

Award No. 12101
Docket No. CL-13996

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES
THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5316) that:

(1) Carrier violated the Clerks' Agreement when it arbitrarily removed the name of Ralph A. Madaio from the Worcester Freight House Roster, Group 3, issued on February 28, 1962.

(2) Carrier shall restore the name of Ralph A. Madaio to the Worcester Freight House Roster, Group 3, with his original roster date of October 5, 1940.

EMPLOYEES' STATEMENT OF FACTS: Mr. Ralph A. Madaio entered service as a Freight Handler, Group 3 position on October 5, 1940, and carried that date on each Group 3 roster issued up to and including the year 1961. He had a promotion date of August 3, 1942 and carried that date on the Group 1 roster.

When the 1962 Worcester Freight House Roster was issued on February 28, 1962, the name of Ralph A. Madaio was omitted from both the Group 1 and Group 3 rosters and the Division Chairman protested the omissions as provided in Rule 46 of the rules agreement, addressing the following to Superintendent J. A. Gregg:

"This is a formal protest of the posting of the Worcester Freight House Roster's Groups No. 1 and No. 3, dated Feb. 28, 1962, as per Rule 46 of our Agreement.

"Omitted from the above Rosters is Mr. Ralph Madaio with an entry date of Oct. 5, 1940, and a promotion date of Aug. 3, 1942. Mr. Ralph Madaio was furloughed from the Group No. 1 roster about 1946 and the Group No. 3 roster in 1960, and carried on each succeeding roster through the year 1961. He is subject to recall under the terms of Rules 45 and 37 of our Agreement.

(a) Mr. Madaio was the senior furloughed employe subject to recall to the assignment of Crane Operator and Servicing of Heaters, Worcester,

(b) He was notified of the position in question,

(c) The claimant declined to accept the assignment on the grounds he was **not** qualified to service heaters,

(d) Mr. Madaio subsequently asserted he was **qualified** to service heaters, and

(e) This employe automatically terminated his Group 3 seniority standing by refusing to accept a permanent position for which **qualified** by asserting he was **unqualified**.

Carrier respectfully submits there has been no violation of the Agreement, except to the extent as knowingly perpetrated by the claimant in this case.

There is no merit to the request for restoration of seniority before you. Carrier respectfully submits that the claim should, therefore, be denied.

All of the facts and arguments contained herein have been affirmatively presented to the Employees' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant entered Carrier's service as a Group 3 employe on October 5, 1940. He was promoted to Group 1 on August 3, 1942. He was furloughed from Group 1 in 1946 and from Group 3 in 1960.

When the 1962 Worcester Freight House Roster was issued in February 1962 the name of Claimant was omitted from both the Group 1 and Group 3 rosters. Petitioner protested the omissions. Carrier restored Claimant's name to the Group 1 roster. It refused to restore the name in the Group 3 roster. The refusal gave rise to the claim in this case.

THE FACTS

On December 28, 1960, Acting Agent Cape at Worcester personally notified Claimant, who was the senior furloughed Group 3 employe at that point, that a permanent assignment of Crane Operator and Servicing of Heaters would become available commencing January 13, 1961 to be filled from the Group 3 seniority roster; and, Claimant was entitled to the position. Claimant, according to Carrier, refused the position stating that: (1) he was not qualified to service heaters; and (2) he did not desire to operate the Boston and Maine Crane which was a requirement of the assignment. In support, Carrier points to the following letter which Agent Cape sent to Claimant, registered mail, under date of December 30, 1960, with copy to Petitioner's Local Chairman:

"Confirming conversation with you in this office on Dec. 28, 1960 relative to the position of Crane Operator and Service of Heaters.

It is my understanding that you would pass up this position on account of the operation of the B&M Crane and also not being qualified to service cars requiring heater service.

Therefore, as you have dis-qualified yourself on this basis, the position has been temporary assigned to Mr. Francis Ciccone, who is qualified to perform the duties required on the position of Crane Operator and Service of Heaters."

Claimant acknowledged receipt of the letter by signing and returning a copy without comment, to Carrier. Petitioner does not dispute that the Local Chairman received the copy mailed to him.

On January 13, 1961 Carrier bulletined the position and on the same day assigned it to Francis A. Ciccone, the employe next senior to Claimant in the Group 3 roster. Three days after, on January 16, Petitioner's Local Chairman wrote Agent Cape that Claimant was qualified to perform the duties of the position and demanded that it be assigned to him. And, on January 23, Claimant wrote Agent Cape:

"Yours of December 30, 1960 File A position of Crane Operator and Service of Heaters.

