

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/Division of TCU
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

1. That the Atchison, Topeka & Santa Fe Railway Company violated the controlling agreement, specifically Rules 19 and 110, when they denied Carman M. D. Derting his contractual right to transfer to another location under the provisions of Rule 19 and granted Carman R. Garcia with lesser seniority than M. D. Derting the transfer under the provisions of Rule 19.

2. That accordingly, the Atchison, Topeka & Santa Fe Railway Company be ordered to compensate Carman M. D. Derting eight (8) hours per day, five (5) days per week, at the applicable hourly rate of pay for carmen retroactive to January 6, 1989 and to continue in that amount until he is again actively employed by the Atchison, Topeka & Santa Fe Railway Company on a permanent position.

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant, a Carman at Cleburne, Texas, with a Seniority date of November 2, 1959, was furloughed at the close of shift effective November 30, 1987. Within seven days of the date furloughed he filed application under Rule 19 for consideration for transfer to other points in the General Manager's territory where men are needed. On January 6, 1989, Carrier filled a vacancy at Dallas, Texas with a furloughed Carman having a seniority date of November 17, 1981.

The Claim under review here was filed contending that Rule 19 was violated when an employee with less seniority to Claimant was placed on the vacancy. The Claim was rejected on the basis that after reviewing Claimant's record, Carrier could not give favorable consideration to his assignment to the vacancy.

Rule 19 provides:

"While forces are reduced, furloughed men on a General Manager's territory will be given consideration in seniority order for transfer to other points on that territory when men are needed, providing they can qualify after reasonable trial to handle the work of the vacant position. An employee will be privileged to return to home point when recalled under the provisions of Rule 24, except that such employee will not be required to accept recall to an advertised temporary vacancy; however, he must be offered the opportunity to do so. If he declines to accept such recall to an advertised temporary vacancy, such rejection must be in writing.

Such employee, if subsequently furloughed at the point to which transferred, will not be permitted to exercise displacement rights on an advertised temporary position previously declined by him at his home point.

(b) An employee laid off in reduction of force desiring to secure employment under this rule must notify his supervisor in writing within 7 days of date of notice of reduction which resulted in his furlough.

An employee who fails to request transfer under this rule within the time limit prescribed above may also be given consideration for transfer under this rule, but not prior to acceptance or rejection of such transfer by all employees who make request in accordance with paragraph (a) hereof.

(c) Employees so transferring shall retain seniority at home point and be shown on the roster at the point to which transferred as of the date of transfer. If recalled to home point for a permanent vacancy or new position he shall forfeit seniority at point to which transferred unless he elects to remain at that point, in which event he will forfeit his home point seniority.

(d) An employee who transfers under this rule and who later resigns, while employed at the point to which transferred, will lose his home point seniority unless his resignation specifies that such resignation affects only the point to which transferred."

On September 16, 1981, a Letter of Understanding was made in connection with the Rule, indicating:

"It is agreed that those employees who file for transfer within 7 days of notice of force reduction will be considered for transfer in seniority order. Employees requesting transfer outside of this 7-day period will be given consideration in the order of their written requests are received."

At issue is whether Rule 19, and Letter of Understanding require that furloughed Carmen seeking transfer be "given consideration" solely on the basis of seniority order, as contended by the Organization, or if other factors, such as an individual's service record, may be considered, as contended by Carrier. It is our view that the language of the Rule, and the Letter of Understanding will only support a conclusion that "given consideration" means "given consideration in seniority order."

Paragraph (a) of Rule 19 clearly states that an employee will be "given consideration in seniority order." The term "consideration" is thus limited to one factor and that is "seniority order." If it was the intent of the parties to include other factors within "given consideration" it was within their power to do so with specific language. They did not include such additional factors, such as service records, within the Rule and, accordingly, it is improper to do so when selecting candidates for transfers to other points.

The terms, "consideration in seniority order," as used in paragraph (a), has only one proviso or exclusion attached - "providing they (Carman) can qualify after reasonable trial to handle the work of the vacant position." A basic tenet of contract construction is Expressio unius est exclusio alterius - when certain things are specified in the language of a rule an intention to exclude all others from its operation will be inferred. Rule 19(a) specified that consideration will be given in seniority order provided that the Carman could qualify. The inclusion of a proviso on qualifications requires the exclusion of all other considerations. Accordingly, when the first sentence of Rule 19(a) is fairly read in its entirety, it must be read to mean that Carmen possessing the ability to handle the work of a vacant position must be considered in seniority order for transfer to other points.

If any doubt remains that "seniority order" was the only factor to "be given consideration" in Rule 19 transfers, when the employee had the ability to qualify for the assignment after a reasonable trial period, it is dispelled by the September 16, 1981 Letter of Understanding. What that Understanding accomplished was to restate that Carmen who filed within 7 days of the date notified of their furlough would be considered for transfer in seniority order. While Carmen requesting transfer outside this period would be considered for transfer in the order of receipt of their request. This, for the first time, established a two track procedure of consideration. One group was to be considered in seniority order and another would be considered on the basis of the order their transfer requests were received. These are the only two factors the Understanding indicated would be used for giving consideration in transfer situations. This two track procedure, established by the Understanding, though, was silent on factors other than seniority and/or date of receipt of application for "consideration for transfer."

