

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19796  
Docket Number CL-20003

Joseph A. Sickles, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,  
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(The Detroit and Toledo Shore Line Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7238)  
that:

1. The Carrier violated the effective Clerks' Agreement when it failed and refused to compensate Clerk Esther Haas a day's pay at the rate of her assigned position of General Accountant for Friday, September 17, 1971 when she reported off sick on said date.

2. The Carrier further violated the effective Clerks' Agreement when commencing Monday, September 20, 1971 it arbitrarily withheld Clerk Esther Haas from service without just cause.

3. The Carrier shall now be required to compensate Clerk Esther Haas eight (8) hours' pay at the pro rata rate of the position of General Accountant for Friday, September 17, 1971.

4. The Carrier shall now be required to compensate Clerk Esther Haas eight (8) hours' pay at the pro rata rate of the position of General Accountant, subject to all subsequent general wage increases, for Monday, September 20, 1971, and for each and every day thereafter, 5 days per week, Monday through Friday that she is denied the right to fill her regularly assigned position of General Accountant.

OPINION OF BOARD: On September 16, 1971, the Carrier's Auditor removed certain journals and records from Claimant's office, which unquestionably caused her to become provoked and, obviously, precipitated certain statements attributed to her on that date.

The transcript of the investigation, held pursuant to Claimant's request under the provisions of Rule 26 (the so-called "unjust treatment" rule) demonstrates the following sequence of events:

The Auditor (GEARY) testified that Claimant stated to him on September 16, 1971 (after removal of journals and records, noted above) that "as of 4:30 this afternoon I am all through." Claimant testified that she said to the Auditor, "I am angry enough to leave at 4:30." A thorough review of the testimony of these two main participants persuades the Board that there was no "meeting of the minds" with respect to the question before us of whether or not Claimant, Esther Haas, resigned from the service of the Carrier (see Award 5124-Carter). While the Board will not attempt to determine which of the two above stated quotations was actually uttered by Claimant, her actions, subsequent to her statement to the Auditor, indicate that she did not affirmatively resign from the service of the Carrier.

The September 16, 1971 conversation with the Auditor occurred at or about 8:20 a.m., yet Claimant finished her tour of duty, leaving at 4:30 p.m. (her regular quitting time). On September 17, she telephoned the Chief Clerk and advised that she was ill and, therefore, would not report to cover her position that day (Friday). When the Chief Clerk advised the Auditor of the discussion, he (Auditor) telephoned Claimant at home and asked her, as he had on Thursday, to submit a written resignation. She refused to comply on both occasions. During the telephone discussion, the Auditor advised Claimant that her position (General Accountant) was going up for bid. She immediately forwarded a registered letter advising that she had not tendered a resignation and stated that she would report for work at 8:00 a.m. on Monday, September 20, 1971. Claimant visited her doctor between 2:00 p.m. and 3:00 p.m. on September 17, and produced a Doctor's Certificate at the investigation. When she reported for work on September 20, she was told by Auditor Geary to gather her personal belongings and depart as she was no longer an employee of the Carrier.

In view of Claimant's immediate and continuing contention that she did not tender a resignation, the Board concludes that Carrier's Auditor acted with undue haste and a somewhat tenacious attitude, bearing in mind his actions of September 16, when he removed journals and records from Claimant's office. It is only reasonable supervisory practice to furnish some sort of explanation to an employee for an unusual action (Award 9866-Weston).

Upon the entire record, we find that Claimant, Esther Haas, did not effectuate a voluntary resignation from Carrier's service, and that she should be returned to the service of the Carrier with her seniority and all other rights unimpaired.

We will next consider the contention advanced by Petitioner that Carrier violated the time limits by failing to render a decision within ten (10) days after completion of the investigation, citing the provisions of Rule 26:

"An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of hearing, representation and appeal as is provided in Rules 23 and 24 \*\*\*."

The pertinent provision of Rule 23 reads:

\*\*\*A decision will be rendered within ten (10) days after completion of investigation\*\*\*."

