Award No. 7822
Docket No. CL-7587

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC HOSPITAL DEPARTMENT

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Southern Pacific Hospital Department violated the Agreement:

(a) When on October 18, 1954, it removed Vegetable Man & Special Diet Aid George I. Lutoff from service on charge of alleged violation of the Hospital Department General Rules and Regulations Rule 1, with respect to insubordination; and,

(b) That Mr. George I. Lutoff be compensated for wage loss suffered up to December 7, 1954, on which date he was restored to service.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, bearing effective date of October 1, 1940, which Agreement (hereinafter referred to as the Agreement) was in effect on the dates involved in the instant claim. The Agreement was amended and/or revised by a Memorandum of Agreement dated July 8, 1949, and supplement thereto dated June 30, 1950, which became effective September 1, 1949, to conform with the National 40-Hour Work Week Agreement signed at Chicago, Illinois, March 14, 1949. Copy of Agreement of October 1, 1940, and subsequent amendments and/or revisions are on file with this Board, and by reference thereto are hereby made a part of this dispute. This Agreement is applicable to the employe herein involved.

Mr. George I. Lutoff (hereinafter referred to as the Claimant) is the regular assigned occupant of position of Vegetable Man and Special Diet Aid, assigned hours 9:30 A. M., to 2:30 P. M., under direction of the Chef, and 2:30 P. M., to 5:30 P. M., under supervision of Dietitian in charge. His rest days are Sunday and Monday.

On October 8, 1954, Mrs. D. N. Fowler, Chief Dietitian, wrote a letter to the Claimant (attached hereto as Employes' Exhibit "A"), which she handed to him on October 9. In the letter Mrs. Fowler made specific charges, based entirely on hearsay, that, in substance, the Claimant had failed to observe her

Managers, a majority of members of said Board being selected by labor unions. Substantially all of the employes of the Hospital Department are covered by collective bargaining agreements with recognized labor unions. The management of the Hospital Department is extremely cognizant of the rights and privileges of its employes, and the working conditions and wages are probably the highest in the industry; however, it cannot lose sight of the responsibility resting upon it to provide hospitalization and treatment to its contributors who, through payment of monthly dues, depend and rely on the services rendered. The Department, must, therefore, discharge this responsibility to its contributors as there would otherwise be no reason for the Department's existence. The Department cannot carry out the responsibility to provide adequate care and treatment unless the employes obey the rules and instructions of the management. It cannot enforce compliance with the rules and instructions if such serious infraction as that for which the Claimant was found responsible is condoned.

Following its usual spirit of fairness, the Business Manager called the Division Chairman of the organization into his office on October 29, 1954, at which time he advised the Division Chairman that he was ready and willing to reinstate Claimant Lutoff at any time that the Claimant was willing to acknowledge receipt of the instructions of October 8, 1954 and signify willingness to abide by the rules and instructions given him in the future. This offer was not acceptable to the Division Chairman, unless the management also compensated Claimant for time lost.

THIRD: **There was no violation of the Agreement, and there is no basis to support a claim against the Hospital Department for time lost.**

At no time has the Claimant or his representative cited any rule of the Agreement which was violated by the Hospital Department. The Department asserts that they cannot do so as the hearing was held strictly in accordance with said Agreement. Rules 46, 47, 48, and 49 of said Agreement were at all times scrupulously observed.

The transcript of testimony taken at the hearing on October 20, 1954 discloses that the Claimant was aided, abbetted and encouraged by the Division Chairman to commit an act of insubordination. To penalize the Department and, in turn, the contributors for such acts on the part of the Claimant and his representative would be most unwarranted. The Hospital Department submits that any claim for time lost was a result of the action of the organization in encouraging and abbetting the act of insubordination, in the first instance, and the further loss of time was due to the Division Chairman not accepting reinstatement of the Claimant to service on October 29, 1954 unless he was compensated for the wage loss.

IN CONCLUSION

All data herein submitted has been presented to the duly authorized representatives of the Claimant or is contained in the records available to the organization.

The Hospital Department reserves the right, if and when it is furnished with the submission which may have been or will be filed ex parte by the organization in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the organization in such submission, which cannot be forecast at this time and have not been answered in this, the Department's initial submission.

(Exhibits not reproduced)

OPINION OF BOARD: We are here concerned with the claim of George I. Lutoff, classified as a Vegetable Man and Special Diet Aide, Hospital Department, for reimbursement for all wage loss suffered between October 18, 1954, when claimant was removed from service and December 7, 1954, at

which time he (claimant) was restored to service. An investigation was held on October 20, 1954, at which time claimant was charged with insubordination under Rule 1 of the Hospital Department Rules and Regulations. Subsequent to the hearing and notification of a finding of guilt as charged claimant was reinstated as above mentioned.

The Organization takes the position that the demand of a subordinate official of the Hospital staff that claimant sign a document indicating acceptance of discipline imposed by her was arbitrary and capricious and without regard to either the discipline rule of the effective agreement or provisions of the Railway Labor Act. It was pointed out that the communication itself contained no time limit for signing and that at the time in question the matter was being handled by claimant's representative with Carrier officials to the end that all existing differences in opinion could be reconciled. It was asserted that the investigation itself failed to adduce evidence of violation of any existing rule. It was further asserted that the same Carrier Officer who suspended the claimant and preferred the charges, handed down the decision of dismissal, but without attending the investigation or participating therein which was clearly contrary to both the letter and intent of Rule 46.

