

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23283
Docket Number CL-23327

Paul C. Carter, Referee

PARTIES TO DISPUTE: { (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
{ Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8962) that:

(1) Carrier violated and continues to violate the Clerks' Rules Agreement at Deer Lodge, Montana when it arbitrarily disqualified Employee W. P. Gaskell on File Clerk Position No. 74040.

(2) Carrier further violated the Agreement when it refused to grant Employee Gaskell an investigation as per his request in line with the provisions of Rule 22(f).

(3) Carrier shall now be required to recognize Employee Gaskell's seniority and promotion rights by reinstating him to File Clerk Position No. 74040 and compensating him for an additional day's pay at the appropriate rate for each workday he is denied his contractual rights to that position.

(4) Carrier shall be required to pay interest in the amount of seven and one-half (7½) percent per annum on all wage loss sustained as set forth under Item 3 of the claim until the violation has been corrected.

OPINION OF BOARD: The record shows that claimant was awarded File Clerk Position No. 74040 at Deer Lodge, Montana, on February 9, 1978. On March 20, 1978, claimant was advised that effective 5:01 P.M., Thursday, March 23, 1978, he was disqualified as File Clerk, Position No. 74040, as prescribed by Rule 8 of the effective Agreement.

On March 21, 1978, the claimant requested of the Division Manager a formal hearing, with company and union representatives. His request was denied on the basis that Rule 22(f) may be invoked only when the unjust treatment is for an offense, occurrence, or circumstance not covered by a rule of the clerk's agreement, and, further, that his request was untimely, had been made to the wrong Carrier Officer and "it lacks specificity." Rule 22(f) of the applicable agreement provides:

"An employee, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employee's complaint, is made to the immediate superior officer within fifteen (15) days from cause of complaint."

We find that **claimant's** request was timely **made** under Rule 22(f); that it was **made** to the officer who disqualified him, and was specific enough **to advise** why it was requested - "due to **being** disqualified on Position No. 74070." At any rate, on March 30, 1978, the **claimant** made a similar request to the **Assistant Division Manager-Administration**, who also denied the **request** for an **unjust** treatment hearing. The dispute was subsequently handled by **representatives of the Organization** in the **usual manner** up to and including the highest **officer** of the **Carrier** designated to handle such disputes, and, **failing to reach a settlement**, the **claim** was appealed to this **Division** by the **Organization**.

Numerous awards of this **Division**, involving the **same** parties, have been **issued**, holding that employees were entitled to **unjust** treatment hearings under Rule 22(f), or **prior similar** rules, when denied positions because of alleged lack of **fitness** and ability. see Awards 8233, 9415, 9854 and 18922. Also, a number of awards involving the **same** parties, have been **issued** indicating that **unjust** treatment hearings were **granted**, in similar **cases**, before the disputes were appealed to this **Division**. see Awards 21615, 22442, 22443, 23050 and 23064.

In its submission in the **present** case, the **Carrier** states:

"...Therefore, for several years, the **carrier** granted **unjust** treatment investigations, when requested, for **most** if not all reasons.

"However, for the past couple of years the **Carrier** has again applied its former position and frankly we commenced and have continued to do so because in the past several years there **have been some** awards **rendered by referees** who have had the courage of their convictions
..."

and cites a **number** of awards involving other parties.

We do not consider the issue to be "referees who have the **courage** of their convictions." The issue is how the parties to the Agreement **involved** herein have placed **themselves under** their own agreement, not only by reason of **Board awards**, but by **their practice**. If the parties to an agreement are not satisfied with the **Agreement** rules as consistently interpreted by this **Board**, the remedy is through Section 6 of the Railway Labor Act, and not through repeated requests for **further interpretations** by this **Board**.

In **view** of the awards issued in **similar** disputes involving the **Same** parties, cited herein, we will sustain parts (1) and (2) of the **claim**. We will sustain part (3) of the **claim** by awarding claimant **compensation** that he would have earned on the position less any amount earned in other employment (Rule 22-e). Part (4) of the claim **is** denied as no rule has been cited supporting it.

The Organization's representative on the Board has called attention to the fact that Carrier's submission was not signed, as required by Circular No. 1 of the National Railroad Adjustment Board, and, in accordance with recent Award No. 23170, (the claim must be sustained for that reason alone.) As we have decided the dispute on its merits, it is not necessary to pass upon this point. However, we do note that the provisions of Circular No. 1 are mandatory.\

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

That the parties valued 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 violated.

A W A R D

Claims sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1981.

DISSENT OF CARRIER MEMBERS
TO
AWARD 23283, (DOCKET 'X-23327)
(REFEREE CARTER)

There were two separate arguments made by the Employees in this dispute which were identified as Item **Nos. 1 and 2** of the claim submitted. Those contentions were :

- 1) That the contract was violated when claimant was disqualified; and
- 2) **That** the contract was also **violated** when claimant was denied his **request** for a hearing.

Concerning the first contention, the Majority does not provide a single sentence of explanation to substantiate its conclusion that Claimant was **improperly** disqualified under the provision of Rule 8. This **Board** has many times been faced with such issues. **The** Board has consistently stated that the determination of qualifications is initially for the Carrier to make. In Award 22462 (Carter), it **was** stated as follows:

"It is a well established principle of the **Board** that it **is** the Carrier's prerogative to determine the qualification of its **employees**, and when the Carrier determines that an **employee** is not qualified for a **position**, the burden then shifts to the **employee** to prove that he or she is **qualified**."

