NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21035
Docket Number CL-20872

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Long Island Rail Road Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7627) that:

1. Carrier violated the existing Clerical Agreements between the parties, particularly the agreement dated September 20, 1972, when it awarded the position of Junior Buyer to a junior employe on August 29, 1973, and;

2. Carrier shall now be required to pay Claimant E. A. White, the senior applicant for the position, the rate of pay of Junior Buyer for each day from August 29, 1973 forward until the violation is corrected.

OPINION OF BOARD: The basic element of this dispute is Petitioner's contention that Carrier violated the Supplemental Agreement of September 20, 1972, when it failed to award Claimant the position of Junior Buyer on August 29, 1973. Carrier denies any violation of the Agreement, contending that Claimant lacked eligibility under the Agreement and did not possess sufficient qualifications for the position, particularly when viewed in the light of his past record as trainee and his prior job experience.

The Supplemental Agreement established a training program to qualify employes for the position of Junior Buyer. The training positions were designated as 5-C-l and a 12 month training period was set forth in the Agreement. It was further provided that the 12 months training period could be shortened by "mutual agreement of both the employe and management", provided both principals were satisfied that the particular employe "has received sufficient training and is qualified to assume the duties of Junior Buyer".

Claimant entered the training program on February 14, 1973, and about seven months later, on August 9, 1973, the position of Junior Buyer was bulletined. The record does not indicate whether any interviews were conducted by Carrier based on such bulletining. Indeed, Petitioner makes the undisputed assertion that interviews of bidders were not conducted by Carrier at such time. It appears, however, that the position of Junior Buyer was in fact awarded to employe De Rosa on August 29, 1973, whose

regular seniority date was inferior to that of Claimant, but whose seniority date under the training program was precisely the same as Claimant's.

Initially, Petitioner raises the procedural objection that Carrier's rejection letter of November 20, 1973 was improper in that it had "no relevance whatsoever" to the claim. We see no basis upon which to sustain such objection. The "relevance" of Carrier's rejection may be a matter for this Board to consider, but in point of fact the letter was a clear rejection of the claim and we so consider it here.

Petitioner raises the further objection that various Exhibits of Carrier attached to its Submission to the Board, numbering Exhibits "7" through "29" inclusive, as well as Carrier's references to various disciplinary matters relating to Claimant, all constitute "new matter" not raised during the handling of this dispute on the property and, as such, clearly inadmissible at this level of appeal.

Careful review of the record indicates that the latter position of Petitioner is accurate; none of these Exhibits or disciplinary references were in fact presented by Carrier on the property. In these circumstances, we have supported the principle of inadmissibility of "new matter" in innumerable prior Awards. Accordingly, we sustain Petitioner's contention on this issue and exclude such "new matter" from consideration here.

See, for example, Awards 13209, 13892, 14129, 14154, 14605, 19101, 20064, 20121, 20255 and 20468, among a host of others.

The clear thrust of the Supplemental Agreement negotiated between the principals, as specifically set forth in subdivisions "(1)" and "(3)", was to establish a training program in specified clerical positions "with normal progression to Junior Buyers or Stockman positions*. The pertinent portions of the Supplemental Agreement are quoted verbatim, as follows:

> "(1) Effective with the signing of this Agreement and in accordance with the provisions of Rule 5-C-1, the Carrier will establish clerical positions under the jurisdiction of the Director of Purchases and Materials for the purpose of cowering vacancies, including vacation vacancies, and to perform extra work as directed and to train for positions of junior buyers or stockmen.
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> (3) The employee awarded or assigned to the 5-C-l clerical positions will be considered trainees for the purpose of this Agreement with normal progression to Junior Buyers or Stockman positions.
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> * • * •

"(5) Selection of successful bidders shall be a matter of joint concern and it will be incumbent upon the Organization to make available a committeeman or other officer to work with Carrier's representative in such selections.

• • * •

(10) Trainees will not be required to complete the full 12 month training period if it becomes apparent to both the employe and management that said employe has received sufficient training and is qualified to assume the duties of Junior Buyer. Mutual agreement of both the employe and management is required under this Section.'

