

AWARD NO. 9

(CASE NO. 9)

BEFORE
PUBLIC LAW BOARD NO. 119

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

and

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY

STATEMENT OF CLAIM:

(1) Carrier violated the provisions of the effective Clerks' Agreement when it arbitrarily and capriciously and with malice aforethought dismissed Judy Atkins from its service on August 7, 1968 without just cause or reason.

(2) Carrier shall now be required to return Judy Atkins to service immediately with seniority and all other rights unimpaired, her record shall be cleared of the charges arising from the investigation conducted on August 5, 1968 and she shall be compensated for all time lost.

JURISDICTION:

The jurisdiction of this Board is set forth in its Award No. 1. The statement of jurisdiction therein is incorporated herein by reference thereto.

This case was added to the docket of this Board by agreement of the parties, dated December 16, 1968, with approval and consent of the National Mediation Board.

OPINION OF BOARD:

In our Award No. 1 (Case No. 1), dated February 27, 1968, we awarded that Claimant herein be reinstated and made whole for loss of earnings, if any, upon our finding that Carrier had violated the Agreement by its dismissing her from service on

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December 10, 1965. In compliance with the Award Claimant was returned to service on March 20, 1968. On request of the Carrier, dated May 27, 1968, we, by Interpretation No. 1, Award No. 1, adjudicated questions framed by Carrier which included:

"A. Question 1"

"The question: 'Is the Carrier liable for damages during period Claimant was able to work and declined to do so?'

"Answer: NO.

"B. Question 4"

"The question: 'Does the carrier have the right to request the claimants to furnish the carrier with a statement of earnings received during the period covered by the claim. Can the carrier require the claimants to furnish to the carrier proof that the employes have made an attempt during the claim period to find employment, if they were left without employment, in an effort to mitigate the damages?'

"Discussion: The Award, paragraph 3(b) of VII. The Remedy, provides that: 'Carrier shall make Claimant whole by paying to her what she would have earned from Carrier in the period from December 13, 1965, to the date Carrier offers her reinstatement less what she actually earned during that period.' This is a statement of the make whole principle judicially established in labor law. To apply it the Carrier has need of the information listed in the question presented, which information is peculiarly within Claimant's ken. Carrier cannot comply until it is furnished with the requested information. It is to be noted that this Board has no power to enforce compliance with its Award. See, Section 3. First (p) of the Railway Labor Act. Nor does it have the power to require Claimant to supply the information."

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"Answer: YES"

"C. Question 5"

"The question: 'Does the carrier have the right to use earnings from sources other than the Detroit and Toledo Shore Line Railroad to determine the amount of compensation due to the claimants?'

"Discussion: Here, again, the make whole principle is applicable. Carrier has the right to deduct from the total amount of wages Claimant would have earned had she remained in Carrier's employ, absent the violation, her earnings from outside employment. But, this is qualified. Outside earnings which she earned and which she could have earned had she remained in Carrier's employ are not deductible."

"Answer: As set forth in Discussion, supra."

Said Award No. 1 and Interpretation No. 1 pertaining thereto are each incorporated herein by reference thereto.

On July 30, 1968, Carrier's Superintendent addressed a letter to Claimant:

"You will please arrange to attend investigation as indicated below:

"PLACE: Conference Room, Lang Office Building, Toledo, Ohio.

"TIME: 2:00 P. M.

"DATE: August 5, 1968

"CHARGE: Furnishing false information to The Detroit and Toledo Shore Line Railroad Company regarding your earnings from

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"other sources and/or regarding absences from work during the period from December 13, 1965 to resumption of service with The Detroit and Toledo Shore Line Railroad Company on March 20, 1968. (Emphasis supplied.)

"You may be accompanied by representation of your choice subject to the provisions of the applicable schedule rules and you may, if you so desire, produce witnesses in your behalf without expense to the railroad company."

The investigation was held as appointed with Carrier's Labor Relations Officer presiding. On August 7, 1968, Carrier's Superintendent -- who was not present at the hearing and consequently had not observed the demeanor of the witnesses -- informed Claimant in writing:

"This has reference to investigation held at Lang Yard, Toledo, Ohio, on August 5, 1968 for the following charge:

" 'Furnishing false information to the Detroit & Toledo Shore Line Railroad Company regarding your earnings from other sources and/or regarding absences from work during the period from December 13, 1965, to resumption of service with the Detroit & Toledo Shore Line Railroad Company on March 20, 1968.' "

"The transcript of this investigation sustains the charge. Discipline in the form of dismissal is administered effective at once."

It is significant that on the same date that the investigation was held -- August 5, 1968 -- Carrier's General Manager wrote to the Organization's General Chairman:

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"Please refer to Award No. 1 of Public Law Board No. 119 involving former Kelly girl Judy Atkins.

"Attached hereto please find a breakdown showing the gross amount due to Miss Atkins by year, the amount to be deducted for earnings from other sources, and the net amount due.

"Note that the total net is \$7,189.70, which allowance will be made to Miss Atkins in the second period July, 1968 payroll.

"It was not possible in this case to make a monthly breakdown as we were unable to obtain the figures of earnings from other sources on a monthly basis and therefore had to list it on the basis per the attached sheet."

Under Rule 23 of the Agreement captioned "Investigations and Hearings" the following provisions are pertinent to the resolution of the instant dispute:

"(a) An employe, charged with an offense, shall be notified in writing of the precise charge at the time charge is made.

. . . .

"(g) Whenever the charge against an employe is not sustained his record shall be cleared of the charge; and in the event he has been taken out of service he will be reinstated and be paid the earnings he would otherwise have received, less compensation earned in other employment."

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The "precise charge" is that Claimant gave "false information" as to the items listed in the charge. The transcript confines the charges only to Claimant's employment by the Toledo Public Library. As to that employment Claimant did give incomplete information as to her earnings, etc. However, in the letter in which she submitted the information to Carrier, dated June 27, 1968, she stated: "If you want to know anymore about my earnings you will have to call the Toledo Public Library" (Emphasis supplied.) -- a consent on her part for the Library to supply to Carrier any information as to her employment that it desired. Carrier exercised the privilege and on the basis of the information obtained computed the amount due Claimant under Award No. 1 as prescribed by Interpretation No. 1 of that Award; and, on August 5, 1968, which was also the date of the investigation on the charge here involved, notified the General Chairman as to the amount and the payroll period in which it would be paid to Claimant.

✓ There is no evidence in the record that Claimant gave "false information" to Carrier as charged. Therefore, the charge fails for lack of proof. Consequently we are compelled to award that the Claim is sustained and that Claimant be vindicated and made whole in all respects as mandated by Rule 23 (g) of the Agreement, supra.

FINDINGS:

Public Law Board No. 119, upon the whole record, finds and holds:

1. That Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;
2. That this Board has jurisdiction over the dispute involved herein, and

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3. That the Claim is sustained.

AWARD

Claim sustained as prescribed in the Opinion, supra.

ORDER

Carrier is hereby ordered to make effective Award No. 9, supra, made by Public Law Board No. 119, on or before *March 21, 1969*

John H. Dorsey

John H. Dorsey, Chairman
Neutral Member

D. G. Vane

D. G. Vane, Carrier Member
DISSENTING

C. E. Kief

C. E. Kief, Employee Member

Dated at Chicago, Illinois this *21st* day of *February* 1969.