I did not state that I was not qualified to service heaters, as it a matter of record that I have serviced heaters on many occasions.

I have been mislead to believe that I would have to be available to service these heaters 24 hour a day and 7 days a week.

Will you now please assign Me to this position, as advertised under bulletin notice No. 3 under the terms of Rules No. 45 para 8 and 37 para (C) of Our Agreement."

Carrier's refusal to assign Claimant to the position resulted in a claim which was ultimately adjudicated in our Award No. 11326.

Nowhere in the record, in the instant case, is there a categorical denial that Claimant was offered and refused the position on December 28, 1960.

When the 1962 seniority roster of Group 3 employes was posted the name of Claimant did not appear therein.

THE ISSUE

The issue is whether Carrier violated the Agreement in failing and refusing to amend the 1962 seniority roster of Group 3 employes to include therein the name of Claimant.

PERTINENT PROVISION OF THE AGREEMENT

Rule 45 of the Agreement provides, inter alia, that:

"Employes with insufficient seniority and qualifications to hold a regular assignment and who are working from an extra list or in a furloughed status, will be required to accept, in the order of their seniority, regular assignments for which they are qualified in the class or classes in which they hold a roster status, or lose seniority previously established therein."

We will refer to this provision as Rule 45, paragraph 8.

CONTENTIONS OF PARTIES

Petitioner contends that Carrier could not offer a position to Claimant until the position was "established". Therefore, what occurred on December 28 is irrelevant. Further, Claimant should have been offered the position by mail or telegram and only if he failed to return to service within seven days thereafter could he be considered out of service. It cites the following paragraph of Rule 45; herein referred to as Rule 45, paragraph 4:

"Employees failing to return to service within seven days after being notified (mail or telegram sent to the address last given) or give satisfactory reason for not doing so, will be considered out of service."

Implicitly, Petitioner contends that the Agreement required Carrier to bulletin the position, it being a new one; and, Claimant should have been notified of the bulletin by mail or telegram and thus be given the opportunity to bid.

(NOTE: Since the Agreement does not require Carrier to bulletin Group 3 positions we dismiss the latter contention. Rule 37 relied upon by Petitioner relates only to Group 1 and Group 2 employees.)

Carrier contends that Claimant's refusal to accept the position for which he has admitted he was qualified caused him to lose his seniority in Group 3. It cites Rule 45, paragraph 8, *supra*.

RESOLUTION

The preponderance of the evidence supports the finding that Carrier offered the position to Claimant and he refused it on December 28, 1960. By operation of Rule 45, paragraph 8, *supra*, if Claimant was qualified to perform the duties of the position he was required to accept it or suffer the loss of his seniority previously established in Group 3. Since Claimant admits that he was qualified and since we have found that he refused to accept we will deny the claim.

We find no merit in Petitioner's arguments that: (1) Carrier cannot offer a position until it is "established"; and (2) the position should have been offered to Claimant by mail or telegram.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

That Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1964.

LABOR MEMBER'S DISSENT TO AWARD NO. 12101
DOCKET CL-13996

We believe the Referee grossly erred in writing his opinion.

The OPINION reads in part as follows:

"Implicitly, Petitioner contends that the Agreement required Carrier to bulletin the position, it being a new one; and, Claimant should have been notified of the bulletin by mail or telegram and thus be given the opportunity to bid.

(NOTE: Since the Agreement does not require Carrier to bulletin Group 3 positions we dismiss the latter contention. Rule 37 relied upon by Petitioner relates only to Group 1 and Group 2 employees.)

Petitioner contended and rightly so that the position should have been and was bulletined. The bulletin appears in the record (R19) and bears a posting date of January 13, 1961, with a closing date on the bulletin of January 18, 1961. The Award bulletin was likewise dated the same day, January 13, 1961 (R20).

For ready reference both of these bulletins are hereby quoted:

"BULLETIN NO. 3

Advertising new position or vacancy

Place: Worcester, Mass.

Date Posted: Jan. 13, 1961 Closing Date Jan. 18, 1961

Department: Freight House

TO EMPLOYEES CONCERNED:

The following position is hereby advertised for applications or bids in accordance with Rule 38 (bulletining positions) of the Clerks Agreement. Applications or bids shall be submitted to the undersigned not later than Jan. 18, 1961.