Subdivisions (1) and (3) are not in dispute and clearly indicate the pattern of the training program. The various other subdivisions of the Agreement detail procedural matters relating to implementation of the program. The latter issues are also not in dispute, and these subdivisions, therefore, are not quoted.

Subdivision (5), upon which a good portion of Petitioner's submission is hinged, contains the language "Selection of successful bidders shall be a matter of joint concern . . . ". The clear intent of the Agreement, as evidenced by- the sections which precede and follow subdivision (5), is that "joint concern" relates solely to selection of those who will be permitted to participate in the training program by assignment "to the 5-C-l clerical positions". There is no provision in the Agreement indicating that "joint concern" shall also apply to either the bulletining or the awarding of the disputed position.

Moreover, we find no restriction in the Supplemental Agreement prohibiting Carrier from bulletining the position of Junior Buyer during the period of the training program or prohibiting Carrier from filling such position with eligible and qualified employes other than those encompassed in the training program.

Petitioner urges that Carrier violated the Agreement when it failed to conduct interviews on the bulletined position of Junior Buyer and when it awarded this position to De Rosa. Assuming, arguendo, that this may be so (which issue we do not decide here), such "violation" could only apply to senior employes eligible and qualified to bid for such position. It would not apply to this Claimant.

The language of subdivision (10) is clear that the shortening of the prescribed 12 month training program was subject to agreement between the Organization and Carrier as to receipt of sufficient training and qualifications by a particular employe "to assume the duties of Junior Buyer". No

such agreement was reached either as to De Rosa or as to Claimant. Rut Claimant maintains that the disputed position should have been awarded to him; that his seniority was superior to that of De Rosa. Neither position of Claimant is valid.

Firstly, Claimant's 12 month training period had not been shortened by the required agreement. Thus, he was ineligible to bid for the position of Junior Buyer at the time it was bulletined. Secondly, as determined by Carrier (and which will be discussed in detail hereafter), Claimant. was not at that time qualified in experience and ability to fill that position. Thirdly, in relation to Claimant's "superior seniority", his rights to advancement as trainee and his seniority under the training program were concededly precisely the same as that of De Rosa under sub-division (11) of the Supplemental Agreement, which states in part "Seniority shall date from the date the trainee entered the training program outlined in Section 9 hereof".

In the latter context, we have held repeatedly, that seniority comes into play only when an employe's qualifications, merit and capacity have been satisfactorily established. In short, that seniority even if superior is a secondary consideration.

See, for example, Awards 15387 (Dorsey), 15784 (McGovern) and 15929 (Ives).

See also Rule 2-A-2 (a) of the main Agreement between the principals here, which states specifically ". . . fitness and ability being sufficient, seniority shall govern".

In discussing the merits of this dispute, we have excluded from consideration those Exhibits of Carrier which, as indicated above, have been ruled inadmissible as constituting "new matter". Nevertheless, the issues of Claimant's eligibility and qualifications for the disputed position of Junior Buyer were specifically raised on the property in Carrier's denial letters of November 30, 1973 and March 13, 1974.

The issue, therefore, of Claimant's qualifications becomes of considerable importance. Carrier has made its position amply clear to Claimant and to Petitioner that it has not found Claimant qualified for the position of Junior Buyer, either in ability or past job experience. Faced with such determination by Carrier, the burden of proof shifts to Claimant to establish affirmatively that he is in fact qualified to hold the disputed position.

In the latter context, we quote from Award 20361 (Lieberman), the principle there enunciated being precisely applicable to this dispute:

> "Over many years this Board has held consistently that it is Carrier's prerogative to determine the fitness and ability of an employe for a position and such determination will be sustained unless it appears that Carrier was arbitrary or capricious in its actions (Awards 15494, 16360, 19129 and others). When Carrier determines that Claimant lacks fitness and ability, as in this case, Petitioner has the burden of proof to establish Carrier's error: that Carrier's action was arbitrary and capricious."