The Respondent takes the position that neither the Southern Pacific Hospital Department nor claimant are employes or a Carrier within the meaning of the Railway Labor Act and/or the claimant was not performing work of a class or craft within the meaning of Section 3 (h) of such Act. In the alternative the Respondent argued even though it were found that this Board had jurisdiction, the instant claim should not be considered on its merits for the reason that claimant's appeal was not presented in writing with the Hospital's Board of Managers within the time limitations of the effective agreement or the by-laws of the Department. As to the Organization's contention that its action in disciplining claimant was improper the Respondent asserted that claimant had a poor record of work performance, was guilty of violating Rule 1 of the Rules and Regulations of the Hospital Department, he being insubordinate, and lastly claimant had been given a complete, fair and impartial hearing.

In discharging its duty and responsibility in considering disputes submitted to it this Board is limited to exercising only those powers that have been bestowed upon it by the Railway Labor Act. In creating the National Railroad Adjustment Board, Congress in its wisdom divided the Board into four Divisions and gave each such Division jurisdiction over certain crafts. The Respondent argues that neither it, as a Hospital Department, nor the Claimant as an employe thereof are "employes or Carriers" within the meaning of the Act.

We are of the opinion that this issue was considered and ruled upon by the Fourth Division of this Board in Awards 461, 465, 466, 521 and 579, wherein it was found that parties similar to those with which we are here concerned were respectively Carrier and Employes within the meaning of the Railway Labor Act and that jurisdiction over the issue therein dispute was vested in said Division.

In considering the question of jurisdiction of this Division as raised by the Respondent we must look to Section 3 (h) of the Railway Labor Act which defines and limits our authority. This section provides:

> "Third Division: To have jurisdiction over disputes involving station, tower, and telegraph employes, train dispatchers, maintenance-of-way men, clerical employes, freight handlers, express, station, and store employes, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employes. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employes."

It is noted that disputes covering hospital employes are not specifically mentioned as coming within the confines of the jurisdiction bestowed on this Division. We found in Award 1697, that:

"* * * This omission does not in and of itself indicate that such disputes are not within the jurisdiction of this Division if a liberal interpretation of the language used can bring the employes involved within any of the particular classes enumerated. * * *"

Here we are confronted with a Scope Rule that does not describe the work encompassed thereby or list in detail all of the job classifications coming thereunder. We have in innumerable Awards held that similar Scope Rules reserve to those employes covered by the Agreement all work usually and traditionally performed by them.

Claimant here was classified as a Vegetable Man and Special Diet Aide working under the supervision of a Chef between the hours of 9:30 A. M. and 2:30 P. M., and under the supervision of the Dietitian in charge between 2:30 P. M., and 5:30 P. M. The record indicates that during the afternoon hours claimant performed the following duties:

POSITION NO. 4 (K-32)

Hours: 2:30 P. M. to 5:30 P. M.

2:30 P. M.	Set up cold special orders for 2H and wards.
3:30 P. M.	Serve hot vegetable to all hot carts. (Add light diets to potato and vegetable orders)
3:40 P. M.	Serve hot specials.
4:00 P. M.	Wash small table, serving cart, help clean stove, sweep floor and rubber mats.
4:10 P. M.	Have supper.
4:30 P. M.	Clean steam table, food mixer table, shelves for soiled dishes.
4:45 P. M.	Bring 2H hot cart to potwasher, empty, clean, and return to 2H station.
5:00 P. M.	Bring 3H cold cart to dishwashing room, empty, & wash cart. Clean garbage can. Fill cart with dishes (cups & sauce dishes to remain on cold cart). Bring tray of glasses to DK. Add 3H breakfast fruit to cart. Take cart to 3H.
5:20 P. M.	Bring in serving pans & put on stove. Clean sink, and Harkness food dummy.
5:30 P. M.	Off duty.

It is evident that neither the job title of claimant nor the duties performed by him can be said to be either (1) "clerical employes, freight handlers, express station and store employes" within the above quoted portion of Section 3 (h) of the Railway Labor Act or (2) work usually and traditionally performed by this craft and/or encompassed by the Scope Rule of the confronting agreement.

Neither will a most liberal construction of the term or classification of "dining car employes" as enumerated in Section 3 (h) of the Act cover the status of an individual classified as a Vegetable Man and Special Diet Aide assigned to perform the duties listed above. They refer to distinctly different types of work.

What we stated in Award 1697 is likewise true here:

"* * * But the parties cannot by agreement confer on this Division of the Board jurisdiction over a dispute not covered by the

applicable provisions of the statute. Concededly, it might be highly desirable that all problems arising under a particular agreement should be determined by one division of this Board. We are concerned, however, not with the desirability of a particular course of procedure but with the power of this Division to act."

For the reasons stated this Division does not have jurisdiction to consider this dispute.

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

That the parties to this dispute waived oral hearing thereon;

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 does not have jurisdiction over this dispute.

AWARD

This claim is dismissed on the ground that this Division lacks jurisdiction over it.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of April, 1957.