Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36577
Docket No. CL-36618
03-3-01-3-144

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Union Pacific Railroad Company (former Southern
(Pacific Railroad)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-12718) that:

(1) Carrier acted in an arbitrary, capricious, and unjust manner, in violation of Rules 27, 36, 50 and others of the Agreement, when it disallowed clerical employee Joe Mannella his seniority right to displace onto Position 133P, Assistant Buyer, Los Angeles, CA., and further then failed to grant Mr. Mannella an unjust treatment hearing as provided in Rule 50 of the current CBA.

(2) Claimant Mannella made a proper request for such a hearing on May 18, 2000 after having been unjustly denied his contractual right to displace on Position 133P by Carrier and said hearing should now be granted.

(3) Carrier shall now be required to place Mr. Mannella upon Position 133P, which was previously denied him, or allow him the unjust treatment hearing under Rule 50 and compensate him at the rate of $140.20 per day beginning on May 5, 2000, and continuing each day thereafter until he is placed on Position 133P."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

This dispute arose on May 15, 2000, when the Claimant requested to displace a junior employee from Position 133P, Assistant Buyer, in the Carrier's Supply Department in Los Angeles, California. The Claimant's request was denied, based on the Carrier's determination that he did not possess the minimum qualifications for the position.

The Claimant timely requested an Unjust Treatment Hearing in accordance with Rule 50, which states:

> "An employee who considers himself unjustly treated shall have the same right of investigation and appeal as provided in Rules 46, 48 and 49 if written request is made to his superior within fifteen (15) days of the cause of the complaint."

The Carrier denied the Claimant's request by letter dated May 19, 2000, as follows:

> "In response to your letter dated May 18, 2000, you will not be granted a hearing. The job description clearly states the minimum requirements necessary for the position which you do not possess. In our opinion, you were not unjustly treated. . . ."

The instant claim protests the Carrier's failure to award the Claimant the position and, further, its failure to accord him the right to an Unjust Treatment Hearing. The Organization asserts that seniority governs the assignment of positions when fitness and ability, which the Organization submits the Claimant possessed, are sufficient. Moreover, the Organization argues that Rule 50 is unambiguous and specifically affords employees the demand right to an Unjust Treatment Hearing to redress just these sorts

of disputes. The Carrier is not privileged to ignore the provisions of Rule 50 because it has determined that the outcome is a foregone conclusion.

The Carrier argues that qualifications, fitness and ability to perform a job are determinations within its province. In this instance, the position sought by the Claimant has a longstanding published prerequisite. Specifically, an applicant must have at the time of his bid or displacement one year of experience in the Supply Department within the previous three years. A prior decision has already held that this minimum level of experience is a reasonable means of ensuring the efficiency of the Supply Department. Public Law Board No. 4070, Award 56. Because the Claimant did not possess this prerequisite for the job, the Carrier contends that a rational basis existed for its determination to deny the displacement request.

That being the case, the Carrier submits that no useful purpose would have been served by conducting an Unjust Treatment Hearing. As stated in the Carrier's July 26, 2000 on-property correspondence:

> ". . . the Unjust Treatment provision as established in Rule 50 was not intended as an avenue for the employee to call into question the established criteria set by the Carrier each and every time an employee fails to meet such and is therefore denied a displacement."

Equally important, the Carrier argues that the right to an Unjust Treatment Hearing is limited solely to those situations in which no reference is made to other Agreement violations. The instant dispute first and foremost is a claim that the Carrier violated Rules pertaining to promotion, assignment and displacement. The Carrier contends that the request for an Unjust Treatment Hearing is secondary in this matter and predicated solely on the claim that the Carrier violated specific Rules of the Agreement. Thus, the proper forum to address this dispute is through the claims and grievance process of the Agreement, and not through an Unjust Treatment Hearing.

The Board carefully reviewed the record in this case. The Organization contends that there were two violations of the Agreement in the instant matter; first, when the Carrier arbitrarily denied the Claimant's displacement request, and second, when the Carrier improperly refused to hold an Unjust Treatment Hearing. We find that there is no need to address the first argument because the second has merit.

The language of Rule 50 is clear and unambiguous. It plainly establishes the employee's right to request and be granted an Unjust Treatment Hearing. There is no language of limitation which would suggest that this right is available only where the issue is not addressed in some other portion of the Agreement. To the extent that an Award cited by the Carrier reached a different conclusion, we find that the unequivocal language of the Agreement is controlling.

Because Rule 50 is an independent procedural right which must be enforced as written, we similarly find unpersuasive the Carrier's assertion that it is permitted to deny a timely Unjust Treatment Hearing request when it has determined that the employee's position is without merit. Rule 50 contains no language permitting the Carrier to refuse an Unjust Treatment Hearing request based on its pre-determination of the merits of the claim. To be sure, the Carrier's decision as to matters of fitness and ability is an inherent right of management. But that right is not unfettered. It is subject to the right of the employee to contest the decision through the Unjust Treatment Hearing process afforded under Rule 50. The Claimant was not afforded his contractual right to an Unjust Treatment Hearing and the claim must be sustained on that basis.

The remaining question becomes one of remedy for the Carrier's violation. The Board sustains only Paragraph (2) of the Organization's Statement of Claim and directs that the Carrier convene the Rule 50 Unjust Treatment Hearing at the earliest convenience of the Claimant and the Carrier.

