Award No. 13683
Docket No. TE-15109

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYES UNION (Formerly The Order of Railroad Telegraphers)

TENNESSEE CENTRAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Tennessee Central Railway, that:

1. The Carrier violated the Agreement between the Tennessee Central Railway Company (Carrier) and The Order of Railroad Telegraphers, Division 64 (Organization), when the Carrier by letter dated February 7, 1964, addressed to Mrs. J. Pride, 1908 Lebanon Road, Nashville, Tennessee, discharged her from the service.

2. The Carrier shall compensate Mrs. Mila J. Pride for eight (8) hours each day Monday through Friday of each week at the rate of pay for the operator-clerk position at Shops (Nashville), Tennessee, $2.5128 per hour, beginning February 7, 1964, and in addition to the eight (8) hours each day Monday through Friday each week at the straight time rate, Carrier shall also compensate Mrs. Pride for any and all overtime worked by the occupant of her position beginning February 7, 1964; and the Carrier shall continue to compensate Mrs. Pride for both the straight time and all overtime on the operator-clerk position at Shops so long as she is not permitted to work and is held out of service.

3. The Carrier shall, because of the violation set out in paragraph 1 hereof, reinstate Mrs. Mila J. Pride without loss of pay and without impairment of seniority to the operator-clerk at Shops (Nashville), Tennessee and/or any other position to which Mrs. Pride's seniority would entitle her under the rules of the Telegraphers' Agreement, with proper adjustment of salary.

OPINION OF BOARD: Claimant, a 28-year employe of this Carrier, was assigned as operator-clerk in the Chief Dispatcher's office at Shops, Nashville, Tennessee, with hours of 6:00 A. M. to 3:00 P. M. daily, Saturdays and Sundays off. The office opened at 5:00 A. M. and closed at 10:45 P. M.

At the time the incidents giving rise to this dispute occurred, Claimant was experiencing serious marital difficulties with her husband. On February 6, 1964, as Claimant was about to leave for work she thought she observed her husband outside the house. Fearful that he might harm her, Claimant called te Chief Dispatcher at or about 5:20 A. M. on that day, stating: ". . . This is Mrs. Pride, I am having serious trouble with Mr. Pride and I

will be unable to be on the job this morning and will not be there until hear (sic) from me further at a later date." To this statement the Chief Dispatcher replied "all right". Claimant did not work her assignment that day.

Subsequently, Claimant was charged with failure to protect her assignment and, after an investigation, was dismissed from service on February 7, 1964.

There is no evidence of probative value to support the Carrier's finding that Claimant was guilty as charged. Her conduct, under the circumstances, was proper and constituted no violation of any contract rule. To dismiss her from service for failure to protect her assignment was manifestly unjust.

The Board has been urged to limit the damages here sought to the period beginning February 7, 1964 to June 29, 1964, the latter being the date of a letter from Carrier's General Superintendent-Chief Engineer, to the Claimant. The substance of that letter reads as follows:

> "Since your discharge on February 7, 1964 and the hearings and appeals subsequently held, further consideration has been given the circumstances of your case and although we cannot condone your not having taken the proper steps to protect your assignment and you have made no request for leniency, it has been decided to give you another chance.
>
> "With the understanding that any future failure to abide by the rules or the instructions of proper authority will not be tolerated, you will be re-employed without loss of service age as per Rule No. 17 (k) of the agreement provided you report for duty on the extra list to the dispatcher at Shops no later than July 9, 1964."

On July 6, the General Chairman representing the Claimant declined to Carrier's offer on grounds (a) that the conditions expressed therein were "inconsistent" with the claim for restoration of Claimant to her former position with pay for all time lost and (b) that the offer suggested a plea for leniency by the Claimant which, if accepted, would be an injustice to her and "irreparably damage" her case. The General Chairman, however, did offer to consider reinstatement of Claimant to her position and "let the matter of pay for time lost be decided by the Third Division, N.R.A.B. . . .".

