# Award No. 9415
# Docket No. CL-8213

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Merton C. Bernstein, Referee

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## PARTIES TO DISPUTE:

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

## CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

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

1. Carrier violated the Clerks' Rules Agreement and acted in a discriminatory manner when it removed Employe E. J. Meier, Jr. from Relief Position No. 2 after he had been assigned to that position by bulletin and had occupied the position for 31 days.

2. Employe E. J. Meier, Jr. be compensated for eight (8) hours for May 23, 1953 and for each subsequent day at the pro rata rate applicable to the position he would have filled had he been permitted to work Relief Position No. 2.

**EMPLOYES' STATEMENT OF FACTS:** On April 17, 1953 the Carrier issued Bulletin No. 90 advertising Relief Position No. 2, Employes' Exhibit "A".

On April 20, 1953 Employe E. J. Meier Jr., seniority date of October 2, 1941, was assigned to Relief Position No. 2 as per Employes' Exhibit "B".

Employe Meier worked Relief Position No. 2 from April 22, 1953 through May 22, 1953, covering a period of 31 days.

Prior to being assigned to Relief Position No. 2, Employe Meier occupied Relief Position No. 23 for approximately three years. Relief Position No. 23 was assigned to relieve Position No. 435 on Saturday; and while performing the relief work on Position No. 435, Employe Meier was required to operate the teletype machine from one to two hours. Employe Meier was also used on numerous occasions to operate the teletype machine on an overtime basis.

by Assistant Agent Bishop under date of November 23, 1954 which not only supports our statement above but also clearly indicates the lack of ability on the part of Mr. Meier for Position 290.

Because of the increase in teletype work in connection with the yard operations at Bensenville and because the Carrier had experienced difficulty in securing and retaining the services of qualified teletypists on positions which included teletyping, an understanding was entered into with the General Chairman whereby certain positions were reclassified as "Teletype-Train Clerk" and the rates of the positions were increased. Mr. Gilligan's letter dated April 1, 1953, which is a portion of Carrier's Exhibit "B", will confirm that understanding. It will be clear, therefore, that it was necessary that qualified teletype clerks occupy these positions and in fact, that was the specific purpose of the understanding with the General Chairman and the adjustment in rates of the positions and the Carrier had a right to insist that Position 290 be occupied by an employe who possessed the necessary fitness and ability to satisfactorily and efficiently discharge the duties of the position, not only on Friday, Saturday, Sunday, Monday and Tuesday but also on Wednesday and Thursday, the latter two days being included in the relief assignment. It cannot be sincerely contended that an employe who uses a finger on each hand in teletyping is a qualified teletypist. The action of the Carrier in disqualifying and removing Mr. Meier from Relief Position 2, which included relief on Position 290, was not discriminatory but was in accordance with employe Meier's lack of sufficient fitness and ability to properly perform the dution of the position. Numerous awards of your Honorable Board have held it is the Carrier's responsibility to determine the fitness of an applicant and that it is not the function of your Honorable Board to substitute its judgment for that of the Carrier and particularly would this be the case where, as here, the preponderant duties of the position included teletyping and the claim is in behalf of an employe who performed such teletyping work with one finger on each hand or, as is commonly referred to, the "hunt and peck" system.

There is no basis for the claim and the Carrier respectfully requests that it be denied.

All data contained herein has been presented to the employes.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The Claimant contends that he was disqualified from Relief Position No. 2 and denied an "unjust treatment" investigation which he had requested, both in violation of Rules 8 (a) and 22 (g) of the Agreement.

The Carrier contends that the Claimant was disqualified because he was not capable of discharging the duties of the position, that its determination of disqualification is not reviewable and is not the proper subject of an "unjust treatment" investigation, which therefore, was properly denied.

**The Facts and Allegations**

Employe Meier was assigned to Relief Position No. 2 on April 20, 1953 and worked in it from April 22 until May 22, 1953. On that day, the Claimant alleges that Assistant Agent William Bishop told him, in the presence of Local Committeeman Hamann, that he would be disqualified from Relief Position No. 2 unless he withdrew several time claims. Claimant and Hamann

allege that Meier refused to withdraw the claims. Mr. Bishop allegedly stated that he was acting pursuant to the instructions of Supervisor Doyle. Later that same day Mr. Bishop wrote and gave Mr. Meier a letter informing him that Meier was disqualified.

