

Award No. 9325

Docket No. CL-11133

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD COMPANY

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

(a) The Carrier violated the Rules of the Clerks' Agreement when it refused to permit Mrs. M. S. Vann (hereinafter referred to as Claimant) stenographer at Hamlet, N. C., to exercise her seniority on position of Steno-Clerk in the office of its Assistant Freight Traffic Manager at Charlotte, N. C., as of May 1, 1958, and,

(b) Claimant be paid the rate of said Steno-Clerk's position for Thursday, May 1, 1958, and for each work day thereafter until allowed to go to work on this position, with all rights unimpaired.

EMPLOYEES' STATEMENT OF FACTS: Claimant's name was shown on the seniority roster of District 3 — Freight Traffic — as Steno-Hamlet (Agricultural Agent) with a seniority date of March 29, 1943.

On February 26, 1958, Claimant wrote Mr. L. A. Jones, the Perishable Diversion Agent at Hamlet and told him that as her position of stenographer in the Agricultural Agent's office was being abolished, effective March 1, 1958, she wished to exercise seniority on the position of stenographer in his office, occupied by an employe junior to her, effective March 1, 1958.

Mr. Jones acknowledged Claimant's letter and advised her that the position of stenographer in his office was being abolished effective with the close of business, Monday, March 3, 1958. He accepted her exercise of seniority, however, and informed Claimant that unless she advised otherwise, he would expect her to report for the one day's duty at 9:30 A. M., on Monday, March 3. Claimant accordingly, reported and worked Monday, March 3, 1958.

The letter shown below is from a doctor (surgeon) on Carrier's list of Company doctors and fully explains Claimant's absence from duty subsequent to March 3, 1958.

Rule 17(c) by merely asserting at any time after the expiration of the 10 day period that he was "sick" a day or two during such 10 days and that he desired to be covered by Rule 32(d). It was therefore suggested that rather than agree to such an erroneous application of a clear and concise rule it would be far better to simply cancel that provision of Rule 17(c).

In summary, it is simply the position of the Carrier that due to the failure of the claimant herein to comply with the unambiguous provisions of the controlling agreement she forfeited all her seniority rights and the Carrier, in compliance with such agreement, correctly refused to permit her to displace Clerk Hinnant.

Carrier affirmatively asserts that all data used herein has been discussed with the General Chairman of the Petitioning Organization.

OPINION OF BOARD: The factual circumstances involved in this are not disputed. Claimant occupied the position of Stenographer in the Carrier's Agricultural Agent's office at Hamlet, North Carolina. On February 26, 1958, after receiving notice that her position was to be abolished effective March 1, 1958, Claimant advised the Perishable Diversion Agent at the same location, of her desire to exercise her seniority on the position of Stenographer in his office. This Agent informed her that the latter position was to be abolished at the close of business on March 3, 1958. Nevertheless, Claimant worked the position on March 3, 1958.

On the evening of March 3, 1958, after her tour of duty, Claimant was admitted to Hamlet Hospital. She was released from the hospital on March 11, 1958. On March 13, 1958, she advised the Perishable Diversion Agent of her desire to exercise seniority to displace Clerk Rawlings in his office and requested permission to be off duty in order to learn the duties of that position. By letter dated March 15, 1958 to the Agent, she withdrew her assertion of seniority on Clerk Rawlings position for the reason that the work was foreign to the type of work to which she was accustomed. On the same date, Claimant wrote to the Carrier's Assistant Freight Traffic Manager at Charlotte, North Carolina, that she desired to exercise her seniority over junior employe Hinnant in his office, that she was then under the care of her physician and that she wished to be marked off sick until released by her physician, at which time she would protect the position. By letter dated March 17, 1958, the Assistant Freight Traffic Manager declined Claimant's request on the ground that she had failed to exercise her seniority "within the ten day period, expiring on March 13th".

The record contains a statement of Claimant's physician which reads as follows:

"This is to advise that M. S. Vann was admitted to Hamlet Hospital, and under my care, March 3, 1958, and released March 11, 1958. She returned for further treatment March 13th for infection of ears and surgery (removal) of parotid cyst on March 28th and released the following day. She came to the hospital twice each week during the above mentioned times and through April 28.

"During the periods of time mentioned herein, it would have been impossible for her to work due to treatments being administered."

The record also shows that the claim was progressed and appealed on the property, and that it is now properly before the Board.

