NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21093
THIRD DIVISION Docket Number CL-21218

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7876) that:

(1) Carrier violated the Agreement between the parties when it removed Mrs. A. Williams from the Building Janitor assignment without just and sufficient cause, and disciplined her without benefit of a formal hearing.

(2) Carrier shall compensate Mrs. Williams for all wages and other losses sustained account of her removal from the assignment.

OPINION OF BOARD: Claimant was hired by Carrier on September 25, 1969. She worked as a Crossingman until May 4, 1971 when she bid on and received a position as Janitor in the Transportation Department, which she held until March 20, 1973. She was off injured from March 20 to May 14, 1973. On August 8, 1973, she was the successful bidder on a position as Tower-Clerk/Pay Clerk which she held until March 8, 1974. On that date, due to a force reduction, she exercised her seniority rights and went back to a position as Janitor on the 2nd Floor of the building. On March 15, 1974, after five days of work as a janitor, Claimant received a letter from the Trainmaster which provided:

> "This is to advise, that you have been disqualified as a Building Janitor in the Pontiac Terminal, due to poor workmanship.
>
> Your name has been placed at the bottom of the Clerks Furlough Board, but you will not be called for a Building Janitors position, due to disqualification. You may be called for other work in Pontiac, when vacancies occur."

On March 15, 1974 Petitioner submitted a Claim on behalf of Claimant alleging violation of Rule 26 and requesting an Unjust Treatment Hearing (under Rule 34). It is noted that in the course of the handling on the property Carrier agreed, without prejudice to its position, to permit Claimant to bid on a Janitor's position, which she did successfully on August 22, 1974; she was not called for any work prior to that time, based on her position on the furlough list.

The most relevant rules cited by the parties in this dispute provide as follows:

"RULE 8 -- TIME IN WHICH TO QUALIFY

(a) Employees entitled to bulletined positions or exercising displacement rights will be allowed thirty (30) working days in which to qualify, and failing, shall retain all their seniority rights and may bid on any bulletined positions but may not displace any regularly assigned employee except that an employee who fails to qualify on a temporary vacancy may immediately return to his regular position.

(b) When it is definitely determined, through hearing if desired, that the employee cannot qualify, he may be removed before the expiration of thirty (30) working days.

(c) Employees will be given full cooperation of department heads and others in their efforts to qualify.

RULE 25 -- ADVICE OF CAUSE

An employee, charged with an offense, shall be furnished with a letter stating the precise charge at the time the charge is made.

RULE 26 -- INVESTIGATION

An employee who has been in the service more than sixty (60) days or whose application has been formally approved shall not be disciplined or dismissed without investigation. He may, however, be held out of service pending such investigation. The investigation shall be held within ten (10) days of the date when charged with the offense or held from service. A decision will be rendered within ten (10) days after completion of investigation.

RULE 34 -- GRIEVANCES

An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, appeal and representation as provided in Rules 26, 27, 28, 31 and 32, if written request which sets forth the employee's complaint is made to his immediate superior within sixty (60) days of cause of complaint."

The principal thrust of Petitioner's position is that Carrier improperly used the techniques of disqualification as a form of discipline. This was patently improper since Claimant was thus deprived of due process. Additionally, it is argued that Claimant's two years of service as a janitor previously did not require her requalification for this second time. It is also argued that she wasn't allowed a reasonable period in which to qualify and was not given the cooperation required by the Rule. Finally, it is asserted that the evidence did not support Carrier's conclusion that Claimant was unqualified. Petitioner also notes that it had been the practice on this property not to require requalification of skilled employes who went back to a position on which they had previously qualified.

Carrier contends, inter alia, that no hearing was required prior to the disqualification of Claimant. It is argued further that Rule 26 is not applicable to this dispute since Claimant was neither disciplined nor dismissed. Most significantly, Carrier insists that Rule 8 is clear and unambiguous on its face and applies to all employes each time an employe receives a bulletined position or exercises seniority. Further, Carrier argues that the record shows that Claimant did not demonstrate, within a reasonable period, that she had the ability and qualifications required of the position in question. Carrier cites the evidence of five supervisors who testified at the hearing. In its submission, Carrier stated:

> "Rule 8 of the Agreement makes no exceptions whatsoever for an employee merely because such employee may have previously held the same or a similar position. Rule 8, by its language, is applicable to all employees and all bulletined positions. To uphold the employees contentions with respect to Rule 8, would be to write new provisions into the rule and this Honorable Board has held on numerous occasions that this it cannot do. Rule 8 must obviously apply to employees each time they bid or displace onto a position because in some cases a period of many years could pass between the time an employee initially held a position and the time the employee returns to such position. Thus, physical or mental conditions could change an employees ability to again perform satisfactorily the duties of a position they formerly held. In the instant case we have what appears to be a change in the attitude of the claimant towards janitorial duties. Whether her experience on clerical duties subsequent to leaving a janitors position caused her to look upon janitors work as menial duties beneath her dignity, or for what reason her performance on the janitors position dropped so far below that expected of an employee cannot be explained, however, the record in this case clearly shows that her attitude and interest in her work and quality of work as a janitor was so bad that carrier had to disqualify her from the position."

There is no doubt that Carrier has the right to determine an employe's qualification, and in the absence of an arbitrary or unwarranted conclusion, such judgment of ability and fitness will stand. Further, in the absence of contractual restraints, which are absent in this case, such judgments are not restricted to the first time an employe works on a job. However, this case is peculiar in several respects. First, what is in question is the employe's attitude and diligence, rather than ability. This gives rise naturally to the question of the propriety of using disqualification rather than discipline as the basis for action. Then, it is obvious to Carrier that the Claimant was in a very low skilled position which she had previously filled successfully for two years; this too gives cause for questioning the use of disqualification. Finally, there was no evidence of any cooperation whatever accorded this employe, who was at best chagrined with having to take a lesser position once again. Further, a five day work period,(although permissible under Rule 8 (b), supra,)was an extremely short period of time to determine qualification under all the circumstances.

In this dispute, the question of whether the disqualification was indeed a disciplinary action is a very close question, which we do not find it necessary to resolve. We also recognize that disqualification can well be the penalty imposed in a disciplinary matter. We find that under all the circumstances in this dispute, the disqualification finding by Carrier was arbitrary and capricious, and unwarranted. There was too short a period for qualification, given the two year prior history and also no cooperation as required by Rule 8 (c). The evidence in the hearing, after the fact, was not sufficient to overcome these serious deficiencies. We agree with the reasoning expressed in a related dispute (Award 13302) in which we held that:

> "The alarmingly swift action and precipitate decision of the Supervisor to disqualify the Claimant....flies in the face of that degree of reasonable cooperation so apparently inherent in the language of Paragraph 2 (d). We find further that the conduct of the Carrier in this case amounted to an arbitrary and capricious abuse of its powers and as such was in violation of the spirit and intent of the Agreement."

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 14th day of June 1976.