About nine days later Mr. Meier wrote to General Car Supervisor Doyle requesting an investigation of his disqualification "in accordance with Rule 22 (g)".

On June 2, Mr. Doyle rejected the requested investigation on the ground that "As your disqualification on relief position No. 2 is covered by the schedule rules, rule 22 (g) to which you refer has no application in this case." If Claimant's allegations are correct, Mr. Doyle would have been familiar with the time slip contention.

Thereafter the dispute was progressed in the usual manner. During these negotiations, Mr. Bishop signed a letter denying he had made the threat that if Mr. Meier did not withdraw his time claim he would be disqualified. Employes contend that this denial, coming eighteen months after the occurrences, is not credible. Carrier contends that the threat had been denied long before and that the signed statement merely put into documentary form information it had had and made known. It was presented on the property in timely fashion.

The Carrier proposed in December 1954 to arrange for a test of Claimant's teletyping skill to dispose of the qualification dispute. Claimant and his representative declined the test on the ground that he was out of practice and the test would not be representative of his ability on the job.

Both parties presented written statements and arguments concerning the ability of the Claimant to do the tasks in Relief Position No. 2. For example, Carrier states that Claimant teletyped by the "hunt and peck" system. Claimant's representative contends this but points out that he always completed his teletype work in Relief Position No. 2 and the position he held before that within regular hours. None of the evidence is conclusive on the issue of qualification.

**The Rights Conferred by Rule 22 (g)**

The basic issue in this case is whether Employe Meier had a right to the hearing he claimed under Rule 22 (g). It provides:

> "An employe, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation, hearing and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within thirty (30) days from cause of complaint."

An initial understanding of the import of the provision requires comparison with Rule 22 (a), which provides in part:

> "An employe who has been in the service more than sixty (60) days, or whose application has been formally approved, shall not be disciplined or dismissed without investigation and prior thereto the employe will be notified in writing of the precise charge."

**(The Rule goes on to specify the procedure for invoking and conducting the investigation.)**

The first difference in the two provisions is that Rule 22 (a) is limited to "an employe who has been in the service more than sixty (60) days, or whose application has been formally approved". Rule 22 (g) is not so limited; it applies to "an employe, irrespective of period employed".

Subsection (a) is limited to cases of discipline or dismissal. Subsection (g) applies to an employe "who considers himself unjustly treated". Under (a), an employe has to be charged by the Carrier; under (g) the employe initiates the proceeding by his written request. Thereafter the procedures are the same.

Clearly, subsection (g) of Rule 22 is a great deal broader than subsection (a). Equally clearly, an employe who is the subject of a dismissal or disciplinary proceeding need not resort to subsection (g). It is conceivable (but unlikely) that subsection (g) prescribes the procedure for an employe who claims he has been dismissed or disciplined without being accorded the procedure provided by subsection (a). See, for example, Award 3053 (Carter) in which the Carrier contended that the Employe had resigned and the Employe contended she had been dismissed without a proper investigation. The Employe requested a hearing under an "unjust treatment" provision which is similar to, but not the same as, the one before us and was held to be entitled to it.

**Meaning of the Limitation of Rule 22 (g)**

There is some language that is difficult to interpret in Rule 22 (g). The phrase "other than covered by these rules" is a **limitation** whose meaning is anything but clear. An analogous provision in another clerks' agreement provides: "An employe who considers himself **otherwise unjustly treated . . .**" and goes on to confer the same right to hearing and appeal. (Quoted in Award 3053 (Carter).) Its physical relation to the discipline-discharge-investigation rule (which in other respects is the same as in the Agreement before us) is approximately the same as that between the two provisions in this case.

So, one possible construction of the apparent exception is that it shows that the procedure is in **addition** to the discipline-discharge cases procedure.

In another Clerks' case, Award 7412 (Coffey) the text of the analogous rule is:

> "Grievances—Rule 34. An employe who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation," etc.

The difference between Rule 34 in that case and Rule 22 (g) in this case is that the former uses "otherwise" and here the word is "other".

Rule 34 would seem to be read as "treated otherwise" (i. e. other than discharge or discipline) but in that event the words should not be separated by a comma. The language in that case seems to have been construed to mean that Rule 34 applies to cases not involving other rules—but the interpretation placed upon it is by no means clear.

