

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22707
Docket Number CL-22558

Richard R. Kasher, Referee

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

PARTIES TO DISPUTE: (

(Chicago, Milwaukee, St. Paul and Pacific
(Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8569) that:

1) Carrier violated, and continues to violate, the Clerks' Rules Agreement in Chicago, Illinois, **commencing** on December 31, 1976 when it failed to assign **Employee J. M. Aniciete** to an Assistant Bureau Head position held by an employee with less seniority.

2) Carrier shall be required to recognize J. M. **Aniciete's** seniority, promotion and displacement rights to Assistant Bureau Head positions, assign him to the position which he sought on December **31**, 1976, and compensate him for **an** additional eight (8) hours pay at the rate of \$58.9476 for each work day he is denied displacement rights in District No. 71.

3) Carrier shall pay employee **J. M. Aniciete** interest at the rate of **7½%** compounded **annually** on the anniversary date of *this* claim for amount due under Item (2) above.

OPINION OF BOARD: Claimant was displaced from his position as an Assistant Bureau Head by a *more senior* employee. At the time, there was another Assistant Bureau Head position occupied by an employee junior to the Claimant.

Claimant's supervisor notified him of the second position but expressed some **concern** over the Claimant's *ability to do* telephone work associated with that position. The **supervisor** also notified the Claimant of a Tracing Clerk position and **asked** him if he would like to be temporarily assigned to that position.

The **Claimant requested the temporary assignment**; made a written application for the same position; and, ultimately, was awarded the Tracing Clerk job. This is the only position for which the **Claimant** made a written application.

On two previous occasions where the Claimant was displaced he completed the appropriate **forms** for exercising his seniority. On a third occasion he protected his rights through a **phone** call.

However, in this case Claimant subsequently requested an unjust-treatment investigation under the provisions of Rule 22(f). That hearing and an appeal hearing were held. Claimant's position was denied.

It is the Organization's **position that the** Carrier violated the agreement "when it failed to assign the Claimant to an Assistant Bureau Head position held by an **employee** with less seniority."

The Organization states **that the** Claimant was "denied the basic concept of seniority, promotion and displacement rights." The Organization cites **Rule 3**, which provides **employees the** right to exercise seniority in the case of a reduction **in** force; Rule 7, which provides **that** promotions "shall be based **on** seniority, fitness and ability" with a special emphasis **on** the rights of senior **employees** where "fitness and ability are sufficient"; and, Rule 12, which provides, in part, that:

"(a) . . . **Employees** whose positions have been abolished or who are displaced **through the** exercise of seniority may, fitness and ability being sufficient, exercise seniority within fifteen (15) days from the date affected; if seniority is not exercised, the **employee** will be furloughed and will be recalled to service as per Rule 12(d).

. . . A declaration of an **employee's** intent to exercise seniority is not, in itself, sufficient to constitute the actual exercise of seniority. In addition, he **must** actually occupy and perform service **on** the position on or before the fifteenth (15th) day following the date he was affected unless, after filing declaration of intent in writing, he is prevented from doing so...."

The **Organization** also alleges **that** the Claimant was denied due process in that the unjust-treatment investigation was not, and could not be conducted fairly and impartially. The Organization argues that the hearing officer was "the head of the very department wherein the unjust **treatment** occurred"; the hearing officer "bad to" issue a decision in support of his subordinates; the hearing officer refused to step aside when requested to do so; the Claimant's supervisor authorized the selection of the hearing officer; and, the hearing officer (as supervisor to the Claimant's supervisor) was actually self-appointed.

On the merits, the Organization argues that "the **Claimant was** not allowed to **make** the displacement which he desired and /that/ to do SO in writing would have been an exercise in futility." The **Organization** adds **that** the "telephone problem" is, in fact, discrimination **based on** the Claimant's being **Philippino**.

The Organization also questions the qualifications of the senior **employee** who replaced the Claimant. It is stated **that** the senior **employee** "never worked in the office of the **Manager** of Revenue Accounting."

As a remedy, the Organization calls for full back pay, with interest.

The Carrier argues that **Rule** 12 is clear -- a declaration of intent must be filed in writing -- and that the Claimant failed to do so. The Carrier further notes that, on three previous occasions, the **Claimant** did properly give notice of his intent to exercise his seniority rights.

The Carrier stresses that it had no duty to assign the Claimant to the Assistant Bureau Head position. Rather, the Claimant had a duty to make his desires known in writing. The Carrier adds that the Claimant was never told if he could or **could not** have the position, just that it was available.

The Carrier also argues that the Claimant was never forced to take **the** Tracing Clerk position, "but was merely **advised...that** if he wanted the position on a **permanent** basis, he would have to protect **himself** by bidding on the position." This the Claimant did.

The Carrier notes that the Claimant's fitness **and** ability is not at issue. It is purely a matter of his failure to make written application. The Carrier stresses that to sustain the claim would be in direct conflict with the Agreement.

The Carrier also protests the Claimant's demand for full back pay, noting that the Claimant has been working full-time in the Tracing Clerk position. At best, the Carrier argues, the Claimant could receive the difference in rates.

The Carrier denies **the** applicability of **Rule** 3 and 7 in this case. Rule 3, the Carrier notes, does not apply since the Claimant made application for a vacant position. Rule 7 is argued to be **inapplicable** since the provisions of **Rule** 12 were not first met.

The Board finds that the Agreement clearly states that, in order for the Claimant to exercise his seniority, he had to make a declaration of intent in writing. **In** the Statement of Claim, the Organization **alleges** that the **Carrier** violated the Agreement "When it failed to assign /the Claimant/ to an Assistant Bureau Read position held by an **employee** with less seniority."

Since the Claimant did not make a written declaration of intent, the Organization has a burden of proving that there were improper **substantial mitigating** circumstances which prohibited or restricted the Claimant's ability to exercise his contractual rights. This has not been proven.

The Organization argues that the *Claimant* was intimidated and **that to have** complied with the contractual requirements would have been an exercise **in** futility. We do not find that there was intimidation in this case. The Claimant has filed declarations of intent before. If he felt intimidated this time he still should have **made** the declaration and then protested the Supervisor's actions if he believed he was unjustly treated or that his Agreement rights were violated.

The Organization also argues that the Claimant was discriminated against by virtue of **his** national origin. This is not the form to consider such an issue.

While the hearing officer and the Organization were sometimes at odds during the hearing, the Board finds that the substance of the Organization's arguments were fully addressed by the Carrier. The hearing officer was not the head of **the department where** the allegedly unjust treatment occurred; **the** hearing officer was appropriately requested as **an** outside party; and, he was not self-appointed. And, we do not find the lack of a full and fair hearing.

In conclusion, the Board finds **that** the **Carrier** did not violate the Agreement when it "failed to assign /the Claimant/ to an Assistant Bureau Head position held by an **employee** with less seniority."

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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of **Third** Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1980.