To the communication, the General Superintendent replied on July 7, 1964, stating, among other things, that the Carrier's offer of June 29, "had no connection whatever with (the) claim . . ." and was "notice of my decision to give her another chance and re-employ her without loss of seniority as per Rule 17 (k) . . ." He further advised that the "only conditions attached were that she abide by the rules . . . and instructions of proper authority and that she report for duty . . . no later than July 9, 1964."

On July 14, 1964, the General Chairman again declined to accept Carrier's offer on the same grounds set out in his letter of July 7 (supra).

From an analysis of the Carrier's offer and of certain other documentary evidence of record including a letter dated June 24, 1964, from Carrier's Acting Supervisor of Wages, where, among other things, the admission is made that in discussing Claimant's case at that juncture he "was talking about a subject the Organization has not broached, i.e., **leniency . . .**" **(Emphasis ours)** the Board finds the position taken by the Organization was correct, and in the

interests of the Claimant. Her acceptance of the June 29 offer would have constituted a request for leniency and, consequently, an admission of guilt which, in turn, would have furnished the Carrier with an air-tight defense to the claim when later considered by this Board.

It is true that the Board has followed and applied the doctrine of mitigation of the damages sought where a Claimant is offered but refuses to accept reinstatement in a job comparable to the one lost through dismissal. (See Third Division Awards 1111, 5027, 5498, 12986; First Division Awards 12116 and 13206, Fourth Division Award 1123).

Here, however, the offered employment—extra work—was not comparable to the regular assignment held by the Claimant nor was there any agreement that only the claim for back pay would be progressed (as suggested by the General Chairman). We know of no authority which requires a Claimant, under the circumstances found here, to agree to what amounts to a constructive abandonment of a claim for monetary damages by pleading for leniency and thus admitting guilt.

In view of the foregoing, the claim will be sustained, less any amounts earned by Claimant during the period from February 7, 1964, to the date of her reinstatement.

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

That the Agreement was violated.

AWARD

Claim sustained to extent shown in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of June 1965.

DISSENT OF CARRIER MEMBERS TO AWARD NO. 13683
DOCKET NO. TE-15109

Award 13683 is in serious error, is not supported by the record, and we dissent.

There is no proper basis for the Referee's conclusion that Claimant's conduct, under the circumstances, was proper and "constituted no violation of any contract rule." Claimant was not dismissed for violation of any "contract

rule." She was dismissed for violation of an Operating rule of the Carrier, and Awards of this Board are legion in upholding the application of discipline for the violation of such rules.

The error of the Referee is compounded in declining to limit the damages accruing to the Claimant. The offer of re-employment without loss of seniority was contained in letter from the Carrier's General Superintendent-Chief Engineer to the Claimant on June 29, 1964, as quoted in the Award. The letter of July 7, 1964, addressed to the General Chairman by the General Superintendent-Chief Engineer, referred to by the Referee, but not quoted in its entirety, reads:

> "I received in this mornings mail your letter of July 6, file 233-237 concerning my letter to Mrs. Mila J. Pride dated June 29, 1964, and also a letter from Mrs. Pride stating that the matter of her returning to work has been turned over to you for handling.
>
> "Please be advised that my letter to Mrs. Pride under date of June 29, 1964, had no connection whatever with your claim in her behalf. It was exactly what it purported to be and nothing else, i.e., notice of my decision to give her another chance and re-employ her without loss of seniority as per Rule No. 17 (k) of the agreement. The only conditions attached were that she abide by the rules of the Company and instructions of proper authority and that she report for duty to the dispatcher no later than July 9, 1964.
>
> "The claim you referred to has been declined by me and you have appealed from my decision. It is therefore out of my hands and I am not in a position to give it any further handling. Furthermore I do not see how my decision to re-employ Mrs. Pride as authorized by the agreement could possibly have any effect on your progression of her claim for pay for time lost.
>
> "I am willing to discuss this matter with you if you think such discussion would serve any useful purpose but it should be understood that such discussion would not in any sense constitute further handling of your claim and that I am not agreeable to extending the time length for Mrs. Pride's re-entering service which remains July 9, 1964 as stated in my letter to her under date of June 29, 1964."