In Award 7283 (Cluster) a somewhat similar fact situation existed. There the Claimant was disqualified and claimed a right to a hearing under the discipline rule of the Agreement (the parties and the provisions in that case were not the same as those here). It was held that disqualification for inability to perform the work of the position was not a discipline case. The opinion observed "Regulation 7-B-1, which deals generally with the rights of employes who feel that an injustice has been done them in other than discipline matters was available to Claimant". Such a hearing had not been requested and perhaps was not directly in issue so that the observation is probably dictum; but it is of interest.

The provision in that agreement provided:

> 7-B-1. (a) "An employe who considers that an injustice has been done him in matters arising under this Agreement, other than those covered in Regulation 4-T-1 and in Regulation 7-A-1, or a representative properly authorized by him to act in his behalf, may present his case, in writing, to his superior within ten (10) days after the date of the occurrence in question."

It is also pertinent to observe that it was a disqualification provision which the Board intimated was the proper subject of a rule similar to but not the same as Rule 22 (g).

It can be seen that the general scheme of the agreement in the foregoing case and that in this case are the same. However, the "unjust treatment" provision is more precise and clear in Award 7283. As an analogy, the agreement and its interpretation in Award 7283 indicate that matters dealt with by a contract are subject to the "unjust treatment" provision and that, specifically, disqualification may be made the basis of an "unjust treatment" investigation.

In CL-8543 (in which Award 8422 (Lynch) was rendered) the Carrier argued that:

> "Analysis of Rule 22 (g) will show that while this rule gives an employe a right to an investigation when he considers himself unjustly treated it **specifically excludes unjust treatment that is covered by these rules.**" (Emphasis supplied.)

The argument continued that the words "other than covered by these rules" excluded more than discharge and discipline cases because the words "these rules" not "this rule" were employed. Essentially the same arguments were made in this case.

We agree that more than discipline and discharge cases, which are covered by Rule 22 (a), are embraced by the limiting phrase of Rule 22 (g).

But the argument itself is unclear and the lack of clarity flows from the incompleteness of the Rule which it paraphrases. It is not "unjust treatment" "covered" by the rules that is excluded for the rules surely are not meant to provide for unjust treatment. Is it then "claims" of unjust treatment? That can hardly be, because it is just such claims that are the subject of Rule 22 (g) and the exclusion would be coextensive with the rule.

Is it then claims of unjust treatment **not covered** by the rules? The argument seems to claim that **anything** subject to the rules is meant to be

excluded from Rule 22 (g) and only subjects not covered by the rules can be the basis of an "unjust treatment" proceeding.

This would seem to claim too much. For example Rule 23 (f), prohibiting arbitrary refusals of leave, specifies that a complaint of such refusal "may be handled under the provisions of Rule 22 (g)". Apparently it is the only rule which specifically refers to 22 (g). But if alleged violations of this rule may be made the basis of a Rule 22 (g) investigation, it is hard to see why any other alleged rule violation cannot be (unless the employe is specifically not covered by the rule whose alleged violation is the basis of the complaint).

A **violation** of the rules is hardly in accordance with the rules and hence would not seem to be a matter ". . . covered by the rules". It would appear to follow that alleged violations are not removed from Rule 22 (g) by the limiting phrase "other than covered by the rules".

What else could "other than" refer to here? It could mean an employe "other than [one who is] covered by these rules [elsewhere]" in a dispositive way. So, for example, Rule 1 (b) provides that only a few rules of the Agreement will apply to certain positions attached to top executives. Rule 1 (c) specifically provides that certain other classes of employes will not be subject to specified rules, e. g. Rule 7 providing for promotion by seniority. In other words, employees in that group are not subject to the promotion provisions and cannot complain of improper treatment under it in a Rule 22 (g) proceeding. Thus, read, the exception—although not clear—seems to mean that the "unjust treatment" procedure is available to any employe unless his case is covered by the discipline or discharge procedure or if the subject of his claim is outside the agreement as to employes in his category.

Award 6467 (Sharpe) denied the applicability of a rule similar to (but not the same as) Rule 22 (g) on the ground that, as it was contained under a caption "Discipline and Grievances" and specified that the **procedure** was to be "as if his case was one of **discipline**", it was meant to be limited to discipline cases. This is not in harmony with the Awards, the foregoing reasoning or the contention of the Carrier here, which explicitly contends that it excludes discipline cases and others as well. That Award cites no authority for its determination.

