Award No. 10838
Docket No. CL-13023

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

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

NEW YORK CENTRAL RAILROAD
(Eastern District, Boston and Albany Division)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5036) that:

1. Carrier violated the rules of the current Clerks' Agreement, effective January 1, 1957, as amended, when on November 25, 1960, at approximately 6:00 P. M., it notified Mr. L. R. O'Grady, Freight Handler at Cambridge St. Sears Freighthouse, by letter that at the close of business Friday, November 25, 1960, he was being dropped from service due to application not approved, without giving Mr. O'Grady a hearing as provided by the rules of the Agreement,

2. L. R. O'Grady shall have his name restored to the seniority roster as of the date he first performed service in Seniority District No. 29, Group 3, and his record cleared of the notation of dismissal,

3. L. R. O'Grady shall be compensated a day's pay for the period November 27, 1960 through December 5, 1960 for each day he was denied work, and

4. L. R. O'Grady shall be compensated a day's pay after Dec. 5, 1960 for each day that a junior employe works and claim to continue until such time as the rules of the Agreement are complied with.

OPINION OF BOARD: Claimant O'Grady entered Carrier's service on September 1, 1950 as a clerk in the General Foreman's office of Motor Power Department, Seniority District No. 7 at Beacon Park Yard in Boston, Massachusetts. On November 4, 1960 he was furloughed from that Department due to reductions in force. Thereafter he applied for a position as Freight Handler, Stower and Stevedore in the Operating Department, Seniority District 29 and on November 7, 1960 was assigned to that position. On November 25, 1960 Claimant was handed a letter by Agent Clifford which read:

"at the close of business Friday, November 25, 1960 you are dropped from service. Application not approved."

The present claim was initiated by the Organization and was denied at all stages by the Carrier.

The Organization takes the position that Claimant was dismissed from Carrier's service without a hearing in violation of Rule 43(a) of the Agreement. The Carrier contends that Claimant was not disciplined or dismissed from Carrier's service but was merely dropped from the particular job as freight handler, because of lack of ability to perform the work, and that Rule 43(a) does not apply.

Rule 43 is entitled "DISCIPLINE" and part (a) reads:

"No employe shall be disciplined or dismissed without a hearing, but may be held out of service pending such hearing, which shall be prompt. At reasonable time prior to the hearing, he shall be apprised of the charge against him and given opportunity to secure the presence of necessary witnesses." a note to the rule says: "It is understood that this rule does not apply to new employes who have not been in the service more than 60 calendar days."

The Organization and Carrier disagree on whether Claimant was hired as a new employe in District 29. The Carrier says he was a new employe since he had not worked there before, had a new seniority date there and had to prove his fitness for the job in order to keep it. The Organization argues that Claimant transferred under Rule 38 from District 7 to District 29, and was entitled to preference over new employes and non-employes. Of course, Claimant was not a new employe of Carrier — he had ten years of service. But he did have to apply for this new job and it is agreed that he would have a new seniority date there as of the time he began work provided he was adjudged qualified for the job. A determination of whether he was a new employe in District 29 will become necessary only if Rule 43(a) is applicable to this case.

The crux of the present claim is whether Claimant was dismissed from Carrier's service. The letter given to him by the Agent did not use the word "dismissed". It said "dropped from Service. Application not approved". These last three words can only refer to the application which Claimant made for the freight handler's job, and he must have understood this. He knew he had to qualify for the job and was subject to a probationary period. Of course, more precise language might have been used such as "you are removed from the position as a freight handler because you are not qualified". But the Board believes the language used could reasonably be interpreted to mean only this. In view of his long service with the Carrier Claimant must have understood that the words "Application not approved" meant that Carrier was not satisfied with his work as freight handler and was dropping him from that job.