The Employes contend that the Carrier violated Rule 32(d) of the applicable Agreement by refusing to permit Claimant to exercise her seniority rights on the position in the office of the Assistant Freight Traffic Manager after she was released by her physician.

The carrier contends that in accordance with Rule 17(c) Claimant forfeited all her seniority for the reason that she exercised her seniority on Clerk Rawlings' position in the Perishable Diversion Agent's office and, without written permission to be absent, failed to report on the position within the ten day period required by the Rule. The Carrier also contends that Rule 32(d) does not protect Claimant because she exercised her seniority on Clerk Rawlings' position.

Rule 17(c) reads as follows:

"Employes whose positions are abolished may exercise their seniority rights over junior employes in the same seniority district; other employes affected may exercise their seniority rights in the same manner. Employes whose positions are abolished or who are displaced and whose seniority rights entitle them to regular positions must assert such rights within ten (10) days and must report for the position within that time, unless written permission to be absent is granted, or forfeit all seniority. It is understood that an employe will not be considered displaced until the senior employe actually reports for his position."

Rule 32(d) states that:

"When an employe, by reason of absence on account of sickness, is unable to exercise seniority (sic) (seniority) rights within the time limits specified in Rules 17 and 18, he must exercise seniority rights upon return to service or within three (3) days thereafter." (parentheses supplied)

While Rules 17(c) and 32(d) use the term "exercise" of seniority rights, neither of them define it in the context in which it appears therein. Consideration of the language of Rule 17(c) suggests such meaning.

The first sentence of Rule 17(c) states that "Employes whose positions are abolished may exercise their seniority rights . . ." and that "other employes affected may exercise their seniority rights in the same manner". The second sentence distinguishes between the assertion of seniority rights and reporting for the position, separately states a ten day limit for the performance of each such act with provision for extension of the reporting time on written permission to be absent, and provides for forfeiture of all seniority rights on non-compliance. The last sentence indicates, with respect to the senior employe who is entitled to, and does, assert seniority under the Rule, that such employe cannot affect the seniority roster unless he actually reports for the position which he claims. The assertion of the seniority right remains a barren statement of intention to use that right until it is executed by reporting for the position because the junior employe in the position is not "considered displaced until the senior employe actually reports for his position". From these provisions of Rule 17(c), it appears that the exercise of seniority rights thereunder must be regarded as two

pronged: (1) the assertion of such right to a position, and (2) the execution or consummation of such assertion by reporting for the position.

The time limits for such exercise of seniority rights in accordance with Rule 17(c) are extended by Rule 32(d) for the employe who is absent "on account of sickness" until his "return to service or within three (3) days thereafter".

The uncontroverted statement of Claimant's physician establishes that from the time she was admitted to Hamlet Hospital on March 3, 1958 to April 28, 1958, sickness rendered Claimant unable to exercise her seniority rights insofar as it required her, pursuant to an assertion of such rights, to report for the new position in accordance with Rule 17(c). As a result, such exercise of her seniority rights was protected by Rule 32(d).

This result is not affected by the fact that on March 13, 1958, Claimant asserted her seniority on Clerk Rawlings' position and requested permission to be off in order to learn the duties of the position. The undisputed fact is that, according to her physician, she was unable to report for work on any position on account of her sickness for a period of forty-six days after the aforementioned date and, for that reason, fell within the protection of Rule 32(d). It may also be noted that under Rule 31(a) a sick employe need not obtain permission to remain away from service.

Claimant's aforementioned assertion of seniority and request for permission to be off cannot alter the meaning of the exercise of seniority established by Rule 17(c) or affect the postponement thereof granted by Rule 32(d) on account of sickness. It cannot reasonably be said that her aforementioned assertion and request evidenced her waiver of the protection of Rule 32(d). Claimant did not indicate any such intention. Nor does the record show that the carrier took any action in reliance on such assertion and request or was prejudiced thereby.

For the same reasons, the claim is not adversely affected by Claimant's letter dated March 15, 1958 to the Assistant Freight Traffic Manager.

With respect to the claim for compensation, Rule 26(g) is not apposite. This is not a disciplinary case involving suspension or dismissal. However, since the claim for compensation is to be made whole for the agreement violation, Claimant's compensation on that account should be subject to the deduction of her interim earnings.

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 the Agreement was violated.

AWARD

Claim (a) is sustained.

Claim (b) is sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty,
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March, 1960.