Award No. 2164
Docket No. 2132

NATIONAL RAILROAD ADJUSTMENT BOARD

FOURTH DIVISION

Referee Jacob Seidenberg

PARTIES TO DISPUTE:

RAILROAD YARDMASTERS OF AMERICA

UNION BELT OF DETROIT

STATEMENT OF CLAIM: Claim and request of the Railroad Yardmasters of America that: —

> Yardmaster M. H. Cozzens be reinstated as Yardmaster with all seniority and other rights unimpaired, and be compensated at the appropriate rate for January 1, 1965, and all subsequent dates on which his seniority would permit him to work, account being improperly disqualified as a Yardmaster.

OPINION OF BOARD: The claim devolves upon the construction and application of Rule 8(d) and Rule 11(a) of the Yardmaster's Agreement. Rule 8(d) states in part as follows:

> "Employees who have established seniority as Yardmasters under this Agreement must while they are in the service of Union Belt of Detroit in any capacity, thereafter protect all Yardmaster service made available to them in the district in which they were working when they established such seniority or forfeit such seniority. . . ."

Rule 11(a) states:

> "Yardmasters will not be withheld from service for minor offenses and will not be disciplined without being afforded a fair and impartial hearing, which will be held within ten (10) days of management's knowledge of the alleged offense, however, suspension pending a hearing may be invoked where circumstances warrant. Employees involved will be notified in writing of the charge not less than five (5) days prior to date of hearing."

Some, but not all, of the operative facts giving rise to the claim are in controversy. The record reveals that the Claimant, an unassigned Yardmaster, had filled a Yardmaster vacancy on December 31, 1964 during the hours of 6:30 A.M. to 2:30 P.M. On or about 2:00 P.M. of that day, the Trainmaster notified the Claimant that he should work the 10:30 P.M. assignment that day. The Claimant contends that he informed the Trainmaster that, because of personal committment to take his mother from Detroit to Toledo that day, he would be unable to work the proffered assignment since he would not be properly rested.

The Carrier denies that the Claimant advanced any reason for refusing

the 10:30 P.M. assignment but only told the Trainmaster that he was not going to work any second tour on December 31, either for the Trainmaster or anyone else, even if it meant losing his job.

The Claimant did not work the 10:30 tour and on December 31, 1964 the Trainmaster informed him in writing that his services as relief yardmaster were thereby terminated as pre Rule 8(d).

The principal thrust of the Organization's case is that, under the existing agreement, the Carrier may not unilaterally terminate the Claimant's seniority as Yardmaster without affording him a hearing as provided for in Rule 11(a). The Organization denies that Rule 8(d) operates as to automatically deprive the Claimant of his contractual rights. It points out that there were various factual aspects of the controversy which could have been properly resolved by a fair investigative hearing. It also notes that the suspension provision of Rule 11(a) would have adequately protected any Carrier rights regarding taking immediate action against the Claimant, if the Carrier was convinced that such immediate action was necessary.

The Carrier, on the other hand, denies that it "disciplined" the Claimant and therefore it was not necessary for it to invoke the provisions of Rule 11(a). On the contrary it maintains that it complied with the specific provisions of Rule 8(d) which were directly in point with the specific issue. The Carrier further states that Rule 8(d) is a specific rule that takes precedence over Rule 11, a general discipline provision, assuming that the latter rule had any relevance at all. The Carrier argues that there is a difference in these two rules to the extent that Rule 8(d) by its terms takes effect immediately while the discipline rule requires a five day advance notice of the scheduled hearing.

The Carrier contends that the Claimant forfeited his yardmaster seniority by his own actions, i.e., his refusal to carry out a proper assignment. Under the terms of Rule 8(d) the forfeiture became immediately operative. The Carrier states that it is obligated to comply with these specific provisions of the agreement or run the risk of having claims filed against it. The Carrier further contends that there would be no useful purpose served by holding a hearing, "oral" or otherwise because the record is clear that the Claimant was available for, but declined to perform, an appropriate assignment.

The Carrier sums up its position by maintaining that there is no vested property right here involved which cannot be taken away without first invoking the due process aspects of the discipline rule. In the instant case, the parties established yardmaster seniority by Rule 8(o) and then provided for its forfeiture by Rule 8(d). The same contract rule that granted it to the Claimant could also take it away.

The Board finds, upon review of the evidence, that the Carrier's contention is ill founded that the deprivation of a yardmaster's seniority is not a disciplinary sanction, and therefore not entitled to the procedural protection encompassed within Rule 11(a). It is difficult to envisage a more severe disciplinary action that the Carrier could take against any employe in this Industry, short of outright dismissal, than to deny an employe the right to exercise his contractually awarded seniority.