Award 5913 (Douglass) is fully harmonious with the interpretation made in this case. It was observed that an "unjust treatment" hearing was available under the language of one provision governing qualifications, but only as to non-starred positions. In that case the unjust treatment provision as to fitness was held to apply only to non-starred positions. The case is not very helpful here, however, because of differences in contract language.

Award 6066 (Wenke) held that a somewhat similar rule was not available defensively to the Carrier charged with a violation of the agreement. Apparently the defense was that the unjust treatment rule is the exclusive method for determining alleged rule violations. It was this specific argument that was rejected. This is not the same thing as saying that "unjust treatment" rules may not be invoked for alleged violation of rules. The peculiarity of "unjust treatment" rules is that they give an aggrieved employe the right to a formal investigation; to get it he must act within short time limits. Cases like Award 6066 and 7412 (discussed above) merely stand for the proposition that the unjust treatment rule does not prevent processing of allegations of rules violations in the usual manner as provided by statute. The observations

in those cases that similar rules do not apply to alleged rule violations were somewhat offhand and made about issues not central to the cases. They provide little effective guidance here.

Other awards dealing with provisions similar to Rule 22 (g) have been presented in an excellent brief from the Carrier representative. They include several observing that an employe may contest removal from a position because of a physical disability under the "unjust treatment" provision, e. g. Awards 8186 and 8175 (Smith). Such situations are non-disciplinary disqualifications. These and the other cases cited are not precedents for our decision here; they do illuminate the general purpose and reach of a provision of this kind.

**The Relationship of Rules 8 and 22 (g)**

We already have discussed the Carrier's contentions in Award 8422 (Lynch) and now turn to the Board's Award. It was held that an employe who was disqualified as incompetent under Rule 8 ("Time in Which to Qualify") could not obtain an investigation of the propriety of the disqualification under Rule 22 (g). This determination is urged as controlling here.

Rule 8 (a) provides:

> "When an employe bids for and is assigned to a permanent vacancy or new position he will be allowed thirty (30) days in which to qualify and will be given full cooperation of department heads and others in his efforts to do so. However, this will not prohibit an employe being removed prior to thirty (30) days when manifestly incompetent. If an employe fails to qualify he shall retain all seniority rights but cannot displace a regularly assigned employe. He will be considered furloughed as of date of disqualification and if he desires to protect his seniority rights he must comply with the provisions of Rule 12 (b)."

In Awards 8422, (concerning the same parties) the Carrier had argued "that Rule 8 is a specific rule that is all inclusive as to the rights of the parties in cases of this nature. In numerous awards we have recognized the universal principle that a specific rule will always control over a general rule leaving the latter to cover those fields not covered by the specific rule". It was held that "Rule 22 (g) is not applicable in the instant case because the circumstances here come specifically within the coverage of Rule 8 (a)."

Award 8233 (Lynch) held that the only condition needed for a Sec. 22 (g) investigation is that the employe "feel unjustly treated". It is difficult to harmonize Award 8233 with 8422 (Lynch). Therefore an analysis of the "principle" applied in the latter case may be helpful. In pursuing the history of the "principle", resort was made to the record in CL-8543, the case in which Award 8422 was rendered, for the published argument and text do not cite authority.

The Carrier's brief did present a list of cases in support of the "principle". They were Awards 7857 (Shugrue), 7643 (Lynch), 7412 (Coffey), 7399 (Wyckoff), 7312 (Rader), 7307 (Larkin), 7136 (Carter) and 4959 (Parker). They involve only the rule of construction to be applied but not similar contract provisions. Taking them in the order in which the awards were issued they show:

**Award 4959 ,Parker):** "At the outset it must be conceded there seems to be some inconsistency if not overlapping in the terms of the foregoing provisions of the contract. In such a situation our duty is clear. **We must harmonize and give force and effect to what is to be found in each rule if that is possible.** In doing that it will, of course, be necessary to recognize and apply universal principles of contractual construction. Three of such principles, so well established that they need no citation of authorities to support them, have particular application here. One is to the effect that as between general and special provisions of a contract the special controls the general. Another is that when some of the terms of an agreement are inconsistent, uncertain or ambiguous they will be construed so that no part of the contract will be disregarded or made meaningless. Still another is that where language of one provision or rule of a contract is susceptible of two interpretations, one of which will nullify another and the other give it meaning, it will be construed in such manner as to give both provisions force and effect."

