was proper and was effective as a termination of his seniority rights under the Agreement."

Based on the foregoing statement, and others of similar import made by its reviewing officers in denying the claim on the property, it cannot be denied and must hereafter be assumed, that so far as Carrier is concerned, the intended immediate result of its action of March 21, 1953, must be regarded as permanent dismissal of Claimant from service with severance of all prior contractual relationships and obligations, including any and all seniority and displacement rights theretofore existing under the current Agreement.

On March 26, 1953, Claimant advised Carrier, that pending the determination of his status as an excepted employe, in order to protect his seniority rights in accord with Rules 16 and 24 of the Agreement, and effective as of March 31st, he was displacing a junior employe, occupying the position of Chief Money Clerk. Nothing of record informs as to what happened immediately thereafter. However, it does appear that on April 22, 1953, Claimant's duly authorized representative filed a claim on the property, which included all essential elements of the claim now before this Board, and that such claim was denied by Carrier's reviewing officer, i.e., its Superintendent and its General Manager, for reasons similar to those appearing in its heretofore quoted Answer to the Employees Submission. Thereafter the case was progressed to this Board.

Subsequent to the date of the denials above noted, and on July 1, 1953, under conditions and circumstances which cannot be related, because not shown by the record, Carrier appointed Claimant to the excepted position of Agent at Glens Falls, N. Y. Thereafter he accepted such position and has since continued to fill it.

Having stated facts sufficient to permit an understanding of questions raised by the parties in support of their respective positions, Rules of the Agreement, effective September 1, 1949, on which decision of those questions must necessarily depend, should now be noted.

The pertinent portion of Rule 16 provides:

"An employe returning after leave of absence or when relieved from temporary assignment, excepted or official position, may return to former position or may—upon return—or within three (3) days thereafter, displace a junior employe who has bid in a position bulletined during such absence."

The involved provisions of Rule 26 read:

"Employees now filling or promoted to excepted or official positions shall retain all their rights and continue to accumulate seniority in the district from which promoted."

Rules 29 to 33, inclusive, relate to discipline and grievances and, so far as here important, state in substance that an employe who has been in service more than thirty days shall not be dismissed from service without an investigation and hearing.

The record contains a number of specious arguments, based in the main on erroneous concepts of the force and effect to be given the existing facts. These, although they need not be labored, require mention. With respect to

them it suffices to say the related facts and heretofore quoted rules of the Agreement impel the following conclusions:

1. That Rules 16 and 26 of the current collective bargaining Agreement are applicable to both excepted and official positions, hence the question whether Claimant had an excepted or official position on March 21, 1953, has no bearing on the issues involved.

2. That Carrier's contention that, since Roberts was an official, the remedies under the collective agreements and the Railway Labor Act were not available to him lacks merit and cannot be upheld.

3. That a contention advanced by Claimant to the effect Carrier could not remove him from the position of Assistant Superintendent without an investigation and hearing also lacks merit and cannot be sustained.

With the foregoing questions disposed of it may now be stated that upon careful analysis of the entire record it appears the real questions presented by such record to this Division of the Board for decision are (1) whether, as Carrier contends, the action in dismissing Claimant from his position of Assistant Superintendent resulted in complete severance of his connections with such Carrier and (2) if not, the nature and extent of rights retained by him thereafter under the current Agreement.

Touching the first question it must be remembered it is conceded that prior to taking over the Assistant Superintendent position, Claimant had attained seniority rights under prior agreements existing between the parties and that on the date he was relieved from that position the current Agreement contained Rules 16 and 26 as heretofore quoted. Under comparable conditions established Awards, to which we adhere, are to the effect that dismissal from an excepted position does not destroy any rights existing under the Agreement. See, Awards Nos. 2941, 5793 and 6250. Since the rules last above mentioned apply to both excepted and official positions analogous reasoning compels the conclusion such Awards are decisive of the question now under consideration and we so hold.

Having determined Claimant's connections with the Carrier were only partially severed by its action on March 21, 1953, we turn to the second of the questions last above mentioned. Upon doing so we have little difficulty in concluding, based on what is said and held in the Awards heretofore cited, that when Claimant was removed from the position of Assistant Superintendent he reverted to the status of an employe, retaining his seniority rights under Rule 26, also his right under Rule 16 to displace a junior employe who had bid in a position bulletined during his absence, and that neither of these rights could be destroyed nor denied him without the investigation and hearing provided for in Rules 29 to 33, inclusive, of the Agreement. It follows Carrier violated the Agreement in dismissing him from service without the investigation required by such Rules.

Due to the state of the record the monetary penalty to be imposed for Carrier's infraction of the Rules in the particular just mentioned presents great difficulty. Heretofore, it has been pointed out that on July 1, 1953, Claimant was appointed to and accepted the excepted position of Agent at Glens Falls, New York, and is now holding that position. We know of no Rule of the Agreement which precludes that action on the part of either of the parties to such arrangement. Under such circumstances it cannot be held that he is to be compensated for wage loss, if any, sustained subsequent to that date. However, the record does make it appear that due to Carrier's action he was kept out of service from March 26, 1953, the date on which he attempted to displace a junior employe, until June 30, 1953, inclusive. Under such circumstances, and without passing on, or regard to, arguments advanced as to the sufficiency of such demand, we think the proper penalty to be imposed is compensation for wage loss sustained from the date such demand was made up to the date on which he accepted the present position.

Since Claimant has accepted and is now filling another position in the service of the Carrier he is not entitled to an order restoring him to service. However, if, under existing conditions, he has been deprived of, or sustained a loss in, seniority rights as a result of the Carrier's action on March 21, 1953, those rights should be restored to him and it is so ordered.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

AWARD

Claim sustained to the extent warranted by the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of January, 1955.