While the Organization asserts that Agent Wilson, in his letter of December 19th, changed the Company's position from that of dismissal to one of dropping Claimant from the freight handler's job the Board feels that this was merely a clarification of the original notice. The record shows that throughout the processing of the claim Carrier asserted that Claimant was dropped as a freight handler because not qualified. This

is also borne out by the fact that Claimant still holds and continues to accumulate seniority in his old District No. 7, and furthermore continues to perform relief services there. This is hardly consistent with the Organization's theory of dismissal from service.

The Board concludes, therefore, that Claimant was not dismissed from Carrier's service on November 25, 1960 but was merely released from the position of freight handler in District 29 where he had worked for two and a half weeks. By the title and content of Rule 43(a) it is limited to matters of discipline, e.g. it says that the employe shall be apprised of the charges against him. Claimant was not charged with any misconduct and there is nothing to indicate that Carrier sought in any way to punish him for an alleged wrongful act. In short, Carrier's action in disqualifying Claimant cannot under any reasonable interpretation be considered disciplinary. Numerous Awards by this Board support this view. It follows that there has been no violation of Rule 43(a).

What Claimant really asserts (as indicated by the Local Committee's letter of January 2, 1961) is that the Carrier was required to first hold a hearing on his qualifications as a freight handler before dropping him from the job. Rule 43(a) does not give him this right. In fact the Agreement contains no rule concerning the procedure for disqualifying an employe in a situation like the present case. The Awards hold that the employer is the judge of fitness and ability and that the employe has the burden of proving his fitness and ability after the Carrier's determination to the contrary. We in no way imply that an employe who is wrongfully withheld from service is without remedy. He is entitled to fair and just treatment. If he feels that he has been unjustly treated a remedy is available under Rule 44 of the Agreement which insures him a hearing if he makes a written request to his superior within seven days. Unfortunately for Claimant he made no such request in this case, choosing instead to stand on Rule 43(a).

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

That the parties waived oral hearing;

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

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of October 1962.

LABOR MEMBER'S DISSENT TO AWARD 10838, DOCKET CL-13023

The absurdity of this Award stems from the Referee's erroneous acceptance of Carrier's distorted explanation of the pertinent facts. The ridiculousness of the situation would be humorous, if the fact did not remain that Claimant's valuable property rights of seniority had been taken from him without due process. In Award 4747, Referee Carter stated the controlling principle, when he ruled:

> "It will be observed that the provisions of Sections (a) and (b) of Rule 14 were completely ignored by the Carrier. This Board has said many times that the seniority rights of employes to positions under collective agreements are valuable property rights. The Agreement provides the method by which they may be terminated or restricted as a matter of discipline. The method pursued by the Carrier in this case is wholly ineffective to sustain the assessment of discipline. Claimant was not advised before or at the hearing that he was on trial. The most casual examination of the controlling Agreement would have disclosed the procedure to be followed. We feel obliged to point out again, as we have before, that agreements are made to be kept and when, as here, the rights of an employe are prejudiced by their violation, it is the function of this Board to award the relief required. * * *."

The record conclusively shows that Carrier erroneously considered Claimant a new employe, who had not been in service more than sixty days, and for that reason could drop him from service by disapproving his application of employment, without the necessity of giving him a hearing under Rule 43. This is self-evident from the notice of dismissal given to Claimant on November 25, 1960, reading:

> "At the close of business Friday, November 25, 1960, **you are dropped from service. Application not approved.**" (Emphasis ours.)

It is crystal clear from this notice of termination of Claimant's employment that Carrier was relying on the exceptions contained in Rules 53 — Validating Records and Rule 43 — Discipline.

Rule 53 (a) provides:

> "(a) Application for employment will be approved or disapproved within sixty (60) calendar days after applicant begins work. If application is not disapproved within the sixty (60) calendar day period, the application will be considered as having been approved. * * *.
>
> (b) In the event of the applicant giving materially false information, this rule as to time limit shall not apply. However, any action taken under this paragraph must be in accordance with the provisions of Rule 43."

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Rule 43 provides, among other things, that:

> "No employe shall be disciplined or dismissed without a hearing, * * *, which shall be prompt. * * *."

