

Award No. 12529

Docket No. MW-12357

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LEHIGH AND NEW ENGLAND RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the effective Agreement when, on December 24, 1954, it disqualified and removed Mr. Michael Zupko from the position of Section Foreman on Section No. 3, without just and sufficient cause and without the benefit of a hearing and investigation.

(2) The Carrier now be required to restore Mr. Michael Zupko to the position of Section Foreman with seniority rights as such unimpaired.

(3) Mr. Michael Zupko now be allowed the difference between what he received at the Track Laborer's rate and what he should have received at the Section Foreman's rate since December 25, 1959.

EMPLOYES' STATEMENT OF FACTS: On or about November 1, 1959, the Carrier bulletined the position of Section Foreman on Section No. 3, Pen Argyl, Pennsylvania, in accordance with that portion of Rule 4 (a) which reads:

"New positions, permanent and temporary vacant positions will be bulletined any time within ten (10) days after they are created or occur for a period of ten (10) days during which the employees may file their applications with the Engineer Maintenance of Way. Bulletins will show advertisement number, position, present location, normal hours of service, starting time and rate of pay, and will be posted at headquarters of employees entitled to consideration. Application, in writing, on Form EMW-7 must be made in triplicate, two copies to the Engineer Maintenance of Way, who will retain one and return the other properly receipted, as an acknowledgment, and one copy to the General Chairman. Copy of assignment notice will be published in the same manner as bulletin notice. Assignments will be made within ten (10) days after close of advertising

"Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment. The exercises of such judgment is a prerogative of the management and unless it has been exercised in an arbitrary, capricious or discriminatory manner we should not substitute our judgment for that of the management."

the following from the Opinion in Third Division Award 6753:

"No rule of this jurisdiction is more firmly established than the one that a Carrier is possessed with certain discretionary powers in determining the fitness of an employe for service and that its exercise of those powers in respect to such matters will not be disturbed in the absence of a clear affirmative showing they have been exercised in an unreasonable, arbitrary or capricious manner."

the following quoted from the Opinion in Third Division Award 6829:

"We cannot substitute our judgment for that of the Carrier in matters of this kind. Our function is limited to a review of the Carrier's decision to ascertain whether it was made in good faith upon sufficient supporting evidence, or whether it was the result of capricious or arbitrary action without reasonable support in the record before us."

Carrier contends that it has acted in the exercise of the authority reserved to it and pursuant to the applicable requirements of the agreement, specifically Rule 4(d).

The Carrier further contends that none of the rules, understandings or practices were violated as charged by the Organization in part (1) of their Statement of Claim when, on December 23, 1959, it removed claimant from the position of Foreman, Section No. 3, Pen Argyl, Pa., for failure to qualify for the position in question.

The Carrier, therefore, respectfully requests that the claim be denied.
(Exhibits not reproduced.)

OPINION OF BOARD: On November 25, 1959, Claimant was assigned to the advertised position of section foreman. Although he held no seniority on the roster covering section foremen, he was awarded the position because no bids were received from any employees holding seniority on that roster.

He alleges that he was disqualified and removed from the position after 29 days without just and sufficient cause. He contends that Carrier's action was arbitrary in view of the fact that he was not given the reason for his removal. Furthermore, he asserts that he was qualified on the basis of prior assignments in which he temporarily filled positions of extra gang foreman and section foreman without Carrier's criticism of his handling of these positions.

In its denial of the claim Carrier relies on Rule 4(d) which provides as follows:

"Employees assigned to bulletined positions will not be considered to have qualified for such positions unless and until they have been the incumbents of said positions for thirty-one (31) calendar days after reporting for duty in said positions . . ."

It asserts that it complied with the rule in advising Claimant by letter of his failure to qualify and his removal to be effective December 24, 1959 before the specified 31 day qualifying period.

We understand the rule to provide that Carrier has the right to disqualify and remove the employe before 31 days. We are not persuaded by Claimant's argument that because the letter advising him that he did not qualify for the position did not include the reason for discharge that the action was unjust and arbitrary. The rule does not require that a reason be presented. The record does disclose, however, that at a later date a reason was given.

As to Claimant's contention that Carrier was also unfair in denying him a hearing and an investigation, we find that the rule does not make provision for such proceedings. Accordingly, Rule 4(d) was not violated.

Although we recognize that previous experience contributes to fitness and ability to qualify for a promotion, it does not follow that Carrier is precluded from considering actual performance of the applicant while on the job. From the above considerations we do not find that the Carrier acted arbitrarily, capriciously, or unreasonably in its dismissal of Claimant before the 31 day period had expired.

The numerous other rules cited by Claimant are not applicable. Perhaps Rule 8 might have been used as a basis to secure a hearing for unfair treatment, but Claimant did not invoke it within the time required.

In the absence of a violation of the Agreement, the claim is denied.

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

The Agreement of the parties was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 21st day of May 1964.