

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21178
Docket Number CL-21070

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
(Southern Pacific Transportation Company
((Pacific Lines)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7824) that:

(a) The Southern Pacific Transportation Company violated the Agreement when it failed and refused to grant Mrs. Hilda Moss an investigation duly requested in accordance with Rule 50 thereof; and,

(b) The Southern Pacific Transportation Company shall now be required to grant Mrs. Hilda Moss the investigation as requested on April 24, 1973.

OPINION OF BOARD: While working as a night janitress on the seventh floor of the Carrier's General Office Building in San Francisco, the Claimant was the senior bidder on a first floor janitress position designated as Position No. 89. The Claimant was awarded the first floor assignment by Clerks' Assignment Notice No. 6, dated April 16, 1973; however, the Carrier declined to place her on the position on the ground that there are no seniority rights to a specific floor and thus no concomitant obligation by the Carrier to assign any janitor to a specific floor. Under date of April 24, 1973, the Claimant protested the Carrier's action in not assigning her to Position 89 and requested an "unjust treatment" hearing under Rule 50. This request was denied by the Carrier in a letter of April 27, 1973 which stated that:

"The matter upon which you base your request is not a subject or basis for an alleged "unjust treatment" complaint as intended by the rule and request for hearing is accordingly denied. If you feel the agreement has not been properly applied in handling your assignment, it is, of course, your privilege to progress a claim for alleged agreement violation."

Under date of May 2, 1973, the Division Chairman filed a claim alleging that the Carrier's handling of the Claimant violated several enumerated rules of the Agreement.

The May 2, 1973 claim alleging rules violations is still an open claim on the property, so far as the instant record indicates, and the

merits of that claim are not involved in this dispute. The sole issue here is whether or not the Carrier improperly denied the Claimant's request for an "unjust treatment" hearing under Rule 50 which reads as follows:

"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 complaint."

The Employees' position is that the Claimant is the moving party under the above Rule and that nothing in the Rule gives the Carrier the right to say that the Claimant had no right to the requested investigation. The Carrier's Submission states that "no showing had or could be made that Claimant had been aggrieved in any way that would justify a Rule 50 hearing procedure"; and that the Claimant's remedy in the dispute lies in the application of the Agreement to the facts concerning her assignment to Position 89. The Carrier's theory for the foregoing, as reflected in its Submission, is that Rule 50 is intended to apply where an employee claims a benefit above and beyond the benefits encompassed by the Agreement and that a claim alleging Agreement violations must be processed under the usual claims procedures which do not provide a hearing. The Carrier's Rebuttal Brief reiterates that the May 2, 1973 claim alleging Agreement violations is in the proper forum for disposition of the instant dispute; however, the Rebuttal Brief goes on to state that the Carrier "has no quarrel with the application of Rule 50" and that its objection is that the "Employees are progressing the same claim on two bases." The Carrier's Submission and Rebuttal Brief, when read together, thus appear to take the position that the instant claim should be estopped because of the existence of a collateral proceeding arising from the same facts, or alternatively, that the Rule 50 hearing should be deferred until after the parties' handling of the collateral proceeding (i.e. the May 2, 1973 claim) has been concluded.

In support of their respective positions, the Employees cite Third Division Award No. 8233 and the Carrier cites Award No. 3, Public Law Board No. 843, involving these same parties. In Award No. 8233 the Carrier's denial of an unjust treatment hearing was held to be a violation of the Agreement where such hearing had been requested after the employee's removal from service on medical grounds. The Board stated that:

"The only qualification necessary was that the employee
'Consider himself unjustly treated.'"

In Award No. 3, Public Law Board No. 843, the Board considered a claim wherein the Carrier failed to grant a Rule 50 hearing which had been requested in conjunction with a claim that the Carrier had violated the

employee's displacement privileges under Rule 36. In denying the claim, and in ruling that no violation resulted from the Carrier's failure to hold a Rule 50 hearing, the Board stated:

"The Claimant had the right to complain of unjust treatment, but such complaint should be made with reference to matters not covered by the rules of the Agreement. In this dispute the Claimant could only obtain relief, if any, under a rule of the Agreement covering the situation that exists in this dispute.

The claim that the failure to hold the investigation under Rule 50 'renders this demand due and payable, without consideration of the merits of the claim' is not correct. There is nothing in the Agreement to sustain such a claim.

We hold that the failure of the Carrier to hold the investigation pursuant to the provisions of Rule 50 was not a violation of the Agreement."

In assessing the foregoing, and the whole record, it is noted that the ruling in Award No. 8233 was limited to the request for an unjust treatment hearing and that no claim alleging Agreement violations was involved. The claim in the dispute now under consideration is likewise so limited in that the Statement of Claim speaks solely of the request for an unjust treatment hearing, without any reference to a claim alleging Agreement violations. The instant claim is therefore within the purview of Award No. 8233 and the claim will accordingly be sustained on the basis of that Award. The claim in dispute in Award No. 3, Public Law Board No. 843, was of a nature substantially different from the herein claim and such Award is therefore not herein applicable. In that Award, as here, the Employees contended that a Rule 50 hearing had been improperly denied. However, unlike the instant claim, the claim in Award No. 3 also involved an alleged violation of an Agreement Rule. More important, the contention about Rule 50 in that Award was not that the Board should award the employee his hearing right; instead, the contention was that, because the hearing right had been denied, the Board should sustain the part of the claim alleging an Agreement violation without even considering the merits of the claim. In contrast, this dispute does not involve any contention that a compensatory award should issue solely because of the denial of a hearing.

In studying this dispute, it has been recognized that at first blush there is some plausibility to the Carrier's position against being confronted with two proceedings on the same facts at the same time; however, the aforementioned authorities, as indicated, and the record as a whole do not disclose support for this position. Since the employee's claim alleging an Agreement violation was actually adjudicated by the Board

in Award No. 3, this Award provides no authority for the proposition that collateral estoppel applies in the facts of this case. Moreover, the instant record clearly establishes that the Claimant did not simultaneously initiate the two proceedings and indeed the record strongly indicates that the Claimant would have been satisfied to pursue her rights solely under Rule 50. In any event, the record shows that the collateral proceeding involving the claim alleging Agreement violations was not instituted until after the Carrier denied the Claimant's request for a Rule 50 hearing. The collateral proceeding was thus in part a direct result of the Carrier's action in denying the hearing. In these circumstances, it would be inappropriate to estop the instant Rule 50 proceeding because of the existence of the collateral proceeding. Also, since there has already been a substantial passage of time since the herein claim was initiated in April 1973, a further denial of the Claimant's Rule 50 rights would not be appropriate.

In view of the foregoing, it is concluded that the claim is meritorious and that it should be sustained.

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 Employees involved in this dispute are respectively Carrier and Employees 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 was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:



Executive Secretary

Dated at Chicago, Illinois, this 13th day of August 1976.