Petitioner contends that the decision rendered by Mr. Geary, dated October 22, 1971 (after an investigation held on October 7, 1971), does not meet the requirements of the 10-day proviso hereinbefore cited. Carrier argues: (1) that this contention was raised only at the highest level of appeal by Claimant's

General Chairman in his letter of December 15, 1971 end from its **language was** raised only es a side issue end not es a serious point - that it **was** not raised at the hearing of October 7, 1971 end Rule 23 (Investigations) **was** not even mentioned; and (2) Rule 23 is not applicable to the situation here involved es the hearing which **was** held wee held under the provisions of Rule 26 end **was** not en "investigation" under Rule 23 and therefore the time limits of that rule are not applicable.

In answer to Carrier's first argument, we merely point out that there was no issue of time limits **until** the untimely denial letter of October 22, 1971 received by Claimant's Local Chairman, who, Carrier readily points out, "then turned the matter over to the Organization's General Chairman Mr. W. B. Murphy who then appealed to the Carrier's highest officer, General Manager C. J. McPhail, in letter dated December 15, 1971. (CARRIER EXHIBIT "H")." We do not understand how the issue of procedural defect could have been raised et a earlier time. Carrier's argument **appears** untenable in that respect, es is the statement that it "**was** raised only es a side issue and not es a serious point." This Board does not presume **to** determine then en employee's highest **representative** deals in frivolity in handling claims end grievances in behalf of his constituents. The language of Rule 26 dispels Carrier's second argument. There are no time **limits** specifically stated in Rule 26, just es there are no time **limits mentioned in** the provisions of Rule 24 to which Rule 26 refers. However, Rule 26 **also** makes reference to Rule 23 which does set forth time limits which must, **of necessity**, be applicable to sll three rules (23, 24 end 26). Carrier **suggests** that we decide that there are no time limits in either Rule 24 or Rule 26 to govern the handling of investigations, hearings end appeals if they are not initiated by the Carrier; but are **commenced** et the request of the employee. Such a construction and application would be obviously destructive end certainly not convey the intent of the parties to the Agreement. Awards 17081 (Meyers), 17145 (Devine), 18335 (Dugan), 18352 (Dorsey), 18354 (Dorsey), 18620 (Franden) and 19275 (Edgett) are cited with approval.

Finally, we consider the claim for compensation. Carrier has stated et Page 37 of its Ex **Parte** Submission:

"As Claimant **was** formerly on en excepted **position** (i.e., not subject to seniority, promotion, displacement or assignment rules but awarded by appointment) this Board lacks jurisdiction to restore her to said position but **can** only (if it finds for the Claimant) restore her seniority **rights** end compensation et the rate of whatever position she can hold, but not et the **rate** claimed herein, end such compensation should be on the make-whole theory pursuant to the **common law** of damages.

"The doctor's certificate for September 17, 1971 showing incapacity due to 'ANXIETY' (Exhibit "D") is worthless end is nothing more then a self-serving document without probative value. **On** the basis of both a lack of employment relationship end Lack of proof of **any** reel illness, the claim for sick pay is without support."

We have held above that Rule 23 is applicable to this dispute, which provisions, under Paragraph (g), read, in part:

"\*\*he will be reinstated and be paid the earnings he would otherwise have received, less compensation in other employment."

We have determined that Claimant's employment relationship was not terminated by the 35-second conversation and rash behavior of both the Auditor and the Claimant. As to the "self-serving document", Carrier has entered nothing to the Record to prove that the document was anything but genuine. The Claimant's doctor is shown on the certificate as a Doctor of Osteopathy (D.O.) which has not been refuted by Carrier (upon whom the burden of proof rests in such affirmative defense). The doctor's name and address were entered in the Transcript and, if Carrier believed it to be other than authentic, it was incumbent on it to secure evidence sufficient to prove support for the assertions it has now made.

Claimant, Esther Haas, did not resign. She properly presented her doctor's certificate to her immediate supervisor as proof of her inability to perform work on Friday, September 17, 1971, and, in handling of the dispute on the property, Carrier made untimely denial of the claim (which fact was called to the attention of the Carrier at the earliest opportunity available to the Employees under the Agreement provisions). Based upon all these circumstances, we hold as follows:

Claimant, Esther Haas, shall be returned to the service of the Carrier, with all seniority and other rights unimpaired; that she be permitted to exercise her displacement rights, consistent with her seniority date, over any junior employee holding a position fully covered by all rules of the Agreement (we are not empowered to order that she be placed on a position not subject to the promotion, assignment and displacement rules of the Agreement); she be compensated at the rate of pay of the position on which she displaces, beginning October 22, 1971 (the date of the untimely denial heretofore discussed), and for each work day and holiday thereafter in accordance with Rule 23(g), above-quoted; and be paid one day's compensation at the rate of the position of General Accountant, for September 17, 1971, for sick leave pursuant to Rule 45 of the Agreement.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

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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: E. A. Killen  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1973.

