Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29133
THIRD DIVISION Docket No. CL-29361
92-3-90-3-282

The Third Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (Allied Services Division
(Transportation Communications International Union
(
(Western Railroad Association

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10459) that:

1. The Western Railroad Association violated Rules 2, 4, 5, 8, and 11 of the Agreement when on January 10, 1989, Mr. C. Bush who after returning from disciplinary leave, in accordance with the Rules Agreement sought to exercise his seniority rights by bidding on Position No. 38, Analyst, which was bulletined during his absence and for which he is Qualified and was rejected by you "account attendance record."

2. The Association shall now be required to compensate Mr. Bush with an amount equal to what he could have earned, but not limited to his daily rate of pay, overtime and holiday pay commencing with January 10, 1989, and continue such compensation until the dispute is resolved."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On November 2, 1988, the Association issued Bulletin No. 4 for Analyst Position No. 38, with a closing date for receipt of applications set for November 7, 1988. On January 10, 1989, the Claimant bid for Position No. 38. On the same date, the Claimant was not selected by the Assistant Tariff Department Manager who wrote "Bid rejected account attendance record" as the reason for his action. In later correspondence on the property, the Association provided other reasons for the Claimant's non-selection. It asserts that the Claimant, who at the time that Bulletin No. 4 was issued was serving a 120-day suspension for failing to protect his assignment, did not have Rule 11 rights to the position because he was in discipline statue. Moreover, it contends that the Claimant failed to properly exercise his Claim to the position

because he bid on it, rather than utilizing a "bump slip." Without prejudice to its contentions that the Claim should be rejected for the reasons stated above, the Association also argues that the Claim should be denied because of the Claimant's "abysmal" attendance record. It points out that he had been previously suspended twice (even before the 120-day suspension) and had received several written reprimands for violations of the Association's policy on absenteeism.

The Association in denying the Claim on its merits relies upon that part of Rule 4 - Assignments and Displacements that reads:

> "(a) Employes covered by these rules shall be in line for promotion. Promotions, assignments and displacements shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.
>
> (b) The work 'sufficient' is intended to more clearly establish the right of the senior employee to a bulletined position or vacancy where two or more employees possess adequate fitness and ability."

After careful review of the Association's procedural arguments, we find they must fail. While the Claimant was on suspension, he was still an employee and, as such, he was entitled to those rights granted by the Agreement. If the Association had to fill Position No. 38 during the period of the 120-day suspension, its rejection of the bid would have been proper because the Claimant was not available for service. With respect to the argument that the proper "bump slip" was not used, this Board notes that the selecting official apparently did not find error on that basis. This is sufficient to warrant rejection of this ex post facto contention.

With respect to the Association's position that it was proper to reject the Claimant's bid because of his poor attendance record, the Organization's counter arguments are not without merit, because the Claimant did have the necessary abilities. Moreover, employees are not on duty each and every day, because of approved absences and illness etc. On the other hand, the Association's contention that poor attendance may properly be considered before it determines whether or not someone has the requisite fitness is also not without merit.

In this industry numerous Awards have pointedly underscored the Carrier's right and leeway to determine fitness and ability. Its determinations may be set aside only if there is a showing that the Carrier's actions were arbitrary, capricious or biased.

The Association rightfully expects its employees to regularly report to work to maintain efficient operations. Moreover, regular attendance at the workplace is an implicit part of an employee's obligation. It follows, therefore, that an attendance record may be considered by the Association when reaching its fitness and ability determination for promotion. In the case at

hand, it was never refuted on the property that the Claimant had a poor attendance record. Apparently, he could not be depended upon to regularly report for work and, therefore, the Association's decision that the Claimant lacked the fitness for Position No. 38 was not an abuse of its discretion.

The Organization's reliance upon Third Division Award 21785 is misplaced. Unlike this case, that Award found that the Claimant's prior record had not been raised on the property.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever, Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1992.

