NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26138
THIRD DIVISION Docket Number CL-26019

Referee Marty E. Zusman

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-9925) that:

1. The Carrier violated Rule 8 of the Agreement when it disqualified Mr. M. A. Buscemi, Clinton, Iowa, from Position #032 on June 14, 1983, without affording him the full sixty (60) calendar days training as provided in the Rule and without establishing that he was manifestly incompetent, also as provided in the Rule.

2. The Carrier violated Rule 22 of the Agreement when it failed to provide Mr. M. A. Buscemi with a fair and impartial unjust treatment hearing on July 6 and 7, 1983, as provided in the Rule.

3. The Carrier shall now be required to restore Mr. M. A. Buscemi to Position #032 at Clinton, Iowa, and provide him with a full sixty (60) calendar days training with full cooperation of department heads and others in his efforts to qualify for the position.

4. The Carrier shall also be required to compensate Mr. M. A. Buscemi for all wage and other losses sustained as a result of his improper removal from Position #032 on June 14, 1983, by paying him eight (8) hours per day five (5) days per week, plus any overtime that he would be entitled to receive by reason of assignment to Position #032, from June 15, 1983, until the date he is reassigned to Position #032, less earnings received in other Carrier employment."

OPINION OF BOARD: Claimant was disqualified by letter dated June 14, 1983, from the position of Yard Clerk. Claimant had bid for the position and was removed after nineteen (19) days of training. The Organization contends that Claimant was not given the full cooperation and time required to qualify for the position as required by Rule 8 which reads in pertinent part:

> "Employes entitled to a position under schedule rules will be allowed sixty calendar days in which to qualify...This will not prohibit employes being removed prior to sixty calendar days when manifestly incompetent. Employes will be given full cooperation of department heads and others in their efforts to qualify".

The Organization further argues that the disqualification was under training guidelines which set timetables for learning the position which do not supersede the Agreement. As such, the Claimant was never shown to be "manifestly incompetent", did not receive full cooperation of department heads and was removed without benefit of the sixty calendar days in which to qualify for the position.

Carrier maintains that the Claimant is manifestly incompetent and that under questioning he closely admits to that fact. Even further that the important responsibilities of the position which include among other basic functions knowledge of the "demurrage and PICL cards" were unlearned by the Claimant in an appropriate time frame. Testimony by the Station Administrator and Assistant Agent that Claimant is unqualified also focus on progress reports and the fact that the most basic IDP function of keypunching rapidly and accurately were unlearned. As such, Claimant failed to qualify for the position. The Carrier categorically denies that its training guidelines were an attempt to supersede the Agreement.

This Board notes that the Carrier removed the Claimant because they believed him to be manifestly incompetent and unable to properly learn the duties of the position. The Carrier also argued that Claimant was given full cooperation and notes nothing in the Rule that requires Claimant to be given the full sixty (60) days to qualify. As such, the burden is on the Organization to establish that the Carrier's actions were a breach of the Agreement.

The record in the instant case has convincing evidence of probative value to establish serious doubt that Claimant had full cooperation to qualify. In the record herein we are struck with what appears to be a lack of communication which by occurrence and error inadvertently lead to Claimant receiving less than full cooperation. For example, the record establishes that the Carrier officials who took the action to disqualify (e.g. Station Administrator and Assistant Agent) were neither directly involved in the training, nor fully knowledgeable of the sequence and pace used in training the Claimant. Mr. Schuh for example states that he does not have "firsthand knowledge" of the "format...used in their training". In addition, he did not talk with those directly involved in training the Claimant. The Assistant Agent indicates that while a trainer indicated Claimant couldn't handle the job at "that time" he never indicated that Claimant couldn't qualify within sixty (60) days.

This Board notes that both men who trained the Claimant state for the record that Claimant was progressing and learning the job. They state that Claimant made a full effort and that he would have been able to qualify in time. Mr. Reins, one of those training the Claimant, indicated in testimony that he did not know "until two, or three, or four...days before he was disqualified" that he only had a specific number of days to train the Claimant. He also indicates that he did "not always have time to explain everything..." due to the pressures of the job.