In Award 15784 (McGovern) we stated:

> "The evidence of record shows that the Carrier simply did not consider the Claimant to be qualified for the position, and since his qualifications were not equal to Woodward's, the right to assignment by preference based on seniority never matured. Under the rules, seniority alone is not the test to be applied; qualifications, merit and capacity must be established first. The burden of proof in this regard is the Claimant's." (Emphas is added)

To the same effect, see Awards 18353 (Dorsey), 19129 (O'Brien), 19762 (Blackwell), 20787 (Quinn), and 20878 (Sickles), among many others.

The position of Junior Buyer involves a myriad of complex, detailed and responsible functions. Its duties are set forth in detail in the Bulletin of August 5, 1973, (Carrier's Exhibit 6), which is properly before us. Clearly, as evidenced by the nature and duration of the training program, considerable training, experience and ability were required before a 5-C-l Clerk would be capable of assuming the responsibilities of this position.

Insofar as Claimant is concerned, the record is devoid of probative evidence that he possessed such capability. His prior experience consisted of doing general clerical work, stenography, typing and related office work. Prior to his entering the training program he had never performed any duties related to purchasing. Petitioner asserts that Claimant worked "as Junior Buyer on several occasions". These "occasions" are not set forth in detail except for the period from November 19 to November 23, 1973, which was a temporary vacation assignment for an extremely limited period. Moreover, this "assignment" occurred some three months subsequent to the date on which the position was bulletined.

Stripped of all irrelevances, therefore, and specifically with respect to Claimant's rights under the Supplemental Agreement training program and his rights, if any, to the position of Junior Buyer, we conclude that Petitioner has failed to sustain its burden of proof factually establishing that Claimant was eligible to bid for or qualified to assume the position of Junior Buyer. The record before us is conclusively in the negative on both counts. Accordingly, we will deny 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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulus
Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1976.

LABOR MEMBER'S DISSENT TO
AWARD 21035 (Docket CL-20872)

The Award of the majority, as authored by Referee Norris, is in palpable error: it conveniently overlooks the facts of record and the exacting requirements of special training Agreement of September 20, 1972 when dealing with the merits of this case.

The special Agreement of September 20, 1972, specifically required that there be consultation and mutual agreement between the parties (1) in selecting applicants for training and also (2) when awarding Junior Buyer position(s) to trainee(s) prior to the completion of the twelve (12) month training period. The record shows thot tho Carrier deliberately violated the Agreement when it failed to consult and reach Agreement prior to filling the bulletined Junior Buyer position here at issue.

The majority held "Moreover, we find *no* restriction in the supplemental Agreement prohibiting Carrier from . . . filling such position with eligible and qualified employes other than those encompassed in the training program." The author's allegation is not only erroneous but his purpose in making it becomes suspect when the thrust of the dispute did not involve that issue. When Sections 3, 10 and 14 of the Agreement are read in context common reasoning will produce only one reasonable conclusion: that the Junior Buyer positions must be filled from among the trainees.

In the penultimate paragraph, page 3, the Referee deliberately evades deciding a very basic part of the dispute and then on the assumption, arguendo, that even though the Carrier had violated the agreement the violation could only apply to *senior* employes eligible and qualified to bid for such position *and* therefore would not apply to Claimant. Likewise, in other parts of the Award reference is made to Claimant not being eligible or qualified to bid for the Junior Buyer position. Factually, the Claimant was "eligible" to bid for any bulletined position, including the one here in dispute, by virtue of his seniority which was not reduced or compromised by entry into the training program; further, he was definitely "qualified" by virtue of having met the requirements of Section 9 of the Training Agreement by having been in the training program for in excess of 60-days; he was available for and had performed relief work on Junior Buyer position(s), with seniority rights thereto as stipulated in said Section 9; and, he had obviously demonstrated his qualifications and/or progress as there is no admissible evidence of record that Section 8 had been invoked by Carrier through the medium of a written unsatisfactory progress report.

Deliberately or otherwise the Referee completely distorts the seniority provisions of Section 11 of the Agreement of September 20, 1972, by taking the last sentence thereof completely out of context with the balance of the provision. Factually, the Trainees are selected from Seniority Districts 1 and 5 for extensive training for specified positions in both Districts; and, contrary to the Referee's misguided opinion that all Trainees establish a new seniority date as of the date of entry into the training program, the successful bidder(s) to Junior Buyer position(s) retain their original seniority date in their home district if their new assignment is in that district and establish a new seniority date only if the new assignment is in other than their original or home Seniority District.

