

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21115
Docket Number CL-21128

Frederick R. Blackwell, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees

PARTIES TO DISPUTE: (

(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7800) that:

1. Carrier violated and continues to violate the rules of the Clerks' Agreement when it disqualified Mr. Roy T. Briggs from the position of Chief Clerk, Machine Room, Everett, Washington.

2. Carrier shall now be required to restore Mr. Roy T. Briggs to the position of Chief Clerk in the Machine Room, Everett, Washington, and reimburse him for any and all loss of compensation incurred from date of his disqualification, November 30, 1973.

3. Such compensation shall be adjusted by 8% interest per annum, compounded daily.

OPINION OF BOARD: On October 30, 1973, the Claimant was placed on the position of Chief Clerk, Machine Room, Everett, Washington, by virtue of his status as the senior bidder on the position. On November 30, 1973, his immediate supervisor, Assistant Terminal Agent Barr, gave him a letter which disqualified him from the position of Chief Clerk at the close of that day's business. Following a hearing, held pursuant to the Claimant's request under Rule 58 (unjust treatment), the Superintendent rendered a decision affirming the disqualification.

The parties' Submissions on the Employees' appeal of the Superintendent's decision join issue on the merits of the disqualification and also raise procedural objections. The procedural objections are noted and treated as follows:

1. The Carrier asserts that the claim is barred from Board consideration because the Employees failed to follow the established appeals procedure. The appeals procedure asserted by the Carrier to be applicable to this case is treated in Carrier letters to the Employees' representative dated May 5, 1970 and January 2, 1974. The May 5 letter refers to "claims resulting from disciplinary action." The January 2, 1974 letter refers to the appeals procedure as follows:

"Appeal in Discipline Cases

With respect to discipline cases the initial appeal from decision will be to the employing officer designated above. The intermediate appeal will be to the Regional Assistant

Vice President of Operations except as otherwise stated below:"

The above quoted procedure was not followed in this case, so the question is whether such procedure is applicable to a disqualification case. The Carrier's contention is that, since the hearing in this case was obtained under Rule 58 (unjust treatment), and since Rule 58 affords the same right of investigation and appeal as for discipline cases under Rule 56, it follows that the appeal of a decision resulting from a Rule 58 hearing is governed by the appeal procedures established for discipline cases under Rule 56. Examination of this contention reveals that, although Rule 58 provides for an appeal after initial decision to the next higher officer and thereafter "in the regular order of succession" to the highest official, the Rule does not provide and therefore omits the steps of the "regular order of succession." The omitted part of the procedure, which is the part in dispute here, is established by conference and correspondence of the parties and thus the Carrier's correspondence on the disputed procedure is pertinent. Such correspondence, in speaking solely of discipline cases and in making no reference at all to unjust treatment cases, fails to reflect any intent whatever that unjust treatment cases were intended to be covered by the subject procedures. Indeed the correspondence reflects that discipline cases were the only cases contemplated by the subject procedures. Moreover, absent a clear contra statement of intent in the Carrier's correspondence, the cross-reference from Rule 58 to Rule 56 does not automatically place an unjust treatment case under appeals procedures which refer only to discipline cases. Such a result is strongly negated by the fact that the substantive differences between the two kinds of cases are significant and self-evident, and as well, by the fact that the usual meaning of the term "discipline" does not render it synonymous with the term "unjust treatment." In these circumstances the Carrier's contentions about the consequences of the cross-reference from Rule 58 to Rule 56 cannot be accepted, particularly since, as previously noted, the disputed procedures have been established by conference and correspondence between the parties and not by the Rules themselves.

2. The Employees object to the consideration of the Section 6 Notices and arguments thereon set out in the Carrier's Submission on the ground that such notices and arguments were not handled on the property. This objection is supported by the record and it is therefore sustained.

3. The Employees also assert that a fair and impartial hearing was denied the Claimant, because (a) the letter of disqualification failed to include the cause therefor; and (b) the hearing was at the Claimant's request and thus he should have been but was not allowed to offer his case in chronological order.

In considering foregoing (a) it is noted that, although Rule 12 (c) required the Carrier to provide a written statement of the cause for a disqualification action, the obvious purpose of the rule is to give an employee notice of the Carrier's reasons for a disqualification action so that he may have adequate information on which to determine his response thereto. Where the written statement of the cause has not been provided, the appropriate time for

objection thereto is before or at the hearing so that the *Carrier* has timely opportunity to provide the stat-t. However, the record does not reflect that ~~timely~~ objection was made before or at the hearing and therefore, under numerous prior authorities, the objection cannot be considered on appeal. As regards objection (b), even though the hearing was held at the Claimant's request, the Carrier had the burden of initially establishing a ~~prima~~ facie case to justify and explain its disqualification action of November 30, 1973; there was thus no impropriety in the order of the evidence. Additionally, the Claimant's defensive and affirmative case was made without any improper interference from the hearing officer and thus the record does not support this objection.

