Award No. 18622

Docket No. CL-18929

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, Referee

PARTIES TO DISPUTE:

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

PENN CENTRAL TRANSPORTATION COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6823) that:

(a) The Carrier violated the Rules Agreement, effective February 1, 1968, particularly Rule 6-A-1, when it assessed discipline of dismissal on R. A. Kimpland, Clerk, Central Region, Williamsport Division.

(b) Claimant R. A. Kimpland's record be cleared of the charges brought against him on April 2, 1969.

(c) Claimant R. A. Kimpland be restored to service with seniority and all other rights unimpaired, and be compensated for wage loss sustained during the period out of service. Plus interest at 6% per annum compounded annually on the anniversary date of claim.

OPINION OF BOARD: Due to the contemplated merger of the Pennsylvania Railroad Company and the New York Central Railroad Company, the Organization and these Carriers entered into an agreement for the protection of its employes in the event of merger. Claimant, a utility employe, was a protected employe under the merger agreement.

On February 26, 1969, Carrier advertised to clerical employes of the Williamsport, Pa. seniority district a position of "Clerk, Extra F-126" located at Williamsport, Pa., "to relieve employes and fill vacancies account vacations at Stations." No bids were received for the position.

On March 5, 1969, the Supervisor of Stations, Williamsport, Pa., wrote Claimant as follows:

"Dear Sir:

"Article VI(c) of the Merger Implementing Agreement provides the following"

If an advertised position for which no bids are received from 'present employes' in the zone in which the position is advertised is not filled as provided in paragraphs (a) and (b) hereof, qualified utility employes in the seniority district, employed outside the zone in which the position is advertised, in reverse seniority order, may be requested by the Company to accept the position. If the first employe requested to accept the position refuses to accept it, he will forfeit his seniority and all protection under the Merger Protective Agreement; but if he accepts and changes his place of residence in accordance with II(b), he shall be entitled to the transfer allowances provided in XII and XIII hereof. Other employes requested to accept a position under this paragraph, which require a change in place of residence in accordance with II(b) hereof, shall be given an election, which must be exercised within seven calendar days from the date of request, to make such transfer, with the benefits contained in XII and XIII hereof, or to resign and accept a lump sum separation allowance which shall be computed in accordance with the schedule set forth in Section 9 of the Washington Agreement; provided, however, that force reductions permitted to be made under the Merger Protective Agreement shall be in addition to the number of employes who resign to accept the separation allowance herein provided.

No bids have been received from 'present employes' for the following:

Position **Clerk F-126 Relief**
Rate of Pay **Position of that assigned**
Location **Williamsport, Pa.**

"As this position cannot be filled by a qualified utility employe in the zone, you have been assigned to this position effective:

March 6, 1969"

Claimant failed to report and was notified to appeal for an investigation in connection with: "Failure to comply with instructions to report to your assignment as Clerk-Relief F-126, Headquarters Williamsport, Pennsylvania, March 24, 1969". He was not present at the investigation but was represented by the Local Protective Chairman. As a result of evidence adduced at the investigation Claimant was dismissed from Carrier's service, for his failure to report to his assignment as instructed.

Petitioner alleges that the bulletin advertising the position in question was improper and thus void ab initio, and that as a result, Claimant was not bound to obey it. Briefly, Petitioner claims this was no position with a definite rate of pay, tour of duty, start of work week, or rest days — it was simply an indication that there was vacation work to be performed all over the division. And Petitioner asserts the Implementing Agreement contains no provision of any kind requiring a "utility employe" to accept this kind of work or to forfeit ones seniority and all protection under the Merger Protective Agreement as Claimant was threatened in Carrier's letter of March 5, 1969. Therefore, there was no position at Williamsport, Pa. ready for the Claimant within the meaning of the Merger Agreements.

Carrier argues that as a utility employe, Claimant had an obligation to accept available positions in his seniority district, which included Williamsport, Pa. Pursuant to Sec. (c) of Article VI of the Implementing Agreement; upon Claimant's failure to accept the position in question, he forfeited his seniority and all protection under the Merger Protective Agreement, thus Carrier states there was no actual necessity for an invesigation and Claimant could have been marked out of service without further proceedings.

Carrier further alleges that our jurisdiction is limited to a review of the disciplinary action taken pursuant to the investigation. Any question concerning the application of the Merger Protective Agreement or the Implementing Agreement, it contends, must be referred to an Arbitration Committee established pursuant to Section 13 of the Agreement. In view of Claimant's insubordination due to his failure to keep the assignment, Carrier believes the discipline of dismissal was not arbitrary, unreasonable or capricious.

In their question of discipline, Petitioner contends there are several reasons why the discipline should have been less harsh: (1) Claimant's residence was over 200 miles from Williamsport, (2) he had no automobile and Carrier failed to furnish him with transportation, (3) he had no funds, and (4) he was in poor health at the time.

Initially, it is incumbent upon this Board to determine whether we have jurisdiction to interpret the provisions of the Merger Protective Agreement and the Implementing Agreement. It cannot be denied that the Railway Labor Act, Section 3, Second, sanctions "the establishment of system, group or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section." Pursuant to this proviso, the parties to this dispute agreed that any questions as to the application of the Merger Protective Agreement or the Implementing Agreement is to be referred to an Arbitration Committee.

This Board is of the opinion that the procedures established by the parties for resolving disputes relative to the Merger Agreements should be respected. Consequently, we are constrained to hold that any questions concerning the application of these Agreements must be decided by the Arbitration Committee set up by the parties.

Thus, the only issue to be decided by this Board, is whether Carrier's action in disciplining Claimant by dismissal was unjust, unreasonable, arbitrary, or capricious. We believe Carrier's action was unreasonable, under the circumstances. While it certainly was Carrier's prerogative to punish Claimant for failure to report to his assignment, discipline of dismissal was excessive. Therefore, we order Claimant to be restored to service with seniority unimpaired, but without compensation for wages lost during this period. That discipline, we feel, was not excessive.

Whether Claimant forfeited his seniority rights automatically as a result of Article VI(c) of the Implementing Agreement is for the Arbitration Committee to determine.

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 violated.

AWARD

Part (a) sustained; Part (b) denied; Part (c) sustained in part as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 30th day of June 1971.

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