Award No. 5175
Docket No. DC-5032

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee.

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of Joint Council Dining Car Employes, Local 351, on property of Chicago and Northwestern Railway Company for and in behalf of Fred Winfield and George Hill and other employes similarly situated that they be compensated for difference between what they should have been paid as bartenders from the date of their removal for their assignments as buffet car attendants on various trains of carrier; Winfield and Hill having been assigned on Trains 105 and 106, and what they actually were paid to the date said claimants are assigned as bartenders on said trains and paid the wage of bartenders as set out in Wage Appendix to Agreement, Carrier having deprived Claimants of assignments as bartenders in violation of Rules 1, 18 (a), 18 (b) and 19 (a) and 19 (c) of Agreement.

EMPLOYES' STATEMENT OF FACTS: Prior to on or about July 11, 1949 Fred Winfield was employed by Carrier as buffet car attendant on Trains 105 and 106. He was so employed since March 31, 1942, and his seniority dates from that date. George Hill was employed by Carrier as buffet car attendant on Trains 105 and 106. He was so employed since April 25, 1944 and his seniority dates from that date.

On or about July 11, 1949 Carrier created new position of bartender on Train 105 and 106. It hired **new employes who had no seniority whatsoever with carrier in Group 3 of classes of employes as contained in Scope Rule 1 of Agreement to fill assignments as bartenders on Trains 105 and 106.** These employes were employed as bartenders in lieu of and in place of claimants. Claimants were thus totally deprived of their rights under the agreement to exercise their seniority for assignment as bartenders when those positions were established by carrier as provided for in Rules 18 (a) and (b) and were denied their rights to promotion as provided in Rule 19 (a) and 19 (c).

The other employes similarly situated are:

1. Joseph Brown
2. Wendell Calbert
3. Wellington Webb
4. E. H. Caolymore
5. James A. Charlton
6. Willie Curtis
7. A. W. Dawson
8. Sherman A. Gillard
9. Willie Gilmore
10. A. L. Jenkins
11. Oscar Motley
12. Wilson Motley
13. A. W. Parker
14. William Small
15. Lester W. Stephens
16. Les O. White

It is the carrier's position that the provisions of rule 1, current agreement, is not here involved.

It is further the carrier's position that neither are the provisions of rules 18(a) and 18(b) here involved.

The carrier further takes the position that the only rule involved in this case is rule 19 dealing with the question of promotion from a lower to a higher class which promotion must, of course, be based on seniority and qualification. In the judgment of Dining Car Department officers there were no employes in the class of buffet car attendants or helpers who could meet the requirements necessary to fill positions of bartenders and at no time have the employes submitted evidence that the claimants Fred Winfield and George Hill did have the necessary qualifications to fill such positions. There are no rules contained in current agreement providing that the carrier must promote employes to a higher class when such employes do not have the necessary qualifications. If in the judgment of supervising officers employes are not qualified for promotion to a position in the higher class it is not necessary that the carrier make such promotion.

It is the further position of the carrier that no rules as contained in current agreement have been violated and therefore the claim as presented is not justified and must necessarily be denied.

OPINION OF BOARD: On or about July 11, 1949 the Carrier established two new positions of Bartender on its Trains 105 and 106 operating between Chicago, Illinois and Portland, Oregon. To fill these positions the Carrier hired Bartenders not previously employed. The Employes contend that under the Agreement between the parties the Carrier was required to promote Buffet Car Attendants to fill these positions.

The rule particularly applicable to the situation before us is Rule 19(a), current Agreement, which provides:

> "Promotion to a higher class of service covered by this agreement shall be based on seniority and qualifications."

Bartenders are included in a higher class of service and in a separate seniority group from Buffet Car Attendants.

The primary purpose of Rule 19 (a) is to eliminate favoritism and prejudice in the promotion of employes from the lower to the higher classes of positions comprehended within the Scope of the Agreement. The accomplishment of this primary purpose in the instant case is made by requiring the promotion of the senior employes in the lower class, Buffet Car Attendant, to the higher class, Bartender, if the applicants have sufficient qualification for the higher class position. The question of an applicant's qualification involves a matter of judgment on the part of Management, and where Management exercises its judgment on adequate evidence upon which to base a finding, and it does not appear that prejudice or favoritism was a motivating factor, this Board will not undertake to usurp the function of Management by substituting its judgment for that of the Carrier.

In the instant case the question for determination is whether any or all of the claimants had sufficient qualifications to fill the position of Bartender. The Carrier contends they have not. The Employes contend they have. Neither present any evidence in support of their contentions upon which to base a finding here.

We therefore remand this case for further consideration of the parties on the property, with directions to the Carrier to examine into the qualifications of the claimants within thirty days, and if any be found to possess sufficient qualification to fill the Bartender positions in question, that they be promoted to such positions in accordance with Rule 19, and an adjustment in wage loss, if any, be made in accordance with the applicable rules of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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 evidence is insufficient to determine the issues raised.

AWARD

Claim remanded in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 21st day of December, 1950.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 5175, DOCKET NO. DC-5032

NAME OF ORGANIZATION: Joint Council Dining Car Employes.

NAME OF CARRIER: Chicago and North Western Railway Company.

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

On December 21, 1950, the Board adopted Award No. 5175 which remanded the dispute for further consideration on the property. The Carrier asserts that it has complied with the award and the Organization insists that it has not.

