SPECIAL BOARD OF ADJUSTMENT NO. 605

PARTIES TO DISPUTE) Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
and
Kansas City Southern Railway Company

QUESTIONS AT ISSUE: 1. Did Hershia Crowder lose his protected status as contemplated within Article I, Section 1 of the February 7, 1965 Agreement, when Carrier dismissed him entirely from service as result of request from the Firemen and Oilers Organization that Crowder be removed from positions covered by their Agreement for his failure to comply with the Firemen and Oilers Union Shop Agreement?

2. Should Hershia Crowder now be returned to active service?

OPINION OF BOARD: On October 1, 1964, Claimant was in active service as an extra porter with two or more years of an employment relationship with the Carrier at Shreveport, Louisiana; a position included within the scope of the BRAC Agreement. Hence, he was a protected employee pursuant to the provisions of Article I, Section 1 of the February 7, 1965 National Agreement.

On November 22, 1967, Claimant's position was abolished, whereupon he transferred to another seniority district at Shreveport on January 22, 1968, as a warehouse - caller. Subsequently, on August 30, 1968, the latter position was also abolished. It should be noted that the warehouse position was, similarly, under the scope of the BRAC Agreement. Thereafter, as Claimant was unable to displace on a position under the scope of the BRAC Organization, the Carrier offered him a transfer to a laborer position in the Mechanical Department -- under the scope of the International Brotherhood of Firemen and Oilers. Upon Claimant acquiescing to such transfer, the Carrier confirmed it by letter on September 13, 1968, a portion of which is hereinafter quoted, viz:

> "While it is extremely unlikely that these employees will be furloughed from the Mechanical Department, if this should occur we will recognize them as having a protected status under the Clerks' Agreement until such time as they are called back to service in the Mechanical Department."

On December 30, 1968, Carrier received a notice from the F&O Organization that Claimant declined to join the F&O Union pursuant to the terms of the Union Shop Agreement negotiated between the Carrier and the F&O Organization. Following a hearing, Claimant's seniority and employment was terminated on February 28, 1969, without processing an appeal to such decision. However,

on February 25, 1969, Claimant wrote the Carrier requesting restoration of his seniority under the scope of the BRAC Agreement.

In this posture, the Carrier defends its action on two grounds -- the time limits rule and that Claimant's refusal to abide by the F&O Union Shop Agreement was a voluntary act -- a loss of protection pursuant to Article II, Section 1 of the February 7, 1965 Agreement.

Inasmuch as the Carrier has framed its thrust in the instant matter on a procedural attack, to wit:

> "It is Carrier's primary position that this Board has no jurisdiction in this case and that same should be dismissed."

it is essential that we cope initially with said defense.

Specifically, upon notification to Claimant that his seniority and employment was terminated on February 28, 1969, the Carrier avers that an appeal was not processed within ten days thereafter, hence, the instant Claim is defective. It supports this argument by citing Third Division Award No. 16283, as well as numerous other Awards included therein. Absent a careful review of these Awards, we are prepared to accept these citations for the principle which they are intended to reflect -- namely, that a Claim must be dismissed upon failure to comply with a time limit rule. However, our function herein is confined to interpreting the language contained in the February 7, 1965 National Agreement, as well as the November 24, 1965 Interpretations thereto. In that regard, on Page 18 of the November 24, 1965 Interpretations, the following is contained, to wit:

> "HANDLING OF CLAIMS OR GRIEVANCES
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> "Rules and procedures governing the handling of claims or grievances including time limit rules, shall not apply to the handling of questions or disputes concerning the meaning or interpretation of the provisions of the February 7, 1965 Agreement. Such questions or disputes may be handled at any time and may be taken up directly between the General Chairman and the highest operating officer of carrier designated to handle such matters.
>
> "Individual claims for compensation alleged to be due pursuant to the Agreement shall be handled in accordance with the rules governing the handling of claims and grievances including time limit rules, provided that the time limit on claims involving an interpretation of the Agreement shall not begin to run until 30 days after the interpretation is rendered." (Underline added)

Also Cf. Award No. 63 of our Board.