It is not disputed by either side to this dispute that seniority is a right granted by the collective bargaining agreement governing the employment relationship; it is also not disputed that this contractually awarded seniority may be terminated for just cause by the employer. But since it is a contract

right, and not given as an act of grace on the part of the Carrier, it can only be taken away in accordance with the procedural standards encompassed within the concept of due process—both adjectivally and substantivally. The Carrier could, in the instant case, terminate the Claimant's yardmaster seniority for just cause, even without the warrant of Rule 8(d). All that this Rule does is explicate and concretize the Carrier's existing right as well as set forth the kind of employe misconduct which may result in his forfeiting his seniority rights. But there is nothing in Rule 8(d) which grants the Carrier the unilateral right to determine the controverted fact as to whether the employe in question has indeed forfeited his contractually awarded seniority. The determination of controverted facts affecting all aspects of the employment relationship, including seniority rights, must be resolved in accordance with the provisions of Rule 11(a) rather than Rule 8(d). This latter rule is not self operative. It does not bestow upon the Carrier the sole and exclusive right to determine finally, and without effective challenge, the controverted issue of whether the Claimant did, without just and sufficient cause, refuse to execute an appropriate work assignment.

It may well be that the Carrier's attempted disciplinary action was merited by the particular facts of the case, but this must be determined, not exclusively and solely by the Carrier, but rather in a proceeding that conforms to the procedural standards laid down by Rule 11(a). For the Board to find otherwise would be to hold that the Claimant's contractual rights are illusory rather than real. Since the record is clear that the Carrier did not comply with these aforementioned standards, its unilateral action terminating the Claimant's seniority rights as yardmaster must fall.

FINDINGS: The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier and the employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

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AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of FOURTH DIVISION

ATTEST: Muriel L. Humfreville
Secretary

Dated at Chicago, Illinois, this 28th day of November, 1966.

DISSENT OF CARRIER MEMBERS TO AWARD 2164, DOCKET 2132.

Contrary to the erroneous conclusion of the majority, the claimant was not disciplined. By his voluntary act of refusing to report for his assignment on New Years' Eve he forfeited his yardmaster seniority under a rule placed in

the agreement by the Yardmasters' organization to protect other yardmasters from their colleagues "sharpshooting" for preferred assignments or refusing to work an unpopular assignment, such as one on New Years' Eve. Rules similar to Rule 8(d) requiring yardmasters to protect service available to them are common throughout the industry. We have heretofore upheld forfeitures under such rules. In our **Award 763,** BRT v. CMStP&P, a yardmaster, Olson, after displacement from a yardmaster assignment, refused to accept assignment to a regular yardmaster position he formerly held and placed himself on the yardmen's extra board. Then after working one day as a yardman sought to exercise seniority to obtain a yardmaster assignment to his liking. The Yardmaster's local chairman protested, asserting that Olson had forfeited his seniority under a rule similar to Rule 8 (d) here. The protest was upheld by the Carrier's local officers and Olson's yardmaster seniority forfeited. The Brotherhood of Railroad Trainmen appealed the case to this Division, where the claim was denied because

> "The evidence of record shows that J. W. Olson forfeited his yardmaster seniority rights of his own volition."

President Schoh of the Railroad Yardmasters of American was Chairman of the Fourth Division when that award was adopted and agreed by voting to deny the claim that refusal to accept service automatically terminated Olson's yardmaster seniority and that Olson was not disciplined.

In **Award 1664,** BRT v. EJ&E, Referee Weston, the rule, like Rule 8 (d) here, provided for forfeiture of seniority if a yardmaster refused to accept service. In refusing to restore the claimant to the Yardmasters' seniority roster, Referee Weston said:

> "The record is clear that Claimant, an extra yardmaster at the time, refused to accept a yardmaster vacancy that developed on the two to ten P. M. trick on September 9, 1957. He remained adamant in his refusal although he was requested at least four times to accept the vacancy. His name was thereupon removed from the Yardmaster's list in accordance with the requirements of Article 12 (f). Since Claimant also held seniority as a yardman, he remained in Carrier's employ in that capacity.
>
> "In our view, there was no alternative but to apply Article 12 (f) in this situation, although we well recognize the importance of seniority.
>
> "**This is not a discipline** case and its circumstances do not warrant the application of Article 9 dealing with situations of that type. **Accordingly, there is no merit in Petitioner's contention that Carrier was in error in not following the investigation procedure established by the Agreement.**"

When the claimant advised the Trainmaster "he was not going to work any second tour on December 31, either for the Trainmaster or anyone else, even if it meant losing his job," he automatically invoked the provisions of Rule 8 (d) and voluntarily terminated his yardmaster's seniority. He was not disciplined and the provisions of Rule 11 (a) were not and are not now applicable. The award of majority is wrong and we dissent.

A. H. Deane
B. G. Upton
C. A. Conway

Chicago, Illinois
December 13, 1966

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