The Organization also requests that the Claimant be placed on the position of Assistant Buyer and compensated at the rate of that position from the date of his attempted displacement and continuing until he is placed on the position. Until an Unjust Treatment Hearing is held, however, those requested remedies are speculative at best. The claim for compensation can be refiled upon the conclusion of the Unjust Treatment Hearing.

The parties during executive session addressed the question of remedy and requested that a determination be made on the merits as well as the issue of compensatory damages. However, the answers to those questions are contingent upon the result of the Unjust Treatment Hearing that should have been conducted. To address the merits, without affording the Claimant a full opportunity to present evidence at the Unjust Treatment Hearing, would be premature. By the same token, it is the Board's opinion that it would be precipitous to issue a monetary award at this time,

because the question of the Claimant's alleged unjust treatment cannot fully be resolved *until an Unjust Treatment Hearing is conducted.*

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of June 2003.

Carrier Members Dissent
to Award 36577 Docket (CL-36618)
Referee Kenis

There was no dispute in this record that the Organization's claim was that Claimant Mannella was qualified to displace on position 133P and that it was improper to deny the Claimant his exercise of seniority. However, it is noted at page 3 of the Award that the Carrier "has a longstanding published prerequisite" requiring one year's experience in the Supply Department within the previous three years. Claimant last worked in that Department in 1996 thus putting him outside the established qualification requirement. No evidence was ever produced to rebut this basic fact. Obviously, if Claimant did not meet the prerequisite he was not qualified to make the displacement. That should have ended the matter.

But, as is noted at the bottom of page 3 of the Award, the Organization progressed two interrelated claims in this matter. The first was the Carrier "arbitrarily denied the Claimant's displacement request." The second was the Carrier's denial of an Unjust Treatment Hearing for Claimant to present evidence to disprove the Carrier's position.

Arbitration decisions are supposed to resolve real or perceived conflicts, not be the cause to generate them. It is self evident that the resolution of Claimant's qualification "complaint" rested on the factual basis of whether he met the prerequisite or whether there was a misapplication of the prerequisite in some manner. The Organization argued on the property, in its Submission and now in its Concurrence and Dissent that there was "enough additional information....to document that the Claimant has sufficient fitness and ability for Position 133P..." However, the Organization did not justify that assertion. The Organization argued that Claimant had worked a very similar position, and thus satisfied the prerequisite, was never substantiated in the record. The Organization's second argument was that the prerequisite was outside the provisions of the contract and was a recent addition imposed by the Carrier. Here again the Organization produced no evidence in support of its position. If the Claimant did not meet the prerequisite; if its application had been previously upheld in arbitration - note the first full paragraph on page 3 of the Award; - and if there was no shown misapplication of the prerequisite, then the only conclusion is that Claimant was not qualified. As Sherlock Holmes would have said to Dr. Watson such a conclusion on this factual record "was elementary." Again, that should have ended the matter.

However, despite the fact that the Organization in 9 months of handling on the property was unable to produce any evidence that claimant had been mishandled, the Organization and now this Board erroneously provides the claimant and his

Organization with a second opportunity to seek justification for this claim. While we do not dispute that Rule 50 provides for unjust treatment hearings concerning a "complaint", said complaint must have some reasonable basis for being advanced. As is quoted at page 2 of the Award, Claimant's bump was denied because he failed to meet the requirements for the position. Conducting an Unjust Treatment hearing now will not change the facts. As was noted on the property and is cited at page 3 of this Award, an unjust treatment hearing is not an avenue to "question the established criteria set by the Carrier." Had this Board found evidence of the Claimant's qualification or an impropriety in that determination it would have sustained the claim. Such action would certainly make moot any assertion that claimant was entitled to an additional hearing on his "complaint". To now conclude that despite the fact that Claimant was not qualified in May 2000 and despite the fact that no evidence was put into this record to rebut that fact by the Organization in 9 months of claim handling on the property, that claimant is entitled to an unjust treatment hearing on his qualification "complaint" is simply unwarranted, unnecessary and places an unfortunate burden on the parties. This Board on this record should have upheld the Carrier's denial of claimant's displacement attempt and that as a logical result the claim for a hearing would be mooted by the factual record.

We Dissent.

P V Varga
Paul V. Varga

M W Fingerhut
Martin W. Fingerhut

Bjarne R. Henderson
Bjarne R. Henderson

Michael C. Lesnik
Michael C. Lesnik

7/10/03

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO THIRD DIVISION AWARD NO. 36577 (DOCKET CL-36618)
(REFEREE ANN S. KENIS)

The findings of the case require comment. The Referee correctly concluded that Rule 50 Unjust Treatment Hearing "....is an independent procedural right which must be enforced as written, we similarly find unpersuasive the Carrier's assertion that it is permitted to deny a timely Unjust Treatment Hearing request when it has determined that the employee's position is without merit. Rule 50 contains no language permitting the Carrier to refuse an Unjust Treatment Hearing request based on its pre-determination of the merits of the claim...."

Based upon the Carrier's failure to grant the required Hearing, that should have been viewed as a negative to the Carrier's position; couple that with the fact there was enough additional information within the record to document that the Claimant had sufficient fitness and ability for Position 133P the Referee has erred in her remedy of directing the Carrier to convene the Rule 50 Unjust Treatment at the earliest convenience of the Claimant and the Carrier.

The remedy is best described as too little, too late which leads to the re-litigation of the same dispute.

Because of the aforementioned reasons, I concur with a portion of the decision and dissent from a portion.

Respectfully submitted,

William R. Miller

William R. Miller
TCU Labor Member, NRAB
June 25, 2002