LOCATION OF POSITION: Freight House

TITLE OF POSITION: Crane Operator and Servicing of Heaters

BRIEF DESCRIPTION OF PRIMARY DUTIES:

Operate both B&M and NH Cranes as needed and assisting in loading and unloading of LCL Freight, servicing of cars requiring heaters. Service as required.

Applicants must have a license to operate cranes.

RATE OF PAY: \$2.29 per hour

ASSIGNED HOURS OF SERVICE: 8:00 A. M. to 5:00 P. M.

ASSIGNED MEAL PERIOD: 12:00 Noon to 1:00 P. M.

ASSIGNED DAYS OF REST: Saturday and Sunday

TEMPORARY OR PERMANENT: Permanent

IF TEMPORARY PROBABLE OR EXPECTED

DURATION.....

(Signed) W. M. Cape, Jr.

(Title) Acting Freight Agent

cc: Division and General Chairman

R. J. Duggan, Trainmaster

R. Farquharson, GC

W. McGee, DC"

"BULLETIN NO. 3

(Assignment to new position or vacancy)

Place: Worcester, Mass.

Date Posted: Jan. 13, 1961

Department: Freight House

TO EMPLOYEES CONCERNED:

The following position which was advertised under

Bulletin No. 3

Dated Jan. 13, 1961

Location of Position Freight House

Title of Position Crane Operator and Servicing of Heaters
has been awarded to Francis A. Ciccone
whose former position was furloughed.

(Signed) W. M. Cape, Jr.

(Title) Acting Freight Agent

cc: Division and General Chairman

R. J. Duggan, Trainmaster

R. Farquharson, GC

W. McGee, DC"

These bulletins were issued in accordance with the provisions of the Bulletin Rule, Rule 37(h) which for ready reference reads as follows:

Rule 37 — Bulletin

(h) Except for laborers receiving an hourly differential above the going laborers' rate at the point employed, this rule will not apply to employes designated as laborers in Group 3, Rule 1."

The Referee further states in his Opinion:

"The preponderance of the evidence supports the finding that Carrier offered the position to Claimant and he refused it on December 28, 1960. By operation of Rule 45, paragraph 8, *supra*, if Claimant was qualified to perform the duties of the position he was required to accept it or suffer the loss of his seniority previously established in Group 3. Since Claimant admits that he was qualified and since we have found that he refused to accept we will deny the claim."

Why did the Referee pass up the second, third and fourth paragraphs of Rule 45 and skip way down to the eighth paragraph?

Paragraphs 2, 3 and 4 read as follows:

"When forces are increased, return of employes to the service shall be subject to the same provisions. (i.e., Seniority Order) (Emphasis ours.)

Employes desiring to avail themselves of this rule will file their names and addresses with the proper officer at the time of reduction and advise promptly of any change in address.

Employes failing to return to service within seven days after being notified (mail or telegram sent to the address last given) or give satisfactory reason for not doing so, will be considered out of service."

The Carrier is duty bound under the above-quoted provisions of Rule 45 to wait until the closing date of the advertising which occurred January 18th (which they failed to do as they issued the Award bulletin the same day they issued the advertising bulletin, January 13) and if no bids were received then the senior furloughed employe would be notified that he was assigned to the position and if he failed to report within the required time limit of seven (7) days, then and only then would he "be considered out of service" and his name removed from the Group 3 Seniority Roster. (Emphasis ours.)

The Referee continues in his OPINION with:

"We find no merit in Petitioner's arguments that: (1) Carrier cannot offer a position until it is 'established'; and (2) the position should have been offered to Claimant by mail or telegram."

We desire to refer back to the bulletins quoted herein and again it should be noted that the Advertising Bulletin was dated January 13 with a closing date of January 18 which meant that employes in service would have the opportunity to make application for this position up to the closing date of January 18 but please note that the Assignment Bulletin was dated January

13, assigning the position to an employe junior to the Claimant. Such action by the Carrier is plain circumvention of the applicable rules and shows the Carrier's complete disregard for the collective Agreement.

The Referee's ultimate decision was "Claim Denied".

The Division has repeatedly held that "It is the function of this Board to interpret, not to write Agreements". (See Award 5294, Referee Hubert Wyckoff.)

In Award 4569, Referee Dudley E. Whiting said in part:

"One of the basic purposes for which this Board was established was to secure uniformity of interpretation of the rules governing the relationships of the Carrier's and the Organizations of Employees. To now add further fuel to the pre-existing conflict in our decisions upon this subject would only invite further litigation upon the subject and would be contrary to one of the basic reasons for the existence of this Board."

C. E. Kief