Rule 43 contains the following exception:

"NOTE: It is understood that this rule does not apply to new employes who have not been in the service more than sixty calendar days."

Therefore, it is clear that before an employe could be "dropped from service" without a formal hearing, he would have to be a "new employe who had not been in the service more than 60 calendar days." This is the only exception to Rule 43.

The Referee admits that Claimant was not a new employe with less than 60 days of service. Consequently, Rule 43(a) would be applicable, as it specifically provides for a hearing before an employe could be disciplined or dismissed, i.e., "dropped from service. Application not approved." Nowhere else in the Agreement is Carrier privileged to drop an employe from service because his application is not approved, except as provided in Rules 43 and 53.

Anyone with any working knowledge of collective bargaining Agreements on the railroads know that the phrase "application not approved" refers to application for employment and not an application for a transfer to another district, or an application for a position. In fact, Claimant's request, or application, for a transfer from Seniority District 7 to District 29 was an accomplished fact and it would logically follow that such application could not be disapproved after it had been accepted by the Carrier and acted upon by the Claimant.

Therefore, it is crystal clear that it is the Referee who should "have understood this", as these three words, i.e. "application not approved" could only refer to the application for employment, such terms being clearly defined in Rule 53.

It is apparent that not only was the Referee unable to understand the simple language used, in terminating Claimant's employment, in its natural, ordinary and common usage meaning, it was also necessary that he distort and use different language in order to evade the force and effect of what actually happened when Claimant "was dropped from the service. Application not approved." He added absurdity upon absurdity by claiming that Claimant was "dropped" from a freight handler's job. The fact still remains, however, that Claimant was dropped from service on November 25, 1960, and although he was later restored to seniority District 7, he is still dropped from service in Seniority District 29. Whoever heard of an employe being disqualified from one job, which had the effect of removing him from the seniority roster with a forfeiture of seniority? Well, we have that absurd situation here.

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It is interesting to note the Carrier's inconsistent change of position subsequent to the dismissal of Claimant on November 25, 1960, after claim had been filed and Carrier realized that it had proceeded against an employe who had been in its services over 10 years. The sequence of events are as follows:

On December 9, 1960, the Agent on appeal stated:

"* * *. Such disapproval, of course, applies only to his attempt to establish himself as a stower or stevedore, and **could not be interpreted to mean he was dropped from all service**, and I agree that an attempt to terminate his services with the railroad would have to be in accordance with Rule 43. * * *." (Emphasis ours.)

On January 12, 1961, the Assistant Transportation Superintendent took the following position:

"As this was not a case of bidding in from one department to another, I am of the opinion that Mr. Wilson was within his rights to furlough this employe because of his inability to perform the services required at this point, * * *." (Emphasis ours.)

Of course, when an employe is furloughed he does not lose his seniority, as was the case here.

On July 27, 1961, the Assistant General Manager attempted to change the fact that Claimant had been "dropped from service" on November 25, 1960, by making the untenable contention that Claimant had 60 days qualifying period to determine whether or not he was able to perform freight handler's work and "failing to qualify * * *, he was dropped as a freight handler."

Neither the Referee, nor the Carrier has pointed out any rule in the confronting agreement that gives employes 60 days in which to qualify. Rule 12 allows 30 days in which to qualify, however, the Referee claims that this Rule has no application here. It is obvious that the Assistant General Manager was referring to the 60 days contained in Rule 53, which specifically refers to applications of employment.

It is crystal clear from Carrier's inconsistencies and distortions of facts that Claimant was dismissed because his application for employment was not approved. In a similar situation where Carrier attempted to change a dismissal to a suspension, this Division in Award 5527, Referee Whiting, ruled:

"The Carrier later attempted to change the status of the claimant by notice that the separation from the service on April 8th was 'considered as a suspension.' **That did not cure the violation.** It could only be cured by paying the loss of wages caused by the violation and then giving notice of suspension as is shown to have been done by the parties in Carrier's statement of facts in Award No. 3778. Hence the claim must be sustained." (Emphasis ours.)