Moreover, the Questions at Issue contained in the instant matter are directed solely to whether Claimant lost his protected status for failure to

comply with the Union Shop Agreement negotiated between the Carrier and the F&O Organization. Our careful perusal of the Submissions failed to disclose a Claim for compensation. Hence, it is our considered view that the Carrier's assertion of a time limit rule violation must be denied and, therefore, conclude that we have jurisdiction.

Did Claimant lose his protected status under the scope of the BRAC Organization for failure to comply with the F&O Union Shop Agreement negotiated between the Carrier and the F&O Organization? What is the significance of a Union Security clause? How does a protected employee lose his protected status under the February 7, 1965 Agreement? These questions are all relevant to the instant matter.

Although the instant matter is one of first impression before our Board, we believe its importance is transcendental. Section 2, paragraph Eleventh of the Railway Labor Act, as amended, permits parties to a Collective Bargaining Agreement to negotiate a union security and check-off clause. In the event the parties negotiate a union shop clause -- one which requires an employee to pay reasonable initiation fees and dues -- that employee can be compelled to comply within sixty days. Upon failure to abide by the union shop clause, at the request of the Organization, the Carrier would be required to terminate that employee from any position within the scope of that bargaining unit. Provided, of course, that the dues and initiation fee are uniformly required of other employees and that the employee was not denied membership in the Organization. In this regard, we would note that the F&O union security clause was valid and that membership therein was open to Claimant. We would indicate, further, that a union shop clause pursuant to the Railway Labor Act, as amended, is valid even in a Right-To-Work Law State -- as interpreted by the U. S. Supreme Court in Railway Employes' Department, A.F.of L., et al., vs. Hanson, et al.

Significantly, Claimant throughout the period of his employment with Carrier, held membership in the BRAC Organization, including the interval of time that he was employed in the Mechanical Department, a bargaining unit under the scope of the F&O Agreement. Nonetheless, he still retained membership in the BRAC Organization and paid his union dues to the latter Organization.

The next query concerns the relevancy of Article II, Section 1 and Article IV, Section 5 of the February 7, 1965 Agreement. Pursuant to Article II, Section 1, to wit:

> "An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements ---."

In conformity therewith, the Carrier stresses that:

> "Claimant's refusal to pay union shop dues in the same manner as other employees in the mechanical department was tantamount to a dismissal for cause, inasmuch as he had refused to satisfy a contractual condition

> of employment and therefore ceased to be a protected employee. Or it could be held that his failure to comply with the Union Shop Agreement in effect constituted a resignation of his own free will and accord. In short, his own behavior brought him under the terms of Article II, Section 1, and terminated his protected status."

At the outset, we concede that Carrier's argument is pursuasive, however, it neglects a basic premise. Section 1 of Article II, provides for loss of protected status to an employee who is dismissed "for cause in accordance with existing agreements." What "agreements" does the February 7, 1965 Agreement encompass? The answer is obvious -- the BRAC Agreement and not the F&O Agreement! Secondly, did he resign of his own free will? Of course not!

Furthermore, Article IV, Section 5 of the February 7, 1965 Agreement, provides as follows:

> "A protected employee shall not be entitled to the benefits of this Article during any period in which he fails to work due to disability, discipline, leave of absence, military service, or other absence from the carrier's service, or during any period in which he occupies a position not subject to the working agreement; ---"

Thus, we recognize that during the period that Claimant was working under the scope of the F&O Agreement, he was not entitled to the benefits flowing from this Article, pursuant to the February 7, 1965 Agreement. In effect, his benefits were suspended during that period of time, however, upon termination of his employment in the Mechanical Department, he reverted to the status of a protected employee under the February 7, 1965 Agreement.

AWARD:

The answer to question (1) is in the negative. The answer to question (2) is in the affirmative.

Murray M. Rohman
Neutral Member

Dated: Washington, D. C.
June 28, 1973