Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 12139
SECOND DIVISION Docket No. 12004
91-2-90-2-109

The Second Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

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

STATEMENT OF CLAIM:

1. That the Atchison, Topeka and Santa Fe Railway Company violated the controlling Agreement, specifically Rules 19 and 110, when they denied Carman Joe Turner his contractual right to transfer to another location under the provisions of Rule 19.

2. That accordingly, the Atchison, Topeka and Santa Fe Railway Company be ordered to compensate Carman Joe Turner eight (8) hours per day, five (5) days per week, at the pro rata rate of pay for Carmen, retroactive to sixty (60) days prior to the date of claim, August 7, 1989, and to continue in like amount until he is again actively employed by the Atchison, Topeka and 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.

On May 23, 1989 the Claimant attempted to return from a furlough status to fill a Carman vacancy under Rule 19. Carrier advised, on May 24, 1989:

> "After review of your work record and giving you consideration under Rule 19, I cannot give you favorable consideration to fill a vacancy at Topeka Shops."

Thereafter, the Carrier continued to deny the request. See, for instance the Superintendent's June 8, 1989 letter:

"Being in need of people that are able and willing to work 100% of the time is the reason I have not favorably considered your request for Rule 19 transfer."

The Organization argues that Rule 19 deals specifically with seniority and qualification to perform a particular job, but does not permit the Carrier to introduce other extraneous matters, such as work records and attendance figures. To do so would ignore the clear wording of the Rule and in effect would constitute a rewriting of the contractual obligation.

To the contrary, the Carrier contends that it is only required to consider an employee in seniority order and in this case, it did consider the Claimant but found him wanting in consideration of his past record.

Both parties have relied upon recent Awards of this Division. Carrier notes that denial Award in 11986 supports its position. Certainly that Award considered a Rule 19 dispute between these parties, however, it turned upon a failure of probative evidence to support the facts of the Claim. (See final paragraph of Award 11986)

The Organization has relied upon sustaining Award 12025.

"Rule 19

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, provided they can qualify after reasonable trial to handle the work of the vacant position."

The above cited Second Division Award 12025 considered a Rule 19 dispute between these same parties which is remarkably similar to this case, since the Claimant there was furloughed and an employee with less seniority was placed on the vacancy because, "...after reviewing Claimant's record, Carrier could not give favorable consideration to his assignment to the vacancy." (Underscoring supplied)

The issue in the Award was whether the employee must be "given consideration" solely on the basis of seniority order, or if other factors, such as an individual's service record may be considered. The Award stated 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'." It based that conclusion in part on the reasoning that:

> "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 Award then recites that the only consideration that can be considered is one of qualification, and thus, no other considerations are proper.

Award 12025 considered and rejected other Awards as not being pertinent to the issues raised in these disputes.

We have considered the Carrier Members' Dissent to Award 12025 which repeats the same basic arguments advanced in this case.

It is established in this industry, that we should not disturb the findings of a prior Award which resolve a dispute between the same parties concerning the same issue, unless the prior finding is palpably erroneous. This is the case even if the second Award might have reached a contrary result had we heard the case in the first instance. The stated concept is geared to insure a predictability in the resolution of labor-management disputes.

We cannot find that the cited Award is palpably erroneous since it finds basic support in the Rule under review, and Award 11986 was limited to a lack of probative evidence of record to support the factual allegations.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of September 1991.

CARRIER MEMBERS' DISSENT
TO
AWARD 12139, DOCKET 12004
(Referee Sickles)

Claimant had an absenteeism rate of 50% and although he was considered in seniority order he was not assigned by the Carrier to the position.

In the handling of this case as well as in Awards 11986 and 12025, it was an undisputed fact of record that Carrier had considered the entire record of the individuals who made Rule 19 transfer requests. Also, it was undisputed in all three cases that the Claimant "was given consideration in seniority order" as is required by Rule 19 but was not assigned.

While we do concur with the Majority's desire, "...not disturb the findings of a prior Award which resolve a dispute..." it is very clear that Award 12025 interpreted the provision of Rule 19 by inserting language that is not in the rule. We pointed out this error in our Dissent to that Award.

This Award compounds the error made in Award 12025.

We Dissent.

P. V. Varga

M. W. Fingerhut

R. L. Hicks

M. C. Lesnik

J. E. Yost