

Award No. 6892

Docket No. CL-7015

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

**THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC
RAILWAY COMPANY**

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

(a) The Carrier violated the Agreement when, on November 7, 1952, it removed Mr. F. L. McKamey from his regularly assigned position of Depotmaster, Chattanooga, Tennessee Freight Station, and

(b) The Carrier shall now be required to restore Mr. F. L. McKamey to his regularly assigned position and compensate him for all loss of earnings caused by his removal from the position.

EMPLOYEES' STATEMENT OF FACTS: Claimant F. L. McKamey has a clerical seniority as of October 9, 1917. He filled the Depotmaster position from March 15, 1952, to June 24, 1952, due to the illness of the regular incumbent and, on June 25, 1952, after the death of the regular incumbent, was permanently assigned to the position.

On November 7, 1952, Agent C. P. Blanks wrote Claimant McKamey that he was being disqualified. Hearing or investigation was requested and held on November 17, 1952, Mr. I. L. Pratt, Superintendent, presiding. At the close of the hearing, Mr. Pratt announced that he was sustaining the decision of Agent Blanks in the disqualification of Claimant McKamey and, on November 24, 1952, confirmed the decision in writing. Effective December 5, 1952, Claimant McKamey bid on and was assigned to position of Assistant Depotmaster.

Claimant McKamey's claim for restoration to the position and payment for wage loss sustained was appealed up to and including the highest officer of the Carrier designated to handle such disputes. The claim was discussed in conference on September 4, 1953, the Carrier declining to allow the claim. Correspondence in connection with the claim, as well as a copy of the record of the hearing, and a conference called by Agent Blanks on September 11, 1952, is attached hereto and identified as Employees' Exhibits "A" to "U" inclusive.

possess merit, capacity and qualifications (training) sufficient to enable him to fill the assignment of depotmaster at Chattanooga. Hence he was disqualified and removed from the position. This decision was appealed to the highest officer designated by the Carrier to whom appeals may be made who agreed with the decision of the employing officer. Under the clear and unambiguous language of Rule 16 his decision was final. In this situation, the Board does not have authority to make a decision different from that made by the agent and concurred in by the highest officer designated by the Carrier to whom appeals may be made.

(d) There was no violation of the clerical agreement here in evidence when Clerk McKamey was assigned to the vacancy in position of depotmaster and given a fair trial thereon, after which he was disqualified; nor was the Carrier's decision in disqualifying Mr. McKamey capricious, arbitrary or unreasonable.

(e) The record shows without question of doubt that Mr. McKamey's services as depotmaster were entirely unsatisfactory. Unsatisfactory service is ample cause for dismissal. Mr. McKamey was not dismissed. Thus the Carrier extended leniency to him in simply disqualifying him as depotmaster, rather than dismissing him. In these circumstances, he should not now be heard to complain.

(f) Claim being wholly without merit and unsupported by the clerical agreement in evidence and principles of prior awards of the Board should be denied. The Board should so hold.

Carrier in making response to the notice of the Third Division, not having seen the Brotherhood's submission, reserves the right to submit such additional evidence and oral or written argument as to it may seem necessary for a complete presentation of the case.

All evidence in Carrier's submission has heretofore been made known to employe representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: This dispute is before us on claim filed by the System Committee of the Brotherhood on behalf of Mr. F. L. McKamey, who has seniority dating from October 9, 1917. The important facts, in brief, are as follows: The regular occupant of the position of Depotmaster was stricken ill, and during his absence Claimant was temporarily assigned to the position, March 15, 1952 to June 18, 1952. The Depotmaster died and the vacancy in the position was bulletined for bids. Claimant McKamey bid on the position and was assigned to it on June 25, 1952. On November 7, 1952, the Agent in charge disqualified McKamey as Depotmaster for the stated reason of lack of fitness and ability. On November 12, 1952, in accordance with terms of the Agreement, Claimant addressed a letter to his superior, the Agent, requesting that he be given a hearing and that Superintendent of Terminals, Pratt, conduct the hearing.

Prior to this time and on September 11, 1952, a conference had been held of which record was made. Present at this conference were all supervisory employes, including Claimant. The purpose being to check conditions on handling of freight, Chattanooga, Tennessee Freight Station. This conference is mentioned by reason of the fact that it is later referred to in the investigation held November 17, 1952. The original ruling of disqualification was affirmed by the November 17, 1952 hearing.

At the outset let it be said that we are not in agreement that the proposition made on behalf of Carrier is correct in this case, to-wit: That this claim falls into the category of cases where the Organization has the burden of proof as to qualification, merit and capability under the seniority rules, or other qualifying abilities as provided in such seniority rules. This, by

reason of the fact that here we are dealing with a claim involving such qualifications of an employe who filled the position for some three months on a temporary basis and then when a vacancy occurred, and was bulletined, was assigned the position. Under these circumstances we are of the opinion that the burden of showing by proof shifts from the Organization to the Carrier and must be assumed by it. In other words, Carrier here has an affirmative defense.

The investigation covers many pages in the record and to go into detail with reference to all its ramifications would needlessly prolong this opinion.

The important factors as we view the investigation is that based on the conference of September 11, 1952, of which record was made, and at which it is contended that someone was responsible for employes loafing on the receiving platform, the dirty condition of certain cars to be loaded, and the costs of operating, which Carrier contends were too high. As far as can be ascertained from the record of the conference, specific blame was placed on no particular individual, however, later at the investigation it is made to appear that Claimant was the person at fault.

In this operation supervision is given to the Agent, Assistant Agent, Depotmaster and Assistant Depotmaster and the record shows conflicting supervision in some of the operations. Claimant is considered at fault for the loitering of employes who were not originally assigned by him to the job they were doing, these employes having been assigned in some instances before he came on duty. However, there are many such incidents which are given consideration in the questions and answers taken at the hearing. It is difficult in reading the transcript to discover just the precise matters in which Carrier's officials consider Claimant failed, with the exception of unsupported statements in the nature of conclusions relative to costs of operating. It would have been helpful if the various kinds of commodities handled were listed with a description of the same given in relation to LCL and other types of freight handled and conditions involving the handling of various items. The transcript of the investigation is not complete in this respect. Later in 1954 costs are shown but we do not consider this in the light of proper evidence as these costs were not presented at the hearing and hence there was no opportunity given for cross-examination which might have given a better insight into this question. Also injuries by the month are shown in the same fashion.

In viewing the record as a whole we do not consider that Carrier has met the burden of proof necessary to show disqualification of Claimant. Certainly a man who has engaged in this or similar work for Carrier since 1917 and who served as Assistant Depotmaster and temporarily as Depotmaster for three months, if he were, as Carrier now alleges, so incompetent, the question naturally arises why were not these things apparent at the time he was assigned the bulletined position. The record shows that supervisory officials were doubtful on this question. If so, that was the time to raise the question now before us for determination. If such had been the procedure we would view the burden on Claimant to show qualification, but where the situation exists as here we deem it proper that Carrier assumes an affirmative defense. The rule on disqualification is given consideration, however, the record here does not seem to meet the requirements for disqualification. As above stated the evidence for disqualification is too general and does not pin point the specific failures relied upon for disqualification.

Therefore, it is concluded claims (a) and (b) should be sustained.

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 Employes involved in this dispute are respectively Carrier and Employes 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

Claims (a) and (b) sustained as per Opinion.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of February, 1955.