The Referee fails to cite any rules or Awards in support of his untenable conclusions. He states that Claimant "knew he had to qualify for the job and was subject to a probationary period". Here he speculates as to the knowledge of Claimant and also attempts to add a new factor "a probationary period". It is also interesting to note the Referee's attempt to justify the Carrier's change of position by stating that "throughout the processing of the claim Carrier asserted that Claimant was dropped as a freight handler because not qualified". I was of the impression that we were here concerned with Carrier's action on November 25, 1960, out of which the claim was filed alleging a violation of the Agreement. It is rather ridiculous to decide a dispute on actions committed subsequent to the violation, after the party has been put on notice of the violation.

While the author of this Award attempts to justify his erroneous decision on the fact that Claimant was susbequently restored to Seniority District No. 7, as he "still holds and continues to accumulate seniority" thereon, he fails to explain by what Act of legerdermain was Claimant's seniority on District 29 taken from him. He entirely ignores Rules 38, which specifically provides the manner in which such transfers are made. While Carrier admits that Claimant was given preference in transferring to District 29, it claims such transfer was not consumated under Rule 38. This is untenable from the clear and unambiguous language of the Rule, reading in part, here pertinent.

> "(d) Employes voluntarily transferring, without their positions, from their home seniority district to another seniority district, **will acquire seniority in the district to which transferred, as of the date of transfer, and will retain and continue to accumulate seniority in their home district from which transferred.**"
>
> (f) Employes transferring under the provisions of this rule will, if they possess sufficient fitness and ability, be given preference on a seniority basis over non-employes and/or employes not covered by these rules." (Emphasis ours.)

It will be observed that Rule 38 (d) gave Claimant seniority in District 29 on the date of his transfer, i.e., November 7, 1960, over two weeks prior to being discharged on November 25, 1960. It will be noted that the question of "fitness and ability" is determined prior to transfer under Rule 38 (f). In other words, it is a condition precedent to the right of an employe to transfer. Here Claimant's transfer had become an accomplished fact as he had been assigned to a position in District 29. Therefore, the Referee's statement that the burden was upon Claimant to prove his fitness and ability has no application where an employe is assigned to a position and Carrier subsequently moves to disqualify him, as here. Under such circumstances, the Board has held repeatedly that Carrier, being the moving party, has the burden of proving that the employe is not qualified. See Award 6892.

The Referee also attempts to shift Carrier's burden of holding a hearing before discharging an employe onto the Claimant in that he contends that Claimant should have requested an unjust treatment investigation under Rule 44. This contention is not only silly, but rather absurd in view of the fact that Claimant was "dropped from service, application not approved" on November 25, 1960, and he was not informed until December 9, 1960, that Carrier did not mean what it said, he was merely being dropped as a stower or stevedore.

It is clear that the employe's rights under Rule 44, which requires that the request for unjust treatment hearing must be made in writing within seven (7) calendar days of the cause of complaint, were jeopardized, as seven days had elapsed before Carrier's "clarification of the original notice". The words in quotes are the Referee's, not mine. However, the burden was the Carrier's to hold a hearing before dismissing Claimant and nothing in this absurd and erroneous Award can change that fact. See Awards 2528, 2654, 2941, 3857, 5793, 6250, 6868, 6913, 7831, 9229.

There are men, said Epictetus, who will oppose very evident truths, and yet it is not easy to find an argument which may persuade them to alter their opinions. The cause of this is neither the man's own strength

nor the weakness of his teacher; but when a man becomes obstinate in error, reason cannot always reach him.

Award 10838 is based on a false premise and the conclusions reached are neither based on the facts of record nor the governing rules. Consequently, it is palpably erroneous and cannot be used as a precedent.

J. B. Haines
J. B. Haines
Labor Member