

Award No. 14592
Docket No. CL-12615

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**

WESTERN WEIGHING AND INSPECTION BUREAU

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4978) that:

(a) Among other rules the Bureau violated Article V of the National Agreement dated in Chicago August 21, 1954, in failing to render a decision within the sixty (60) day time limits of claimant M. J. Bizzarri's letter dated January 29, 1960, for wages lost from January 25, 1960 until this dispute is settled.

(b) The Bureau violated the Rules of our Schedule Agreement including Rule 27 by not granting claimant Bizzarri an investigation as requested by the claimant's letter of February 26, 1960.

(c) Among other Rules the Bureau violated Rules 3, 6 and 9 by not giving claimant Bizzarri an opportunity to display his qualifications on the Grain Door Foreman's position at Omaha, Nebraska.

(d) Employee M. J. Bizzarri, be compensated for all monies lost between position actually worked and the rate of pay of the Grain Door Foreman's position at Omaha, Nebraska, until this dispute is settled, and, in addition thereto, be assigned to the Grain Door Foreman's position as provided by Rules 3, 6 and 9 so that he may demonstrate his qualifications.

EMPLOYEES STATEMENT OF FACTS: Claimant Bizzarri, on account of force reduction, was being displaced by a senior employe and requested on January 22, 1960 to displace the incumbent on position No. 1, Grain Door Foreman, Omaha, Nebraska, effective January 25, 1960, as shown by Employees' Exhibit No. 1.

The General Chairman's letter of January 26, 1960 to the claimant outlines the opinion of the General Chairman as to the application of Rules 3, 6 and 9. However, it will be noted District Manager Schumacher, by phone conversation with the General Chairman did not agree that Rule 9 applied when an employe was exercising displacement rights. Stating it another way, District Manager Schumacher was of the opinion for an employe to exercise displace-

Bizzarri's letter of February 26, 1960, was not received in District Manager Schumacher's office until Monday morning, February 29, 1960 (See Bureau's Exhibit 9).

On December 20 and 21, 1960, this file was the subject of a conference held in the Bureau's office at Chicago, Illinois, at which time Vice Grand President G. B. Goble as well as the General Chairman L. C. Bell, representing the Brotherhood of Railway Clerks, attended, and following this conference the General Chairman was informed by our letter of December 23, 1960, as to the final decision reached by the Bureau (See Bureau's Exhibit 10).

Again, following receipt of a letter from the General Chairman, we made due reply to him under date of February 1, 1961 (See Bureau's Exhibit 11).

(Exhibits not reproduced.)

OPINION OF BOARD: Under date of January 22, 1960, Claimant wrote Carrier's District Manager:

"On January 21, 1960 Mr. A. D. McGuire informed me of my displacement by G. R. Decker effective January 25, 1960 and I would receive a letter confirming this displacement.

Under provisions of Rule 12 of Working Agreement, I desire to exercise my seniority rights on Position No. 1, Grain Door Foreman, Omaha, Nebraska, effective January 25, 1960.

My seniority date is September 19, 1946."

On January 27, 1960, the District Manager replied:

"This to acknowledge receipt of your letter dated January 22, 1960, received in this office on January 25, 1960, in which you advise that due to being displaced by a senior employe due to the abolishment of his position, that it is your desire to displace the inbumbent (sic) in Position No. 1, Grain Door Foreman, Omaha, Nebraska.

You have had no contact whatsoever with our grain door operations, and to permit you to displace the Grain Door Foreman at Omaha, Nebraska, which is one of our largest operations, would be injustice to you.

Under Rule 12 of our Working Agreement, I hereby decline to accept your displacement."

Then on January 29, 1960, Claimant filed claim with the District Manager:

"This is to acknowledge receipt of your letter dated January 27, 1960 File E-10-FCS declining to accept my displacement of Grain Door Foreman at Omaha, Nebraska.

I disagree with your decision as there have been people employed by the Bureau, on responsible positions, without having previous contact with operations of these positions.

I desire to exercise my seniority rights, **UNDER PROTEST**, on Position No. 201, Roving Freight Inspector at Omaha, Nebraska and also making this a claim for the difference in rate of pay between Position No. 201, Roving Freight Inspector and Position No. 1, Grain Door Foreman at Omaha, Nebraska."

