NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23042
Docket Number CL-22996

Paul C. Carter, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employes
(The Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8797) that:

Claim No. 1

(a) The Carrier violated and continues to violate the Clerks' Agreement particularly Rule 27 and others when on August 9, 1976 it removed Jane C. Triplett from service and did not accord her a timely, fair and impartial investigation.

(b) That Jane C. Triplett now be compensated for all losses sustained by her because of her removal from service.

Claim No. 2

(a) The Carrier violated the terms of the General Clerical Agreement when it removed Jane C. Triplett's name from the Huntington District Transportation Seniority Roster under the erroneous assumption she had forfeited her seniority under the provisions of Rule 28 of Clerks' Agreement.

(b) That the Carrier immediately restore Jane C. Triplett to the Huntington District Transportation Seniority Roster and compensate her for any and all monetary loss sustained resulting from the Carrier's arbitrary action.

OPINION OF BOARD: As indicated in prior awards involving the same parties, the Board finds no proper basis for complaint on the part of the Carrier to the Organization combining in one submission to the Board two separate disputes handled individually on the property. See Awards 22499, 22611 and 22612. We note, however, in Carrier's denial of the claims on December 20, 1978, the claims were combined in one letter of denial.

On this Carrier it has been the practice, since early Award 2144 of this Division, to handle physical disqualifications under the Discipline Rule, Rule 27, of the applicable Agreement, which provides in part:

> "The investigation will be held within 10 days from date charged with an offense or held out of service (unless an extension of time is agreed to between the proper officer and Local Chairman)."

From the record, it is apparent that Carrier had good reasons to have claimant undergo physical and psychiatric examinations. Such examinations were conducted on August 4 and August 6, 1976. Claimant was taken out of service at close of business on August 6, 1976, by the Zone Manager, based on verbal medical disqualification by Carrier's Regional Medical Examiner, which disqualification was confirmed by the Regional Medical Examiner on August 19, 1976. Claimant was notified in writing on August 9, 1976:

> "As per instructions from C&O Physician, Dr. Jacob Webber, you are temporairly (sic) held out of service."

On August 24, 1976, claimant was notified:

> "This is to advise you to attend a Board of Inquiry on Wednesday, September 1, 1976, at 10:00 A.M., in the Conference Room. Passenger Station Annex, Huntington, West Virginia.
>
> "You are charged with not being qualified for service with the Chesapeake and Ohio Railway Company.
>
> "Please arrange to secure the presence of necessary witnesses and duly accredited representatives, if desired.
>
> "Please also acknowledge receipt of this letter on copy of same attached and return to me in the enclosed self-addressed envelope."

At the request of the Local Chairman, the Board of Inquiry was postponed until 10:00 a.m., September 2, 1976.

At the Board of Inquiry, claimant's superior officer testified that claimant was taken out of service on August 6, 1976.

At the outset of the hearing, or Board of Inquiry, the Local Chairman objected on the ground that it was in violation of the 10-day provision of that part of Rule 27 heretofore quoted, and requested that the Board of Inquiry be cancelled for that reason.

On September 9, 1976, claimant was notified:

> "This refers to the investigation held at Huntington, West Virginia, at 10:00 a.m., Thursday, September 2, 1976.
>
> "It has been found you are not qualified to perform the duties of a clerical employe under the Clerks Agreement and you are disqualified for all services."

Time limit rules are strictly enforced on all parties. See Awards 6446, 11757, 14496, among others. As the Board of Inquiry, or investigation, was not held within ten days from the date claimant was withheld from service, we find the Carrier to be in violation of Rule 27.

The Carrier later contended that claimant was compensated in the form of sick leave pay for August 9, 10, 11, 12, 13, 16, 17, 18, 19 and 20. We do not consider such payment to off-set the violation of the ten-day limitation of Rule 27. Further, the investigation being scheduled for September 1, 1976, was not within ten days of August 20. Furthermore, we note that nothing was said of any sick leave payments in response to the Local Chairman's objection to the timeliness of the investigation. The fact remains that the claimant's superior testified that she was taken out of service at the close of business on August 6, 1976.

The record shows that while the claim resulting from claimant's disqualification was on appeal, claimant was given further medical examination by Carrier's Regional Medical Examiner on May 2, 1977, who authorized her return to service. Claimant was notified on May 5, 1977, by Carrier's Auditor, Zone Accounting Bureau:

> "This will confirm telephone conversation between yourself and Zone Manager R. L. Foster, 4:38 p.m., May 4, 1977, in which you were advised that Dr. Weber, Regional Medical Examiner, had authorized your return to service of the Railway Company, as a result of a recent medical examination.

You should arrange to protect your seniority rights in accordance with the Clerical Agreement.

Kindly acknowledge receipt on copy of this letter and return in enclosed self-addressed stamped envelope."

Claimant did not return to service as instructed. On June 20, 1977, she was notified in part:

"Please disregard my letter of June 13, 1977, file 29/51-C (AZAB Cl. 242) and in lieu thereof substitute the following:

> Under date of May 5, 1977, receipt of which you acknowledged on May 9, 1977, I advised you to exercise your seniority under the provisions of the Clerical Agreement to protect you seniority on the Huntington District Transportation Department seniority roster. You failed to exercise your seniority within the ten (10) days specified in Rule 28.
>
> At 10:00 a.m., Tuesday, June 5, 1977, a seniority hearing will be held in the Conference Room, Annex Building, Huntington Passenger Station, at which you may show cause, if any, why your name should not be removed from the Huntington District Transportation Department roster, Huntington, West Virginia.
>
> Please arrange to be present for the above seniority hearing and have with you your representative and/or witnesses, if desired."

Following the "seniority hearing," the Carrier found that claimant had forfeited her seniority under Rule 28 of the applicable Agreement, and claimant was so notified on July 14, 1977. In the handling on the property and in its submission to this Board, the Carrier contended that the procedure followed concerning claimant's return to service in May, 1977, was the same as that followed in other medical disqualification cases for many years with the knowledge and concurrence of the Organization.

The Board finds that claimant acted ill-advisedly in not returning to work when notified by the Carrier to do so on May 5, 1977. The claimant had an obligation to mitigate damages. Any loss suffered by claimant subsequent to that date was of her own volition. The Board also finds that Carrier's actions in finding that claimant forfeited her seniority under Rule 28 for failing to return to service when instructed to do so on May 5, 1977, was proper.

Based upon the entire record, the Board finds that Carrier violated Rule 27 by not holding the investigation within ten days from the date claimant was held out of service, August 6, 1976. For that reason, and without passing upon the merits of claimant's disqualification, we will sustain the claim for pay for time lost by claimant from August 6, 1976, to May 9, 1977, computed in accordance with Rule 27(d). In all other respects the claims are denied.

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 to the extent shown in Opinion.

A W A R D

Claim sustained to the extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1980.