A number of Awards have been cited in support of the proposition that when giving consideration seniority may be passed over, as was done here. Each of these Awards have been examined and found to be inappropriate because they either did not deal with contract language similar to that here or involved promotion to positions outside the Craft. For example Second Division Award 5465 dealt with a promotion of a Carman Helper to a Supervisory position. The Rule before the Division in that case read:

"Subject to decision of Management as to qualifications for such promotion, mechanics in service will be considered for promotion to positions as Foremen."

which clearly does not restrict the exercise of managerial discretion and does not state that Carmen "will be given consideration in seniority order for transfer." Importantly, though, the cases differ in another critical aspect. Our case involves a furloughed qualified Carman seeking transfer to a Carman's position at another location while Award 5465 involves consideration for promotion to a supervisory position.

Another Award relied on in support of Carrier's arguments is Second Division Award 6131. The Rule under review there read:

"Mechanics in service having sufficient experience and ability will be considered for promotion to position of foreman."

Again comparison with Rule 19 discloses significant differences. The Rule in Award 6131 does not require that consideration be given in seniority order. In fact seniority is not mentioned in the Rule under review in Award 6131.

A third decision relied on is Second Division Award 11605. The Rule there read:

"Mechanics in service will be considered for promotion to positions of foreman."

Here again the Rule does not condition consideration in any fashion. Rule 19, of course states that furloughed Carmen "will be given consideration in seniority order."

We have also examined our Award 11986, between these same parties which some view as reaching a result contrary to that reached here. However, a close reading of Award 11986 indicates that the Claims of the Organization were denied, basically because of a lack of probative evidence to support the facts of the Claim decided there. This is not our situation here.

It is manifest that Claimant was not given "consideration in seniority order" for the vacancy at Dallas. For if he had been given "consideration in seniority order" he would have been placed on the assignment which was given to a Carman with less seniority. Accordingly, we find that the Agreement was violated and the Claim will be sustained as presented.

A W A R D

Claim Sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of March 1991.



CARRIER MEMBERS' DISSENT
TO
AWARD 12025, DOCKET 11935
(Referee Fletcher)

The Majority in this Award has taken the clear language of Rule 19(a) stating that:

"...furloughed men on a General Manager's territory will be given consideration in seniority order for transfer to other points..."

to mean that the senior man must be assigned without any other regard. Such a conclusion is in error for the following reasons.

First, the rule provision has been interpreted on the property to mean that individuals will be considered for transfer in seniority order. Carrier, on the property, referred the General Chairman to prior instances where he, the General Chairman, "admitted to having knowledge of our practice with respect to Rule 19...that the Carrier is not contractually required to accept for transfer anybody and everybody who files a Rule 19 transfer request." (Emphasis added)

Second, there is no evidence in the record of this case that Claimant was NOT considered in seniority order. The fact of the matter is that Claimant was senior to Carman Garcia and was considered first. That he was not assigned to the vacancy was due to a review of Claimant's record which included discipline, personal injuries and absenteeism. While Claimant took issue with the validity of some of the items of record, Claimant also asserted that, in considering the record, the Carrier had neglected "to

consider" a number of good reports. Obviously, such clearly acknowledges that the Claimant, who was also the Local Chairman, recognized that the "consideration" afforded by Rule 19, included other records and material beyond strict seniority. What the Claimant objected to was that the Carrier did not consider all of the record; not that it was improper to use such records when "considering" him for transfer.

Third, had the parties meant that consideration was limited only to seniority ranking then the provision would have been shortened to:

"the senior furloughed man making the request will
will be assigned"

The error of finding the only connection to be made with consideration is seniority order ignores the language of the rule itself, prior practice under the rule and other precedent.

Fourth, the issue in this case, as is noted at page 3 of the Award, was whether Rule 19 limited "consideration" to seniority order or could include other factors. Thus, the issue joined by the parties was essentially what could be included in consideration; not whether the consideration of such other factors was meritorious. Thus, the discussion at the bottom of page 3 and top of page 4 concerning qualifications and provisions other than Rule 19(a), are misplaced.

Fifth, the citation of Awards 5465, 6131, 11605 was to note the interpretation this Board has placed on the word "consideration"; i.e., that consideration did not mean assigned.

The dictionary definition of consideration is to give careful thought. It is a process, not a result. Rule 19 requires the process; it does not dictate the result. Therefore, that such prior Awards did not deal with the identical situation here, is understandable, but such does not detract from the valid purpose for which they were cited.

Finally, the Majority noted that Award 11986, involving the same parties and the same rule, was distinguishable because the Organization failed to support their violation of Rule 19 with probative evidence and that such is not the situation in this matter. However, Award 11986 involved the claim that:

"...the seniority rights of the Claimants were violated when Carrier allowed two junior Carmen to transfer in violation of Rule 19."
(Emphasis added)

and the Board did note in its decision that the Claimants:

"...were not accepted due to serious problems in their employment records. The Carrier documented with a list of problems and past practice for its action." (Emphasis added)

That the Board found other evidence of record that Claimants did not meet the initial requirements of Rule 19 does not warrant the conclusion that Award 11986 is not applicable in this case. In both dockets, the Organization has argued and asserted that Rule 19 assignments are limited only to a consideration of seniority standing and nothing more. It is error to conclude that there is no inconsistency in comparing both Awards.

In view of all the foregoing we register our Dissent.



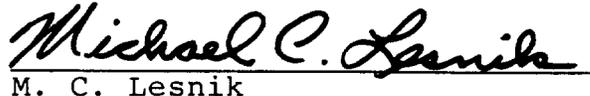
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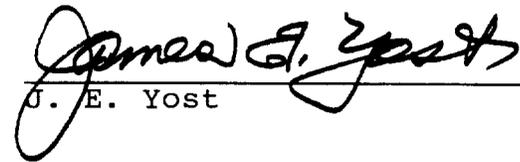
M. W. Fingerhut



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M. C. Lesnik



J. E. Yost