**Award 7136 (Carter):** "We must give effect to all rules of the Agreement. Rule 49 is a general rule, dealing with hours of service and meal periods. Rule 68 is a special rule in dealing with holiday work. To give effect to both we must treat Rule 68 (the special rule) as if it were superimposed upon Rule 49 (the general rule). This is clearly the mutual intent of the parties and we are obliged to give effect to that intent."

**Award 7312 (Rader):** "In construing special rules . . . the same take precedence over general rules in an agreement."

**Award 7307 (Larkin):** ". . . we think that the general provision of Article X must be applied **in conjunction with** this more specific reservation of management's prerogatives. Taking all of the language of Article X, **plus** the plain meaning of Article II . . ." (Emphasis supplied.)

**Award 7399 (Wyckoff):** "If there be any **inconsistence** between Rules 3 (d) and 32 (a) on the one hand and Rules 28, 30, and 45 on the other, the former should control upon the well settled canon of construction that the specific controls the general provision. * * * There is, however, **no real inconsistency** . . ." Emphasis supplied in all the preceding quotations.)

In Award 7412 (Coffey) the Board merely observed that one of the rules invoked was the main one in issue and it was not related to any of the others cited in support of the claim.

In Award 7643 (Lynch), the "principle" was stated in the form presented in Award 8422, but there it was applied so that the two rules were read together, one modifying the other.

In Award 7857 (Shugrue), the "principle" was stated as in Award 8422 with a holding that one rule was more applicable to the facts than another, without however, any intimation that because a specific rule is applicable a general rule may not also be applicable.

The interpretations preceding Award 8422 are harmonious and accord with the generally accepted canons of construction of legal writings.

The leading authority on contracts formulates the canon of construction as follows:

> ". . . where there is a **repugnancy** between general clauses and specific ones, the latter will govern". Williston, **On Contracts** (Rev. 2nd), c. 619.

To the same effect is the **Restatement of Contracts,** Sec. 236:

> ". . . with the aid of the rules stated in sec. 235, the following rules are applicable:
>
> (c) Where there is an **inconsistency** between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provisions".

And Section 235 (c), provides in part: ". . . A writing is interpreted as a whole."

An excellent summary of the principles involved is contained in **Pillsbury Flour Mills Co. vs. Great Northern Railway Co.,** 25 F. 2d 66 at 69 (Cir. 8, 1928):

> "It is an elementary rule of statutory construction that general and specific provisions in apparent contradiction may subsist together—the specific qualifying and supplying exceptions to the general. (Citations.) This same rule of construction applies to contracts. In 13 C. J. 538, Sec. 501, the statement is made
>
> 'Where, however, both the general and special provision may be given reasonable effect, **both are to be retained.**'
>
> * * * * *
>
> "Another cardinal rule in the construction of statutes, is that effect is to be given, if possible, to every word, clause and sentence (citations). The same rule of construction applies to contracts." (Emphasis supplied.)

In other words, Award 8422 introduced a novel interpretation of the canons of construction as applied by this Board and as employed by the courts. The Board's precedents and the canons generally employed in construing contracts and statutes usually seek to give meaning to all parts of the document to be interpreted and applied. Only in the cases of **inconsistency or repugnance** between provision is one applied to the exclusion of the other.

But in Award 8422 the canon was employed in such manner that merely because Rule 8 (a) is applicable to the subject of qualification and disqualification Rule 22 (g) was held totally inapplicable. The claim made that Rule 8 (a) is "all inclusive" and thereby prevents the applicability of Rule 22 (g) is a far different thing from the doctrine that where two provisions are mutually **repugnant** or **inconsistent,** the more general must give way to the more specific.

There is no inconsistency between Rules 8 (a) and 22 (g). They can compliment each other without conflict. Under Rule 8 (a) the Carrier has

the right to disqualify an employe. If an employe feels he has been "treated unjustly" by the disqualification he may seek a Section 22 (g) investigation. It is no answer that he may have the burden of proof or that his claim may be transparently groundless. It was stated in Award 8233 (Lynch), "The only qualification necessary was that the employe consider himself unjustly treated". The contention was made that because the employe's claim was so obviously baseless there was no right to an investigation. "This [apparent baselessness] does not, however, relieve Carrier from the obligations of Rule 22 (g) of this Agreement", the Board ruled.