The merits of this dispute hinge on whether the Carrier's disqualification action violated Rule 12(a) which reads as follows:

"Rule 12. FAILURE TO QUALIFY

A. ~~Employee~~ awarded bulletined positions, or employee securing positions through exercise of seniority, will not be disqualified for lack of fitness and ability to do such work after a period of thirty (30) *working days* thereon. Such employees will be given reasonable opportunity to qualify during such period." (**Emphasis added**)

The ~~Employee~~ concede that an ~~employee~~ may be disqualified under the above rule for lack of fitness and ability during a thirty working day period, but they contend that the Carrier violated the underlined rule provision which states that an ~~employee~~ will be "given reasonable opportunity to qualify during such period." The specifics underlying this basic contention are that: (a) the Claimant had the fitness and ability required by the duties of the position; (b) the Claimant was not given proper cooperation, assistance and guidance in a friendly atmosphere during the relevant period and was not given a proper work place or properly equipped with a phone, desk, etc.; and (c) the Claimant was discriminated against by, and made the victim of a set-up by his immediate supervisor in regard to the disqualification.

The bulletin advertising the Chief Clerk position contained a description of duties which referred to "General Supervision" and which expressly indicated that the Chief Clerk "Must know COMPASS: SPINS & ISC SYSTEMS and be able to supervise data reporting." The term Compass (hereafter Compass or Compass procedures), which embraces the SPINS and ISC part of the system, is the acronym for "Complete Operating Movement Processing and Service System." The Compass procedures integrated into one uniform system many different functions such as the report of a car's location in a yard by track. Compass requires an employee to have knowledge of up to as many as 100 procedures and upon its installation in the Carrier's yard offices, the employees potentially involved with the system attended mandatory training classes to acquire knowledge about the use of the system.

At the hearing the supervisor who disqualified the Claimant, Mr. C. A. Barr, Assistant Terminal Agent, testified that he informed the Claimant on October 29, 1973 that:

"... everything we do in a Yard Office involves COMPASS, therefore, COMPASS knowledge was an absolute requirement to supervise and police reportings."

Mr. Barr further stated that he gave written instructions to the Claimant in four instances, on October 30, November 1, 6, and 19, and that, although only a few ~~Compass~~ procedures were covered by the instructions, the Claimant's errors and inadequate ~~implementation~~ of the instructions evidenced his lack of knowledge about Compass as well as his inability to function as supervisor over clerks working with ~~Compass~~. These instructions, containing thereon Mr. Barr's contemporaneous handwritten notes of the errors, were entered as Carrier exhibits in the hearing record.

Seven members of the clerical force who worked with the Compass procedures testified in the Claimant's behalf. Their testimony indicated that they felt the Claimant made good progress in the time he was allowed to remain on the position, that the Claimant received no meaningful help from supervision, that no one in the Machine Room could have performed the written instructions issued by Mr. Barr, that the Claimant was discriminated against because the present occupant of the position is receiving help of a kind not received by the Claimant, and that he did not have a proper work space and equipment.

The chief points in the Claimant's testimony about the disqualification are reflected in the following extracts from the hearing record of his testimony at the hearing:

Claimant's testimony about the written instructions

"Q. Mr. Barr in his statement states that on October 30, he instructed you on the different procedures and the ten items that he requested you to perform on your duties, is that correct?

A. No that is not correct. I was issued a letter of the assigned duties and as near as I can recall, the words used were, 'Here is a list of duties that I want you to start on', and had a sheet of paper with ten items listed on this page. There was no conversation as to what procedure I might use or any help or advice as to where I might look up these different inquiries which he requested and I went on my own and through talking to the clerks working in the Machine Room, I accomplished the inquiries by contacting one clerk and she advised me as to what COMPASS books I might find these procedures in and together we went over and looked up these procedures for these

inquiries that Mr. Barr requested and she did punch up the cards for me because knowing this would be a daily routine, I figured it would save much time if I just had cards punched up so I could submit them to the computer for my inquiries."

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"Q. And to your knowledge, there is no, is there any other . . .

A . Well, since not being, having any instructions or any help in this matter, all I know is what I've learned, tried to learn on my own and without any proper instructions or cooperation from Mr. Barr, I learned very little at this time."