On this **property**, some of the many Awards **supporting** this principle, given the Majority, were **Awards** 22443 (Sickles), 22980(**Franden**), 23064 (Sickles), 23050 (Roukis), 21615 (Lieberman), 21412 (McBrearty), 16480 (Dorsey), 17948 (Dorsey).

There is not even a hint in this case that the Carrier improperly assessed Claimant's **qualification**. In fact, the only evidence of record bearing **upon** Claimant's qualifications substantiates the Carrier's conclusion; and such evidence **was** never refuted nor rebutted on the property. Yet, **Award 23283** sustains this facet of the Employees' **claim**.

Much of the opinion in this **Award** deals with the prior record on this property concerning Rule 22(f) hearings. And the conclusion is reached that the Carrier violated the contract by not according the Claimant such a hearing. The appropriate remedy, therefore, would have been to provide the requested hearing. However, even though the Carrier did produce evidence to support its conclusion that Claimant was not qualified, the Majority provides recompense as if the Claimant's qualifications for Position **74040** had **been** substantiated.

Award 8233 (Lynch), on **which** the Majority **relies**, stated:

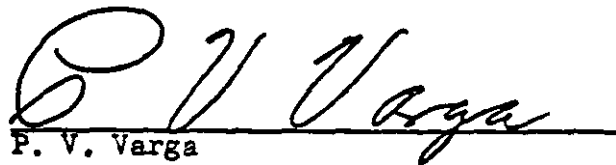
" . . . this Award holds Carrier violated Rule 22(g) only by failing to grant Claimant an investigation. We have not held that Carrier's disapproval of Claimant for Service was not justified. . . . **There** is no evidence before us that such action on Carrier's part was violative of the Agreement."

Such a conclusion should have also been applied in this case.

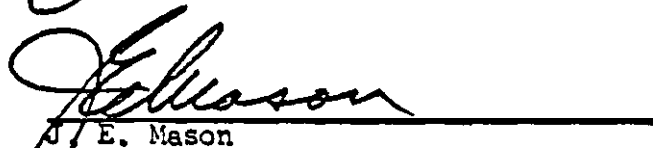
Finally, the Employees could have submitted evidence during the grievance procedure to rebut the Carrier's conclusion but did not do so, The claim that Claimant **was** denied a hearing under the provisions of Rule **22(f)** does not **eliminate** the burden of **proof** required to support that portion of the claim that Claimant **was, in fact, qualified** for the position.

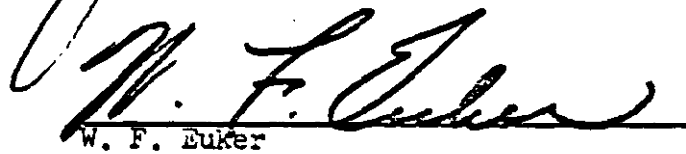
DISSENT OF CARRIER MEMBERS
TO AWARD 23283

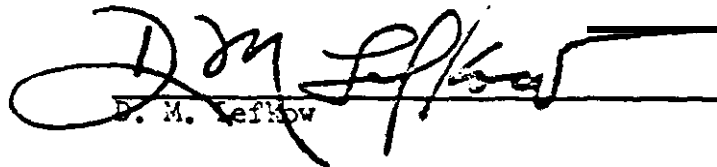
The conclusion reached concerning these matters in Award 23283
are predicated upon **assumption** and supposition, and not the factual record,
On this basis **we dissent.**


P. V. Varga


J. R. O'Connell


J. E. Mason


W. F. Euker


D. M. Lefkowitz

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 23283

DOCKET NO. CL-23327

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks,
Freight Handlers, **Express** and Station **Employees**

NAME OF CARRIER: **Chicago, Milwaukee, St. Paul and Pacific Railroad Company**

Upon application of the Carrier involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the **Railway Labor Act**, as approved June 21, 1934, the following interpretation is made:

It is well settled that the purpose of an interpretation is to explain the award as originally made and not to make a new Award.

The Award upon which an interpretation is sought holds that the **Carrier** violated the agreement as interpreted in prior awards of the Division involving the same parties.

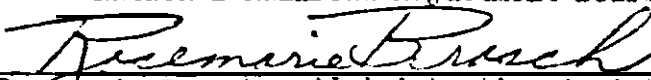
In its request for interpretation the Carrier undertakes to **review** the correctness of the Award and to question the reasoning back of the Award. Such a **review cannot** be had on an application to interpret or clarify the meaning of an award. We have again reviewed Award No. 23283 and find that the reasoning is clearly set forth therein. Furthermore, there is no obligation that the Board, or the Referee who participated in the Award, give their reasons for an award. (See Air Line Pilots, Assn. v Del Casal, CA-5, 90 LC, 12464, Dkt. 80-1695). See also Interpretation No. 1 to Third Division Award 3563, Serial No. 70.

It now develops that claimant in Award No. 23283 retired from Carrier's service in October, 1979, prior to the dispute having been submitted to this Board. Payment due claimant as sustained by Award No. 23283 would cease upon the date of retirement.

Referee Paul C. Carter who sat with the Division as a neutral member when Award No. 23283 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By 
Rosemarie Brasch - Administrative Assistant

Date.5 at Chicago, Illinois, this 28th day of April 1982.