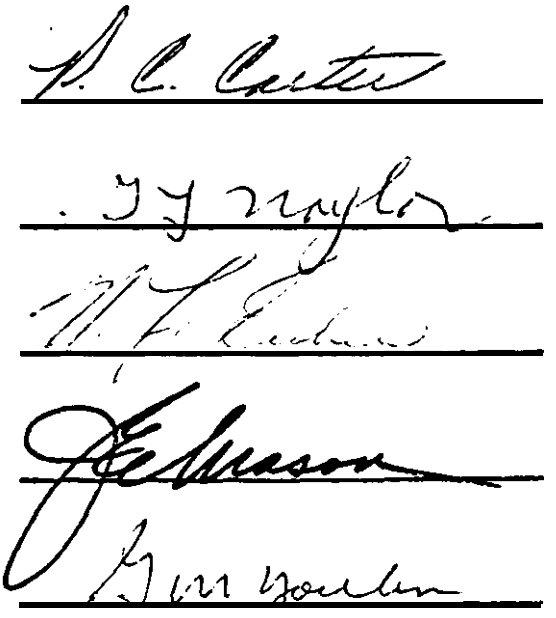
The gross misconstructions placed upon the Agreement by the Referee, and his propensity for ignoring the facts of record, creates a serious doubt as to his ability to act in a neutral capacity: for this and other reasons expressed hereinabove vigorous dissent is registered to the conclusions exprossed in Award Number 21035.

Gerald Toppen
Labor Member

CARRIER MEMBERS' ANSWER
To
LABOR MEMBER'S DISSENT
TO
AWARD 21035, DOCKET CL-20872

Any "propensity for Ignoring the facts of record" more appropriately rests with the dissenter rather than anyone else participating in the decision in the dispute before the Board.

Award 21035 is sound end in response to the issues raised in the docket. The award itself and the record upon which it is based stands as the best refutation of the cries of the dissenter. The award follows well established sound precedent of the Board, end the dissent does not detract therefrom.



REFEREE'S ANSWER TO DISSENT TO AWARD 21035, DOCKET NO. CL-20872

Recognizing, obviously, that the Carrier Members and the Labor Members of the Board have the prerogative of filing dissent to an Award, this Referee has made it a practice not to file any reply to a dissent; there being no point in rehashing the facts or reviewing the positions fully stated in the Award itself.

In this case, however, there are four matters which compel reply:

1. The Dissent refers to distortion of the "seniority provisions". However, the purpose of discussing seniority in the Award was simply to lead to the obvious conclusion, which stated "In short, that seniority even if superior is a secondary consideration".

2. The Dissent asserts " - - - common reasoning will produce only one reasonable conclusion: that the Junior Buyer positions must be filled from among the trainees." (Enphasis added). This presupposes that if no trainee is available (through the completion of the training program or its shortening by mutual agreement, plus possession of the necessary qualifications) then the job of Junior Buyer, in the event of a vacancy, must remain vacant in the interim. The Agreement does not support such conclusion.

3. As to this Referee's alleged "propensity for ignoring the facts of record", it is respectfully submitted that the record of the cases handled by this Referee during the past year, and the submitted Awards (in 80% of which no formal dissents were filed), do not justify this charge.

4. Of far greater importance is the personal reference to this Referee that, in the opinion of the Labor Member, there is "a serious doubt as to his ability to act in a neutral capacity". The record before this Division does not warrant such statement, nor does such personal comment bear any relevancy to the Dissent, which should in simple fairness be limited to the Award proper.

It is respectfully submitted that no Dissent should be used as a vehicle *for* personal abuse of a Referee, whether it be this Referee or any other. The Labor Member is entitled to his personal opinion, but that opinion is no part of the Dissent.

It is therefore respectfully suggested to the Board, and to the Labor Member, that the quoted language under item "4" above should be deleted from the Dissent, in which event this Answer of the Referee is withdrawn in toto.

Dated: New York, New York,
June 11, 1976.

LOUIS NORRIS, Referee