The claim was not disallowed within the time limitation prescribed in Section 1 (a) of Article V of the August 21, 1954 Agreement. Carrier's non-feasance violated said Agreement.

Clerks aver that the claim was never disallowed by Carrier; but, the record shows that it was disallowed in a letter from the Assistant Manager to Clerks' General Chairman dated June 10, 1960; and, on appeal the Manager affirmed the denial on August 5, 1960.

NDC Decision 16 holds that where a continuing violation is involved: (1) a violation of Section 1, Article V of the August 21, 1954, Agreement terminates upon Carrier giving a belated notice of disallowance; (2) the claim for compensation must be allowed as presented for the period from the date of filing of the claim to the receipt of the belated disallowance; and (3) if the claim is before us on the merits we must adjudicate it and award such other and further relief, if any, as our interpretation of the agreement finds applicable.

As to the procedural time limitation violation we hold and will award, pursuant to NDC Decision 16, that Claimant be compensated as prayed for in the claim; but, only for the limited period from January 27, 1960 to June 10, 1960.

The issue on the merits is whether the basic agreement provides that in the exercise of displacement rights, in a reduction of force situation, an employee is entitled to thirty working days in which to demonstrate qualifications for the position on which he seeks to displace. For the affirmative, Clerks cite in support Rule 3 (f) — Seniority Datum; Rule 6 — Promotions, Assignments and Displacements; Rule 9 — Time In Which To Qualify. For the negative Carrier says: (1) Rule 9 is inapplicable in that it only applies to bulletined positions; (2) Rule 6 and Rule 12 — Reducing Forces, are applicable; and (3) under Rules 6 and 12 the Carrier is the sole judge of fitness and ability absent arbitrary conclusion or other action designed to circumvent the agreement.

Carrier has cited numerous denial Awards involving a similar issue and rules. In those cases there was no evidence of the parties intent other than the wording of the agreement. This case differs in that the record contains evidence of the parties intent as to the applicability of Rules 3 (f), 6 and 9. The expressed intent of the parties must be honored.

Manager O'Connell and the General Chairman participated in lengthy negotiations which led to the execution of the Agreement. They, therefore, are qualified to testify concerning the meeting of the minds.

Under date of April 20, 1960, Manager O'Connell addressed the following memorandum, which is self-explanatory, to the District Manager with a blind copy to the General Chairman.

"The General Chairman is here in the office today, discussing with me the application of Rule 3 as it refers to an employe exercising his displacement rights over a junior employe and, in this connection it seems quite obvious to me that the 2nd paragraph of Paragraph (f) clearly sets forth the application of this rule when a senior employe displaces a junior employe.

The 2nd paragraph of Paragraph (f) of Rule 3 reads as follows:

'The exercise of seniority in the reduction or restoration of forces, of the displacement of junior employes, is subject to the provisions of Rules 6 and 9.'

If you refer to Rule 6 you will find that rule defines what the word 'sufficient' is intended to more clearly establish, and if you will refer to Rule 9 you will note that—

'When an employe is assigned by bulletin, such employe will be allowed thirty (30) working days in which to demonstrate qualifications for the position, except that when it is sooner determined definitely that such employe is not so qualified the employe may be removed from the position before the expiration of thirty (30) working days, subject to appeal.'

Inasmuch as the second paragraph of Rule 3 is subject to the provisions of Rule 6 and 9, it becomes our responsibility to apply those rules as they are worded.

In other words, Rule 9 gives the employe thirty (30) days in which to demonstrate his qualifications, unless it is determined sooner that he is not so qualified, in which event he may be removed sooner, but inasmuch as Rule 3 (f) connects up with Rules 6 and 9, I do not see how we can take any other position except to permit an employe, who has exercised his seniority over a junior employe, thirty (30) days in which to demonstrate his qualifications, and I hope this clearly sets forth the application of the rules involved, so as to eliminate any misunderstanding that may have occurred."

In the light of this evidence we will sustain the Claim in this case.

We find no need to rule upon paragraph (b) of the Claim.

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 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

That Carrier violated Article V of the August 21, 1954 Agreement.

That Carrier violated Rules 3, 6 and 9 of the basic Agreement.

AWARD

Claim sustained except for paragraph (b) thereof for reasons set forth in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June 1966.