

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward M. Sharpe, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that:

(1) The Carrier violated the agreement when it refused Wayne H. McKeown the right to a fair and impartial hearing in connection with his protest that he was unjustly treated when the Carrier disqualified him as an Extra Gang Foreman;

(2) The Carrier be required to allow Wayne H. McKeown a fair and impartial hearing relative to his being disqualified as an Extra Gang Foreman;

(3) Wayne H. McKeown be allowed, in addition to compensation received, eight hours' pay at the applicable Extra Gang Foreman's rate of pay, beginning on October 22, 1951, and for each subsequent day on which he is not permitted to occupy the position of Foreman on Extra Gang No. 6, because of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Under date of September 28, 1951, the Carrier issued the following assignment bulletin:

"Terminal Railroad Assn. of St. Louis
Office of General Roadmaster

September 28, 1951.

Mr. H. J. Clark)
Mr. Linzey Cannon) Supervisors.
Mr. J. T. Mersmann)

Referring to Bulletin No. 328 dated September 20, 1951, wish to advise, the position of Foreman Extra Gang No. 6, Union Station District, which has been up for bid, has been awarded—Wayne McKeown.

(Signed) W. H. Horner

Cy: Col. H. Austill
Mr. J. Wicks
Mr. R. E. Stringer, Gen. Chairman"

W. H. Horner
General Roadmaster.

ant's assignment is part of the intricate interlocked layout through which passenger trains enter and leave the Union Station.

As stated by the Chief Engineer to the General Chairman in his letter November 9, 1951, Exhibit A, moving up from laborer to foreman within eighteen months without previous track experience was rapid advancement. The Chief Engineer also stated:

"His failure was, I think, simply due to inexperience and no doubt with more experience and an opportunity he may later qualify as a foreman on a lighter job and then on an extra gang in the Mill Creek Valley." (Union Station territory.)

However, the claimant has failed to take advantage of the opportunity suggested by the Chief Engineer by failing to make application for three different foremen's positions in less complicated territory advertised since his disqualification, resulting in three junior assistant foremen being assigned to them.

Our position is fully summed up in our letter to the General Chairman December 26, 1951, Exhibit B. As our actions were fully in accord with Rule 9, there is no basis for the claim and it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant W. H. McKeown was employed as a track laborer on May 5, 1950 without previous experience. He was made an assistant section foreman July 1, 1950 and was made foreman of Extra Gang No. 6 on September 28, 1951. On October 15, 1951 the Track Supervisor instructed claimant to get material ready to renew 13-15 puzzle on the high speed main line west of Jefferson Avenue, after which he accompanied him to the site and discussed the work that was to be done. Because of dissatisfaction with the work being done, the Carrier demoted claimant on October 19, 1951 to his former position as assistant foreman.

It is the position of the Employees that the Carrier violated the intent and purpose of Rule 22 when it failed and refused to allow claimant's request for a fair and impartial hearing and the summary dismissal from the position he held, on the verbal charge of being disqualified to continue in the position of foreman.

It is the position of the Carrier that claimant was not suspended, dismissed or charged with any offense and that Rule 9 as no written notice of disqualification or hearing as required by Rule 9.

The Employees contend that under Rule 22 (g) "An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided in this rule", he has a right to a hearing in the same manner as if his case was one of **discipline**, by dismissal or suspension.

Rule 9 reads as follows:

"Employes accepting promotion will be given a fair chance to demonstrate their ability to meet the practical requirements of the position, and failing to qualify within sixty (60) calendar days, may return to their former rank in accordance with the seniority provisions of this agreement."

It is the position of the Carrier that the claimant was not suspended, dismissed or charged with any offense, but due to inexperience he failed to demonstrate his ability to act as foreman and that the Carrier is the sole judge of qualifications relating to promotion.

Many cases have been decided in which it was held that the Carrier has the responsibility of determining the fitness and ability of the employe and

the Board will not interfere with the Carrier's decision so long as it does not act in an arbitrary and capricious manner in making the decision. See Award 5603.

Rule 22 is entitled "Discipline and Grievances". It is our opinion that the above Rule is limited to discipline and grievances between the Carrier and its employees.

Rule 9 deals with failing to qualify for promotions. The Rule provides that an employee has no longer than 60 days to demonstrate that he is entitled to a promotion by demonstrating his qualifications for the position he aspires to. The Rule does not mean that the Carrier cannot disqualify an employee prior to the end of the 60 day period if the employee demonstrates his unfitness for the position.

It is our opinion that the facts in this case are to be decided under Rule 9 and that it has not been shown that the Carrier abused its discretion in failing to qualify claimant.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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

The Carrier did not violate Rule 22 of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of January, 1954.