

The Second Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

Parties to Dispute: { System Federation No. 7, Railway Employees'  
 { Department, A. F. of L. - C. I. O.  
 { (Carmen)  
 { Soo Line Railroad Company

Dispute: Claim of Employees:

1. That under the current agreement the carrier violated Rules 31, 32, 112 and letter of understanding dated January 22, 1948, File 141-5, when they demoted temporary Carman Donald T. Susick to laborer, March 7, 1977.
2. Mr. Susick is now claiming to be returned to his position of temporary Carman and made whole for his wage loss and time computed towards his carman seniority date.

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 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.

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

Claimant was employed by the Carrier as a Laborer on April 25, 1976. He was promoted to temporary Carman on January 21, 1977 and was then demoted to Laborer on March 7, 1977. At the time of his demotion, the Organization alleges that there were two other employes who had been also promoted from Laborer still in the position of temporary Carmen with less seniority than Claimant.

The Carrier claims that the Claimant, during his six and a half weeks in the position of temporary Carman, did not perform in a satisfactory manner and had a poor attendance record. Nothing in the Agreement, argues the Carrier, prevents the Carrier from demoting an employe when he fails to qualify during a trial period.

The Organization claims violation of Rules 31, 32, 112, and a letter of understanding between the Carrier and the Organization dated January 22, 1948.

Rule 31 deals with the presentation of a claim, and no showing of violation of this rule is made. Rule 32 deals with disciplinary action. The Carrier properly argues that demotion due to alleged disqualification does not, in and of itself, constitute discipline. In the particular circumstances of this dispute, the Board agrees. Claimant was not disciplined. The question for resolution is whether or not the Carrier had the right, under the Agreement, to set back the employe to Laborer within the short period he served as temporary Carmen.

Rule 112 states in part as follows:

- "1. In the event of not being able to employ carmen with four years experience and the regular and helper apprentice schedule not providing men enough to do the work, the forces may be increased in the following manner:
2. Regular apprentices who have served four (4) periods of 130 days each and helper apprentices who have served four (4) periods of 130 days each may be promoted to mechanics at point employed and will be paid the minimum rate for carmen, seniority to govern.
3. (a) Helpers who have had four or more years' experience at point employed may be promoted to mechanics, they to receive the minimum rate for carmen and be given an opportunity to learn the trade, seniority to govern.  
  
(b) Helpers so advanced will not accumulate seniority rights as mechanics and their helper rights will be protected until eight (8) periods of training of one hundred thirty (130) days each as carmen have been completed. If retained in the service as carmen, seniority rights as mechanics will date from the time of completion of such training, and all rights as carman helpers will be forfeited.
4. If the above does not provide sufficient men to do the work, men who have had experience in the use of tools may be employed. They will establish no seniority rights as a carman until they have completed eight (8) periods of 130 days each training as a carman but will receive the minimum rate for carman during the training period and may be displaced at any time during this training period when four-year carmen become available."

In Section 4 of Rule 112, no mention is made as to limitations of Carrier's rights in demoting an employe who fails to qualify for the new position. Such reference is, however, found in Rule 15 which deals with the filling of vacancies by employes already in the service of the Carrier. Rule 15 states:

"RULE 15

1. When new jobs are created or permanent vacancies occur in the respective crafts, the oldest employees in point of service shall, if sufficient ability is shown by trial be given preference in filling such new jobs or any vacancies that may be desirable to them. All permanent vacancies or new jobs created will be bulletined. Bulletins must be posted seven (7) days before vacancies are filled permanently. Employees desiring to avail themselves of this rule will make application to the official in charge, and a copy of the application will be given to the local chairman.
2. Temporary vacancies of thirty (30) days or more will be filled by assignment for seven (7) days. Senior qualified employees making application will be assigned in accordance with Paragraph 1 of this rule.
3. An employee exercising his seniority rights under this rule will do so without expense to the carrier; he will lose his right to the job he left; and, if after a fair trial he fails to qualify for the new position, he will have to take whatever position may be open in his craft.
4. Employees qualifying to fill temporary vacancies will revert to their former positions at the expiration of such temporary vacancy."

Section 3 of Rule 15 clearly refers to a "fair trial", without spelling out any particular length of service.

The Organization also relies upon a memorandum of understanding dated January 22, 1948 which commences, "With regard to promoting helpers at Shoreham to temporary carmen:" and states in conclusion:

"It was also agreed that any helper that was promoted to temporary carman, and after a fair trial or a period of 30 days it developed that the helper promoted to temporary carman could not qualify, he would be demoted to helper. In each case the foreman would consult the local committee who should agree before any demotions are made."

The Organization claims that this puts a limit of 30 days as a trial period, and since the Claimant served more than 30 days on the new position, he may not be demoted out of seniority. The Board finds two difficulties with this argument. First, the 1948 memorandum of understanding clearly refers to helpers. Claimant was not a helper, but a laborer. While logic may or may not suggest that the promotion of a laborer should fall under this understanding, the Board is not empowered to make such extension. If the parties wish or had wished to include categories other than helper,

it is they -- not the Board -- who must make the change. Second, the language, even if applicable to a Laborer, is not as precise as the Organization reads it. It states "after a fair trial or a period of 30 days". Without pressing the matter further, this appears to state that a helper's demotion will come only after a certain period for adaption to the new position.

Nor is the reference by the Carrier to Rule 38 of relevance here. This deals only with newly hired employes (not applicable to the Claimant) and the reference to a 60-day period concerns approval of the employe's application only.

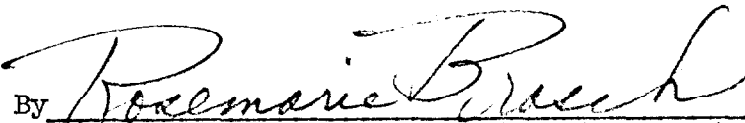
The Board finds that the Carrier's action in this instance is not in violation of any rule of the applicable Agreement. The Carrier offered explanation concerning the employe's performance as to why it took the action. The action was not arbitrary or capricious, and the Organization has made no showing that it was unreasonable or discriminatory. Cited rules and the 1948 memorandum are not applicable in this dispute.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Second Division

Attest: Executive Secretary  
National Railroad Adjustment Board

By   
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of November, 1979.