The above-quoted letter shows conclusively that the decision to re-employ Claimant with her former seniority could have no effect on the progression of the claim for pay for time lost. Any claim progressed would necessarily have been handled under the provisions of Rule 18, which provides in Section (f):

> "(f) If the final decision decrees that charges against the employe were not sustained, the record shall be cleared of the charges. If suspended or dismissed, the employe will be returned to former position and paid for all wages lost, less amount earned in any other service."

There is no proper basis in the record for the conclusion of the Referee that Claimant's "acceptance of the June 29 offer would have constituted a request for leniency and, consequently, an admission of guilt which, in turn, would have furnished the Carrier with an air-tight defense to the claim when later considered by this Board," or that Claimant would have been required

"to agree to what amounts to a constructive abandonment of a claim for monetary damages by pleading for leniency and thus admitting guilt."

The fact remains that Claimant, had she so desired, could have been working for the Carrier from June 29, 1964, without waiving any of her rights under the Agreement. The time lost subsequently was of her own volition, and there is no proper basis for holding the Carrier liable for that time. As this same Referee held in recent **Interpretation No. 1 to Award 12242:**

> "What constitutes the proper measure of damages for breach of a contract for personal services is a question of law. The general rule of law is that the proper measure is the difference between what the employe would have earned under the contract and what he may have earned in the exercise of ordinary diligence in some other employment. * * * "

In **First Division Award 15765** (Referee Carter) it was held:

> " * * * One who seeks damages for a breach of an employment agreement is obliged to mitigate such damage by using reasonable diligence in seeking other employment in the territory where he was employed. He may not sit idly by with impunity and create or accelerate damages to his own advantage. * * * "

In recent **Fourth Division Award 2022** (Referee Dolnick) it was held:

> "Claimant is entitled to recover what he would have received in wages in his position as a General Yardmaster from January 29, 1964 to the date he is reinstated in that position less what he earned in other employment with the Carrier during that period or what he may have earned in other employment with such Carrier if he exercised reasonable and ordinary diligence."

It certainly cannot properly be said that the Claimant here exercised ordinary diligence to mitigate her damages in refusing to accept employment covered by the same Agreement and with her former seniority.

/s/ P. C. Carter

/s/ D. S. Dugan

/s/ R. E. Black

/s/ T. F. Strunck

/s/ G. C. White

ANSWER TO DISSENT OF CARRIER MEMBERS TO AWARD NO. 13683, DOCKET NO. TE-15109

The Dissent of Carrier Members is neither justified nor supported by either the record or the award.

Petulance aside, the dissent seeks to impeach the award on the ground that the Carrier's so-called "offer" to re-employ the claimant should have been construed as an opportunity for claimant to mitigate damages which was refused at her peril.

The Referee, however, correctly recognized this "offer" for what is was: An effort to create an "air tight defense" to the claim Carrier knew would eventually reach this Board.

It must be reassuring to those who sometimes doubt the efficacy of the Board's functioning to note that two references reach the same basic conclusion in separate actions on a similar issue each of which is unknown to the other. In First Division Award 20494 this same Carrier made a "conditional offer" to a dismissed employe which also was refused. The Carrier, nevertheless, made the same argument that it does here about the effect of such an offer. The referee in that case rejected the argument, noting that:

> ". . . The carrier's contention lacks merit because the claimant was under no obligation to accept a compromise."

Inadvertently, the First Division Award was not brought to the attention of the Referee here. His independent thinking, having led to the same result, impresses added dignity upon both awards.

The dissent detracts nothing from the soundness of the decision in Award 13683.

J. W. WHITEHOUSE
Labor Member