Claimant's statements about his knowledge of Compass

"Q. In prior questioning and testimony on various procedures of the COMPASS system, and COMPASS procedures, you stated that you did not have an opportunity to really get into the COMPASS part of the operation nor had you had an opportunity to work a job pertaining to COMPASS prior to this Chief Clerk's position, is that not correct?

A. Well, if you mean opportunity by being to bid on a position in the Machine Room, I had those opportunities. Knowing that I had no sufficient training, it would really be against my better judgment to bid any positions.

Q. Then, Mr. Briggs, you do not have the knowledge to perform the COMPASS procedures.

A. I do not have the knowledge to perform the COMPASS procedures now, but I believe with ample instructions, and opportunity, that I can learn the same as anyone else can learn then.

Q. Mr. Briggs, do you feel that you have the, or do you have the ability to instruct other people on the proper COMPASS procedures?

A. At the present time, no.

Q. Then you are not qualified, or are you qualified to perform the functions as outlined in the bulletin dictating responsibilities and duties of the Chief Clerk position?

A. Not at this time, no."

Exchange between his representative and the Claimant

"Q. You were asked by Mr. Rasmussen, do you feel at the present time that you are qualified to handle this program. At the time you go to a position, and as per our Clerks' Schedule, the requirements to be able to bid for a Clerks' position is to have the basic knowledge and background to have the ability to learn the position. Do you feel that you had the basic background and knowledge to learn this position, had you been given the proper co-operation?

A. Yes, I do and I would like to say that since the Chief Clerk's position was a newly created position, I felt that I had the knowledge and the ambition to learn this position and felt that I would get the same opportunity as the other employees in this department to learn and be instructed as to proper procedure and I feel that I have not been given this opportunity."

The foregoing, and the record as a whole, makes it clear that a basic knowledge and understanding of the Compass procedures and how to use them was a sine qua non for one to be qualified for the Chief Clerk position. About two years prior to this incident the Claimant had taken a two week indoctrination course in the Compass procedures; however, he did not thereafter use the opportunities afforded by his seniority to bid to positions involving the Compass procedures so as to learn more about such procedures. In this regard he stated that:

"Knowing that I had no sufficient training, it would really be against my better judgment to bid any positions."

When asked whether he considered himself qualified to perform the duties of the Chief Clerk position, itself, the Claimant stated:

"Not at this time, no."

The Claimant thus admitted that he had not only followed his better judgment in avoiding the lesser clerical positions which involved the use of the Compass procedures, but also that he was not qualified for the Chief Clerk position which involved both the use of the procedures and the supervision of subordinate clerks using the procedures. In view of these admissions, it is clear that the Claimant failed to demonstrate that he had the fitness and ability to fill the Chief Clerk position at the time he was disqualified therefrom. It is equally clear that the Claimant's affirmative claims about his fitness and ability were limited to the contention that he had the capability of qualifying

'for the position if given adequate instructions and opportunity to learn the Compass procedures. However, this contention does not bring the Claimant within the language of Rule 12 because the Rule does not afford a training opportunity. Instead, the Rule requires the Carrier to respect the rights of a senior bidder who is qualified, subject to the Carrier's right to take disqualifying action if the senior bidder is not in fact qualified. Failure of the Carrier to exercise this right before the senior bidder has occupied the position for 30 working days, precludes the Carrier from taking any disqualifying action. The period of 30 working days is not a training period for the senior bidder; it is as plainly stated in the rule, for the employe to be given a "reasonable opportunity to qualify."

In view of the Claimant's admissions as to his lack of knowledge of the Compass procedures, there is no basis for finding that he was not given a reasonable opportunity to qualify.

The arguments concerning inadequate help of the Claimant and similar matters do not alter this conclusion. The hearing record portrays Mr. Barr as perhaps a stern supervisor, but there is no indication that he was hostile in his dealings with the Claimant or committed any act to impede the Claimant's progress on the position. The Carrier's failure to provide the Claimant with more adequate work space and equipment places the Carrier in a questionable light, but this alone does not bear materially on the Claimant's lack of knowledge of the Compass procedures "or does it persuade that the Claimant was the victim of discrimination or a set-up. And although the testimony of the seven clerks who testified for the Claimant established that the Claimant is well-liked and popular among this group of employes, their testimony on the pertinent facts of the case is greatly outweighed by the probative value of Mr. Barr's testimony and the admissions made by the Claimant.

In view of the foregoing, it is concluded that the Claimant did not demonstrate that he possesses the fitness and ability for the position of Chief Clerk and that Carrier afforded him a reasonable opportunity to qualify for the position as Required by Rule 12. Accordingly, there was no Agreement violation and the claim must be denied.

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

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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. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 16th day of July 1976.