LABOR MEMBER'S DISSENT

TO

AWARD 29133, DOCKET CL-29361

(REFEREE MUESSIG)

The Majority Opinion in the case at bar is totally without logic and fairness to the Claimant and because of such a strenuous Dissent is required.

Historically this Board has adhered to the basic tenant that when discipline is assessed it must be swift and sure. Discipline is to be a corrective measure and not a punitive one. In this case, however, the Board has accepted what amounts to constructive discipline. By accepting the Association's argument that the Claimant could be denied a position, which the Board found he had "the necessary abilities" to perform because of his attendance record, is to allow the Association to exact de facto discipline.

The Board has given the Association the perfect way to deny not only this Claimant, but also, any other employee a position by citing that person's attendance record. This Board was not asked to review the Claimant's attendance record and, in fact was in no position to compare his record against the norm for the work place. It simply had no logical way to arrive at the conclusion that it did.

While the Organization does not condone the actions of employees who fail to properly protect their assignments, it does aver that the parties have negotiated a means to handle this situation. No employer, including the Association, hesitates to discipline an employee, who it feels is derelict in reporting for

work.

To allow the Association to continue to deny the Claimant his contractual right to a position after he has served his penalty for the infraction is tantamount to double jeopardy. The rules of the Agreement give even employees who are suspended rights to seek and hold jobs for which they are qualified. In this Award the Majority has correctly recognized that principle. After making the initial proper conclusion that the Claimant who was on suspension was entitled to bid on open vacancies, they then use a "slight of hand" to take that right away.

Through a tortured process using twisted logic they decided that his prior discipline record should be used as guide in determining his lack of "fitness and ability". There is absolutely no logical rationale for concluding that an employe's attendance record indicates what he or she know's about a job and whether or not they have the requisite "fitness and ability". The bottom line is the Claimant has again been disciplined for that which he has all ready served.

In addition to this and to add insult to injury there is no guidance to the parties as to how long or under what other conditions this Claimant may once again have a reasonable expectation to be able to hold this or any other job that the Association wishes to deny him on the grounds of "poor attendance." This certainly puts the Association in an arbitrary and capricious position.

The Majority chose to ignore Third Division Award 21785 as being misplaced because in that Award the Board found that the

Claimant's prior record had not been raised on the property. A closer reading of the Award, however, reveals more reasoned thinking:

> **"(2)...no comparison with the group average or the accepted bidder's record was offered. (3) Perfect attendance reasonably cannot be expected from or required of any employe, and carrier did not provide sufficient proof of its allegation that the holder of ... position must be on the job each day."**

The same can be said of the Association in the instant case. There was no showing of any group average or proof that daily attendance was necessary to perform the job that Claimant sought.

Far from settling an issue on this property, the Award lends itself to creating future claims and grievances. Award 29133 is in such palpable error as to be of no precedential value.

For the foregoing reason I vigorously Dissent.

William R. Miller
Labor Member N.R.A.B.

Date: March 16, 1992

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
TO
AWARD 29133, DOCKET CL-29361
(Referee Muessig)

Dissentor would have us believe that Award 29133 involved unwarranted discipline, double jeopardy, fitness and ability for positions and has also employed other "buzz" words that would seem to make this matter more than it was.

The only contractual matter of substance decided in Award 29133 was whether Claimant, after serving a 120 day suspension had the contractual right to displace on any position bulletined during his suspension. No contractual basis was ever substantiated in the record. Organization's main contention in this regard, was their bare assertion that a disciplinary suspension was the equivalent of returning from an authorized leave of absence. It is not!

Award 29133 found the Organization's arguments concerning use of a past record, "...not without merit," as was the Carrier's use of the same record to determine fitness. However, such arguments and contentions did not dispose of the issue before the Board. On the matter of Claimant's contractual rights, the Board properly concluded that Claimant "did not have Rule 11 rights to the position..." A conclusion singularly ignored by the Dissentor.

While Award 29133 commented upon many of the parties assertions, Dissentor has pointed to no impropriety in the disposition of the central contractual issue, the Dissent not withstanding.

P. V. VARGA

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

J. E. YOST