This Board notes that the evidence of record establishes that the Claimant had no prior knowledge of the position he bid for and was assigned. It is also established that the training schedule set for him included five consecutive days off and additional short assignments that pulled him away from the uninterrupted acquisition of skill and knowledge. Probative evidence establishes that training was interrupted, uneven, and trainers were unaware of time constraints on teaching job elements to the Claimant. The Carrier's strongest evidence of keypunching speed and error do not weigh heavily when measured against the fact that the Claimant had made clear progress learning nine areas and improving to fifteen of twenty-four areas on his last evaluation. There is ample evidence that if given time and training the Claimant could have performed in the position he bid for and received. Those who were directly involved in training the Claimant state for the record that they were unable to complete the training and that they believe the Claimant had the ability to qualify for the position. A complete review of the four progress reports does not establish that Claimant was failing to learn the position or could not do so. Evidence that would indicate that he had been adequately trained by Mr. Reins or Mr. Meyers and had in their estimation failed to learn key functions is lacking. In fact this Board cannot find clear evidence that Claimant was ever explicitly and completely trained in PICL and other key functions and then failed to learn or retain such information.

On the whole of the record the Organization has provided sufficient evidence of a probative nature to substantiate that Claimant was not manifestly incompetent when removed from the position. Absent clear evidence of manifest incompetence as indicated in prior Third Division Award 21679, we must sustain Part 1 of the Claim. As for Part 2, it is herein determined to be of no added consequence insofar as it alludes to "the rights of hearing and appeal" as provided in Rule 21, Sections (a) and (b).

This Board has reviewed Part 3 and Part 4 of the Claim and while it notes that Carrier did not specifically take exception to each element, it similarily notes that it was on property "denied in its entirety". As for those elements of the Claim which were not specifically disputed on property, this Board neither believes that it can find Carrier in violation without restitution, nor that it should order the Carrier to restore Claimant to Position #032 with wage compensation as if he had qualified. As such, this Board sustains Part 3 of the Claim, but denies Part 4 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 the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 19th day of September 1986.

LABOR MEMBER'S CONCURRENCE and DISSENT TO

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(REFEREE M. E. ZUSMAN)

The Majority Opinion has correctly analyzed the facts of the case and determined that the Carrier violated the Agreement for which there must be a remedy. Unfortunately, that remedy is a compromise, which is less than suitable.

The majority has decided to sustain parts 1 and 3 of the Claim; Part 1 being the violation of the Agreement; and, Part 3 the request to restore Claimant to the position he was unfairly disqualified from, and provide him with a full sixty (60) calendar days training with full cooperation from Carrier Officials in which to qualify.

We concur in the aforementioned, but separate and disagree with the remainder of the Award which fails to sustain Part 4 of the Claim. As pointed out in reargument, the Board not only determined Rule 8 was violated, but so was the decision rendered after the Hearing conducted in accordance with Rule 22. Rule 22(a) grants the Claimant the same privileges as Rule 21, which means that if the final decision of the Carrier is not sustained the Claimant is to be made whole for loss of earnings. This Board determined years ago, in Lead Decision Award No. 13837, that where a rule provides for payment of a violation of the Agreement, that it is not within our privy to determine payment

or nonpayment of a violation, but that instead we are obligated to compensate the Claimant as the rule requires. Rules 8 and 22 were violated and they require the Claimant to be made whole for loss of earnings. The rule does not leave to the Board's discretion the determination of monies owed, but instead requires enforcement of the rule.

The Award itself even recognizes the fact that the Carrier offered no argument against the monetary damages. The Carrier obviously recognized the fact that in fitness and ability cases it is commonplace within the industry that the Claimant be made whole for loss of earnings.

Whenever, in those isolated instances where a clear violation of the Agreement has been made, and the Board fails to make a Claimant whole for loss of earnings, we are sending an incorrect signal to the Carrier. We are telling them go ahead and violate the Agreement again, and if you get caught don't worry too much.

The sympathetic compromise offered in this decision is misplaced and will lead to the promulgation of further grievances. It is because of such we concur in sustaining Parts 1 and 3 of the Claim, but strongly disagree with the failure to sustain Part 4 of the Claim.

William R. Miller

William R. Miller, Labor Member

September 29, 1986