NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 24745
THIRD DIVISION Docket Number MW-25006

Tedford E. Schoonover, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Atchison, Topeka and Santa Fe Railway Company

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

(1) The Carrier violated the Agreement when it permitted Mr. L. W. Doucette to displace Mr. Jack Dunham from his Group 4 position on October 10, 1981 (Carrier's File 11-160-220-88).

(2) Claimant Jack Dunham shall be returned to his Group 4 position and he shall be compensated for all wage loss suffered."

OPINION OF BOARD: Although Carrier argues certain procedural errors in the manner in which this claim was processed the record is not clear on some aspects of this point. For example, Carrier Circular Letter of October 25, 1973, setting up procedures for filing claims and grievances was addressed to the respective General Chairmen and it is not clear as to its applicability to claims filed by individual employes such as in this case. Thus, we pass on to consideration of the merits of this claim.

At the outset we disagree with Carrier argument that the claim is so vague and indefinite that it does not constitute a proper claim for consideration by this Board. The claim alleges Carrier violation of specific rules of the Agreement as related to Claimant's displacement from the position of Fuel Laborer, Winslow, Arizona on October 10, 1981, by L. Doucette. Moreover, the claim contends for back pay from the date of the alleged violation. Thus, the claim meets the standards of being both specific and definite as to time and place. It should also be noted that these procedural points were not raised in Carrier's letter of February 1, 1982, wherein he responded in detail on the merits of the claim and the various Agreement rules involved.

As to Carrier contentions on time limits under Rule 14 being violated by the claim not being filed within the 60-day time limit it is noted this point was not insisted upon during the various appeals. Actually the time limit position was suspended in Mr. East's letter of May 3, 1982 to General Chairman Fleming.

The main problem with the claim relates to Claimant Jack Dunham's misunderstanding of relevant circumstances. The essentials of his claim and his understandings are set forth in his letter of January 4, 1982 to the Carrier, as follows:

> "Reference is made to the letter dated 10-7-81 in regards to the return of Employee L. W. Doucette and end of my assignment, effective 10-10-81. I fail to understand the procedure utilized in returning employee L. Doucette. It was my understanding employee Doucette was on a disability annuity, (Rule 9, Section L) and that an employee returning to service

will exercise seniority rights in accordance with rule 3, Section (C). Recognizing employee L. Doucette had been returned previously to the position of Gardiner, It was my understanding he had exercised his seniority rights. The orthodox procedure utilized in returning L. Doucette appears to be inappropriate and not in accordance with the agreement established between the Atchison, Topeka and Santa Fe Railway and its employees of the Brotherhood maintenance of way employees. Also, in reference to rule 22, section (C),. ACCEPTING OTHER absence accepting other employment without written permission from the ranking officer in the department in which employed shall be considered out of service."

The fact of the matter is that Mr. Doucette was not on disability annuity as stated in Claimant's letter. On the contrary, he was on medical leave of absence due to the foot injury he sustained on November 9, 1978, while working on his regularly assigned Fuel Laborer position at Winslow. As a result of the injury he lost his left foot and remained on medical leave pending recovery and he became physically able to return to active service. Meanwhile, his job of Fuel Laborer was advertised as a temporary vacancy and bid in by Claimant Dunham.

On October 7, 1981, the Carrier Medical Director determined that Mr. Doucette was physically able to return to active service. Accordingly, arrangements were made for him to return to his regular position on October 10, 1981 by displacing Claimant who was junior in seniority.

The second misunderstanding set forth by Claimant was that Mr. Doucette had previously exercised his seniority as a gardener. Such is not the case. What actually happened was that beginning August 14, 1979, Mr. Doucette was permitted to work one or two days per week as a helper to the gardner at the Division Office Building at Winslow. The gardener position is not covered by the Agreement. Since it is an exempt position, the fact Mr. Doucette worked there cannot be considered as an action by which he exercised his seniority under the Agreement. On the contrary, it was a voluntary action by the Carrier in permitting Mr. Doucette to work part time in a non covered position as a therapy measure. He continued to work there on a part time basis until June 23, 1980, when his leg gave him additional trouble.

Included in Claimant's erroneous assertion as to Mr. Doucette's work in the gardener helper job is an inferred charge that he should have been considered out of service due to accepting other employment without permission while on leave of absence, as required by Rule 22. This contention overlooks the fact that Rule 22 does not require disabled employes on medical leave to obtain written permission. This requirement applies only to persons on leave for personal reasons.

The plain facts are that when Mr. Doucette's condition improved sufficiently, and he was declared physically able to return to active service by Carrier Medical Director, he was returned in accordance with applicable Agreement rules. Thus, he was returned to service as required by Rule 5(i) and permitted to exercise his seniority by returning to his regular job as Fuel Laborer in accordance with Rule 3, Section (c), proper applications of the rules in the circumstances.

On the basis of our review of the facts as set forth above we do not find any circumstances giving rise to the applicability of Rule 6 on Transfers as contended by Claimant.

In accordance with the above review of the evidence and the Agreement Rules involved we conclude that the claim is without merit. It is based on a misunderstanding of the essential facts and must be denied.

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.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March, 1984.