On behalf of the Carrier it is contended that Award No. 5175 is void for indefiniteness and court cases were cited to the effect that an award must contain precise and definite findings of fact and a final and definite award which is capable of enforcement. We agree with the foregoing statement but it has no application here. Award No. 5175 is not a final award and it necessarily must be treated as interlocutory in view of the nature of the remand.

The award directed the Carrier to examine into the qualifications of the claimants within thirty days and if any be found to possess sufficient qualifications to fill the bartender positions in question, that they be promoted to such positions.

We point out that an interpretation of an award may not properly be treated as a rehearing or a new trial of the merits of the case. Its purpose is to explain and clarify the award, not to make a new one. The only evidence properly before the Board for consideration is that appearing in the record at the time the docket is closed. New evidence may not be considered in connection with an application for an interpretation. Award Nos. 4967, 5195. The principle set out in Award No. 5669 is similar to the situation here. In that award it was said:

> "The Award adjudicated the claimant's seniority rights in his favor but conditioned them upon his ability to pass a fair and unprejudiced test. * * * Whether the condition had been satisfied, that is, whether the test was fair and unprejudiced, is not a question of interpretation of the award but simply a question of the application of the terms of the award to facts which existed and were known before the case ever got here."

In the present case, we adjudicated the seniority rights of the claimants under their Agreement. The award conditioned the right of claimants to promotion under their ability to qualify as bartenders. The dispute was

remanded to have that question determined on the property. Whether or not claimants were qualified cannot be determined by this interpretation. If the claimants feel that the Carrier has refused to promote them, even though they were qualified, that question should be presented to the Board by a second appeal on the record made on that issue pursuant to the remand. This simply means that we cannot consider the new evidence produced regarding the qualifications of these claimants. We can only make clear and definite any uncertainty or indefiniteness in the award itself.

It is quite evident from the submissions that the only question here involved is what is meant by the words "to examine into the qualifications of the claimants". The qualifications of an employe may be determined from many sources. An examination of an employe's service record has evidentiary value but it is not necessarily controlling. The fact that an employe has never had experience as a bartender is a factor to be considered but it also is not a controlling requirement. If it were, a new bartender could never qualify. The fact that claimants are colored employes and the bartenders now holding such positions are all white, is wholly immaterial in determining their contract rights. Character and intelligence, however, are proper to be considered. The fact that claimants may need some instruction in their duties as a bartender is not of itself sufficient to disqualify. These things, and others as well, are proper to be considered. If, after a complete examination of the qualifications of these claimants, the Carrier in the exercise of its managerial prerogatives finds that claimants are not qualified, its judgment will be sustained, unless it appears clearly that it was the result of prejudice or favoritism and was therefore arbitrary or capricious. The Carrier must consider all the evidence available in determining the qualifications of an employe for promotion under such a rule as we have here. It may not ordinarily seize upon a single evidentiary fact and ignore all others. To do so is not a compliance with Rule 19 (a) and ordinarily constitutes an unfair and arbitrary disposition of the rights of employes. Carrier is entitled to employ and assign qualified employes, but it is required to first promote qualified employes from a lower to a higher class of service under such a rule as 19 (a).

If Carrier has failed in its obligations under Rule 19 (a) after the remand of the case for adjustment on the property, the proper procedure is to bring that grievance or dispute to this Board by an appeal. This Board will then be in position to review the evidence pertaining to claimants' qualifications and make a final decision of that issue.

Referee Edward F. Carter, who sat with the Division as a member when Award No. 5175 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 3rd day of August, 1954.

CONCURRING OPINION

Interpretation No. 1 to Award No. 5175

We concur generally in the Referee's Opinion that the claimants' qualifications cannot be determined by an interpretation to Award 5175; but we find it necessary to take exception to certain conclusions expressed as to the validity of Award 5175, itself.

The Referee properly notes that under ruling decisions of the courts that an award "must contain precise and definite findings of fact and a final and definite award which is capable of enforcement." He does not contend that Award 5175 in any measure meets these requirements; but regardless he thinks that award escapes the application of those requirements because it "is not a final award" but "must be treated as interlocutory in view of the nature of the remand."

There is no provision in the statute that governs our activities which would authorize "interlocutory" awards. 3 First (m) says flatly that our awards "shall be **final** and **binding** upon both parties to the dispute, except insofar as they shall contain a money award."

The holding of the Referee that Award 5175 escapes the requirements of preciseness because it was "interlocutory" in nature thus cannot be upheld; if anything, the failure to either sustain or deny the claim, the remand itself, is imprecise and indefinite. The very nature of the purported award rather than excluding it from the requirements of preciseness actually compelled condemnation on the basis of that requirement. See **Smith vs. L&NR Co.,** 112 F. Supp. 388 for such conclusions concerning an award of a similar nature.

The failure to establish definite rights between the parties, the failure to make precise findings, the failure to either sustain or deny the claim, rendered Award 5175 void and unenforceable. The proffered reason as to why it should escape this condemnation cannot be accepted, since that reason in itself compelled the condemnation. Award 5175 should have been held void.

/s/ J. E. Kemp

/s/ R. M. Butler

/s/ C. P. Dugan

/s/ W. H. Castle

/s/ E. T. Horsley