**NATIONAL RAILROAD ADJUSTMENT BOARD**

THIRD DIVISION

**INTERPRETATION** NO. 1 TO AWARD NO. 19796

DOCKET NO. CL-20003

**NAME OF ORGANIZATION:** Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and station Employees

**NAME OF CARRIER:** The Detroit and Toledo Shore Line Railroad **Company**

Upon application of the Carrier involved in the **above** Award that this Division interpret the **same** in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First **(m)** of the Railway Labor Act, as approved June 21, 1934, the **following** interpretation is made:

**Carrier** seeks an Interpretation of that portion of the Award dealing with back pay, and questions the amount of retro-active compensation, if any, due to Claimant under the terms of Award No. 19796. In that Award we stated:

"We have held above that Rule 23 is applicable to this dispute, which provisions, under Paragraph **(g)**, read, in part:

' . . . **he** will be reinstated and be paid the earnings he would otherwise have received, less compensation in other **employment.** '

\* \* \* \* \*

Claimant, Esther **Haas**, shall be returned to the service of the **Carrier**, with all seniority and other rights unimpaired; that she be permitted to **exercise** her displacing rights, consistent with her seniority date, over any **junior** employee holding a position fully covered by all rules of the **Agreement** (**we** are not empowered to order that she be placed on a position not subject to the promotion, assignment and displacement rules of the Agreement);

"she be compensated at the rate of pay of the position on which she displaces, beginning October 22, 1971 (the date of the **untimely** denial heretofore discussed), and for each work day and holiday thereafter in accordance with Rule 23(g), above-quoted; and be paid one day's compensation at the rate of the position of General Accountant, for September 17, 1971, for sick leave pursuant to Rule 45 of the Agreement." (underscoring supplied)

Claimant states that she attempted to obtain other employment during the time in question but was not successful. Carrier alleges that its investigation showed that Claimant failed to sincerely and diligently attempt to find other employment, and as a result she did not effectively take the necessary steps to reduce the compensatory amount of damages which she seeks, by proper efforts to mitigate **same**. Accordingly, this Board is urged to find that **Claimant** has not made a reasonable, diligent effort to mitigate damages as required and that she is not entitled to any payment of damages during the period October 22, 1971 to June 16, 1973.

The Organization resists Carrier's contention, noting that at no time during the handling on the property did Carrier raise any issue regarding the monetary portion of the claim. Further, it urges that Rule 23(g) is **clear** in its terms and that Award 19796, in citing that Rule, issued a mandate to the Carrier. In addition, the Organization seeks an Award of interest on all monies due.

The request for interpretation is properly before the Board **which** has jurisdiction under the Act.

We have fully considered the contentions of both parties and all cited authority. Rule 23(g) is singularly clear. **It** states that an employee in Claimant's circumstance shall be paid the earnings he would otherwise have received, Less compensation in other employment. The Rule does not contain any further exceptions allowing a deduction for amounts the employee could have earned. While Carrier's argument has appeal, nonetheless, to concur with that argument **would** require this Board to rewrite the Agreement. We **are** unwilling to take that step. It is clear that this Board can only interpret and apply the rules which the parties have written. We **may** not add a second exception **when, in fact,** the Rule contains only one exception.

Consistent with our Award 19796, Carrier shall compensate **Claimant** at the rate of pay of the position on which she displaced, beginning October 22, 1971 and for each work day and holiday thereafter until she was restored to service, less compensation from other employment. Carrier **may** not reduce the compensation due Claimant because she did not obtain other employment **during** the period in question.

Under all of the facts and circumstances of the entire record, the Organization's request that interest be added is denied.

Referee Joseph A. Sickles, who sat with the Division, as a Neutral Member, when Award No. 19796 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD**

By Order of Third Division

ATTEST: *A. W. Paulsen*  
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1974.