It is also asserted, in support of an interpretation that Rule 8 (a) and Rule 22 (g) are not to be read together, that "a specific listing of rights or exceptions" excludes all others and no others should be implied. This is the canon of construction "inclusio unius, exclusio alterius". However, nothing in this canon prevents reading two contract provisions together, especially when they do not conflict. Indeed, this is sound construction and requires no addition or implication whatsoever.

We would conclude that an employe may invoke Rule 22 (g) to secure an investigation of his disqualification under Rule 8 (a) even recognizing that he may have the burden of proof (a question we need not and do not decide here) and the right may be of little value if all he seeks to do is dispute the Carrier's conclusion that he was not qualified. It was urged in this case that the doctrine of Award 8422 should be followed as precedent. Generally, it is valuable to abide by precedent so that those whose interests are affected will have a sure guide for their future conduct. This Board has the practice of following interpretations of the same agreement on the same property. In deference to that practice we do not explicitly overrule Award 8422 although we are not persuaded that its reasoning or result are correct. This is so because the award itself seems not to be harmonious with long standing precedents. So, for example, Award 8422 cannot be squared with this language in Award 2490 (Carter):

> "We adhere to the proposition that a valuable right cannot be abrogated by implication in one section of an agreement when such right was expressly and plainly granted in another section. It will be assumed that the contracting parties intended that some effect be given to both sections and that limitations of one upon the other would not be made except when it appears clearly that they were so intended."

The broad proposition for which Award 8422 stands has potential applications beyond the rules before us and could unsettle the accepted meanings of rules which have been read together if attempts are made to advance one rule and exclude the applicability of others.

One further observation about the language of Rule 22 (g) is in order. Generally it confers the right to demand a hearing where unjust treatment is alleged. The language which causes the difficulty is "other than covered by these rules". It is the scope of this **exception,** not the scope of the rule itself, which is at issue. It would seem that where the exception is unclear or dubious the general rule—the right to an investigation when demanded—should govern.

### More Than "Qualification" Involved

In any event, the allegations in this case involve more than a question of the Claimant's qualification for Relief Position No. 2 and so is not governed by Award 8422 for that reason.

The Claimant alleges that his supervisor (Agent Bishop) told him that unless he withdrew some time claims he would be disqualified from Relief Position No. 2. Bishop, in a statement in the record, denies that he made such a statement. Claimant is supported in his contention by a written statement of another employe, a Brotherhood official.

It is conceded and apparent that if Agent Bishop sought to require the withdrawal of the time claims as a condition of not disqualifying Claimant the attempt would have been improper. It is conceded and there can be little doubt that such an improper method of inducing the withdrawal of claims would be "unjust treatment" and the proper subject of a Rule 22 (g) complaint and hearing.

If the alleged threat to disqualify for an improper reason constitutes a proper ground for a Rule 22 (g) hearing, it is hard to see why the alleged execution of the threat does not also.

Even if a disqualification alone were not the proper subject of a Rule 22 (g) complaint and investigation, it would seem to follow from the foregoing reasoning that the threat and execution of the threat to disqualify for an improper reason introduces an element of "unjust treatment" which Rule 8 (a) simply does not touch. It would seem to be unavoidable that the hearing under Rule 22 (g) would have to involve the disqualification itself. This is so because the allegation of the threat is controverted and would become an issue of fact and credibility. If there were adequate grounds for disqualification on the merits of the Claimant's performance this would tend to cast doubt upon his claim that he was threatened, although there is no logical inconsistency. On the other hand, if he were able to discharge the tasks of Relief Position No. 2 the allegation of threat would be more credible. In turn, his ability to demonstrate that the threat was made would cast doubt upon the bona fides of the disqualification. The issues are inextricably intertwined and Rule 22 (g) would seem to give a right to try them out in a formal investigation.

If the Claimant has a right to a hearing on the issues, it is not for the Board to decide the credibility and ability issues on a paper record in the absence of the very procedure given by the Agreement for the attempted vindication of his position. Therefore we do not find whether the threats were made as alleged by Claimant or not made as alleged by the Carrier. Similarly, we do not decide whether he was qualified for Relief Position No. 2 or not qualified.

**Teletype Test Not the Equivalent of an Investigation**

As indicated above, the issues of qualification and the alleged threats are so intertwined that their interaction upon each other cannot be prevented. For that reason, the proffered teletype tests in December 1954, would not have dealt adequately with the issue of qualification.

