

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25595
Docket Number CL-25701

James Robert Cox, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad
(Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9852)
that:

- 1) Carrier violated the provisions of Appendix No. 8 of the Clerks' Rules Agreement pursuant to Third Division Award No. 23426 which directed the Carrier to return Employee H.T. Davis to service with all rights unimpaired.
- 2) Carrier shall be required to pay Employee H. T. Davis a separation allowance in line with the provisions of Article VI of Appendix No. 8.

OPINION OF BOARD: Third Division Award 23426 returned Claimant to service "with all rights unimpaired but without back pay." He had been dismissed in late 1978. By the time the Award was issued in November, 1981, Carrier had already ceased operations on a substantial part of its System, and there were no positions to which the Claimant could exercise his seniority. There was only one BRAC position remaining in Claimant's seniority group and that position was appointive. It was therefore likely that Claimant would never obtain a regular assignment in the District following his reinstatement. He was, therefore, put on furloughed employe status. Claimant requested a separation allowance which has been denied by the Carrier.

Pursuant to Court Order, the Trustee had been required as of February 29, 1980, to furlough all employes not required for the service. "Protected employes" were entitled to a Separation Allowance under Appendix 8 of the Agreement. "Protected employes" were defined, inter alia, as those regularly assigned. An Agreement provision also stated that employes ceased to be protected in case of dismissal for cause and that "an employe shall not be entitled to benefits of this Article during any period in which he fails to work because of...discipline...or other absence from the Carrier's service." Under the Allowance, separated otherwise qualified employes are given options which must be exercised within seven calendar days and which include following their work, exercising seniority displacement rights or, for those with five or more years employment who are required to move their residence in order to follow their work, an election to accept a lump sum separation allowance.

Carrier takes the position that Claimant was, because of his dismissal from service, neither a protected employe whose position had been abolished nor a regularly assigned employe. They contend that since the Protective Agreement applies only to those employes regularly assigned, that the Claimant could not become regularly assigned retroactively by operation of Award 23426. Since he did not "own" a permanent position he was not covered.

The Board finds that Claimant was not protected since he was not "regularly assigned" within the meaning of the Separation Allowance Provision at the time he would otherwise have been eligible to make the election to obtain the Allowance. The time limitations for declaring the exercise of one of the options are significant features of the Allowance. The Reinstatement Award operated prospectively both compensation wise and with respect to "regular assignment" status. The Award, in fact, reduced the discharge to a suspension and did not restore Claimant to "regularly assigned" or paid status during the period prior to the date of his reinstatement. He failed to work the period during which the benefit had to be elected because of discipline and consequently was not entitled to the Allowance under Appendix 8.

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 22nd day of August 1985.