In any event, a test of teletype ability is not the equivalent of a formal investigation either in scope or procedure. The investigation under Rule 22 would not be limited to the single issue of teletype competence. Procedurally it calls for the production of witnesses, the cross-examination of adverse witnesses, testimony and other evidence on standards of performance and other issues which might be involved.

The offer of the test could not defeat Claimant's right to the investigation provided for in Rule 22 (g).

**The Remedy**

The record shows that from his disqualification in 1953 through 1955 Claimant suffered no wage loss by virtue of the Carrier's actions. There is no information in the record beyond 1955

Claimant's representative contends that despite the fact that there is no demonstrated wage loss the Board has power to award Claimant the compensation he would have earned in Relief Position No. 2. This, it is claimed, is a proper penalty in vindication of the agreement which may be assessed when the agreement does not specify the remedy.

The short answer in this case is that the Agreement **does** specify the remedy. For Rule 22 (g) provides that an employe requesting an "unjust treatment" investigation "shall have the same right of investigation, hearing and appeal, in accordance with preceding sections of this rule. . . ." Rule 22 (f) provides that if the Claimant is vindicated he shall be "paid for all time lost less any amount earned in other employment".

Even if Rule 22 (f) is not precisely applicable, it is clear that a 22 (g) proceeding was meant to be parallel in all respects to a discipline and discharge proceeding. There is no reason for more stringent remedies in vindication of one than the other.

It follows that Claimant is due no back pay for the period through 1955. However, since the submission of the case to the Board it is possible that he has suffered wage loss due to removal from Relief Position No. 2. In that event, he is entitled to any such demonstrable wage loss.

The main right vindicated in this case is the right to a Rule 22(g) investigation.

The claim is therefore sustained as to: any lost back wages less any earnings since 1955; and the right to an investigation under Rule 22 (g) if he should still desire it.

**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 Employe involved in this dispute are respectively Carrier and Employe 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

That the Contract was violated.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of May, 1960.

**DISSENT TO AWARD NO. 9415, DOCKET NO. CL-8213**

Award No. 9415 complicates a simple issue in an attempt to harmonize sustaining of the claim in the instant case with awards which sustained claims under differently worded rules on other carriers rather than follow denial Award No. 8422, involving the same parties, Agreement and Rules as herein, and other denial awards. While the majority admits of difficulty in interpreting the phrase in Rule 22 (g) reading "other than covered by these rules", it is elementary that, if the parties had intended Rule 22 (g) to be controlling over disqualifications under Rule 8 (a), it would have been a simple matter for them to have so provided in Rule 8 (a) the same as the majority herein recognizes that they did in Rule 23 (f).

The parties having included its application under one rule and having omitted it from the other rules, it is eminently clear that they did not intend Rule 22 (g) to be applicable in circumstances covered by Rule 8 (a), and this Division is without authority to change that which the parties themselves have provided.

In any event, no amount of speculative dissertation, particularly after agreeing "that more than discipline and discharge cases, which are covered by Rule 22 (a), are embraced by the limiting phrase of Rule 22 (g)", justified the majority's exceeding this Board's jurisdiction in this case to change, by interpretation, the phrase "other than covered by these rules" to mean "other than covered by Rule 22 (a)" in order to sustain the instant claim.

For the foregoing reasons, among others, Award No. 9415 is patently in error and we dissent.

/s/ J. F. Mullen

/s/ J. E. Kemp

/s/ R. A. Carroll

/s/ W. H. Castle

/s/ C. P. Dugan

**ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD NO. 9415, DOCKET NO. CL-8213**

In a well reasoned and documented opinion, the Referee places a proper interpretation upon the clear and precise provisions of Rule 22(g) under the involved circumstances, regardless of the untenable and illogical remarks of the Dissenters. It is doubtful if I could add anything thereto and it is crystal clear that Carrier Members' have taken nothing from the force of his decision.

It should be noted, however, that it is the Dissenters, who advocate a change, or additional language to the Parties' Agreement and not the majority,

while admitting that "this Division is without authority to change that which the parties themselves have provided." There is nothing in Rule 8(a), by implication or otherwise, that denies an employe the right to an unjust treatment investigation provided in Rule 22(g). Consequently, the well established principle noted in Award 2490 (Carter) is controlling here. Obviously, Award 8422 was in error.

The Award is proper and in accord with the relevant facts and controlling rules.

/s/ J. B. Haines

**Labor Member**