

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21702
Docket Number MS-21094

Dana E. Eischen, Referee

PARTIES TO DISPUTE: (M. J. O'Neill
(
(Robert M. Blanchette, Richard C. Bond
(and John H. McArthur, Trustees of the
(Property of Penn Central Transportation
(Company, Debtor

STATEMENT OF CLAIM: This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an ex parte submission on February 5, 1975 covering an unadjusted dispute between me and Robert W. Blanchette, Richard C. Bond and John H. McArthur, Trustees of the property of Penn Central Transportation Company, DEBTOR, involving the following questions:

Statement of Claim: Claim of M. J. O'Neill clerk New England Division at Boston Massachusetts for reinstatement and pay for all time lost on account of having been disqualified from JOB #111 CLERK at the Boston FACT Terminal Allston, Mass.

Further for alleged violation of Rule 3-C-1(C) of the National Collective Bargaining Agreement between The Penn Central Transportation Company And Clerical, Other Office, Station And Storehouse Employees Of The Penn Central Transportation Company Represented By The Brotherhood of Railway, Airline and Steamship Clerks Freight Handlers, Express and Station Employees.

OPINION OF BOARD: The record in this case is a mass of convoluted details and cross-accusations of Agreement violations during nearly three years of handling on the property before the claim was appealed to us for final adjudication. A succinct and accurate summary of that prior handling, through March 1973, may be found in the denial letter of the top appeals officer on the property dated January 24, 1974 and reading in pertinent part as follows:

"On December 8, 1971, Job No. 111, General Clerk Boston Fact Center, was bulletined and no bids were received. This position was subsequently filled by J. T. Larkin, who resigned effective September 20, 1972. The vacancy this created was advertised on September 20, 1972, and awarded to H. J. Michaels. However, Michaels assumed a hold-down in the crew dispatchers' office on the position of an employee

"Hearing on the request was granted, postponed by agreement, and finally held on December 7, 1972.

Decision on the hearing, appeal from the decision, discussion and request for joint submission were timely filed."

Following discussions between the parties and preparation of the Joint Submission, the matter came on for further conference handling in July 1973 and was rediscussed at the top appeals level in October 1974. It is important to note that the claim as appealed on the property since January 3, 1973 and as described in the Joint Submission under the heading "Subject" was framed as follows:

"Mr. M. J. O'Neill, Clerk, Boston FACT Center, alleges that his disqualification was 'discriminatory, bias, and prejudice' and, as such, he was subject to a formal investigation under the provisions of Rule 7-A-1."

The claim as thus presented was denied finally on the property by letter dated January 24, 1974 on the following grounds:

- "1. The employee has not complied with the provisions of Rule 7-A-1, as the appeal to this level was not made within the time limits set forth in Rule 6-A-1(d). Specifically, the Superintendent-Labor Relations denied the appeal on January 18, 1972 and the appeal was not listed at this level until July 3, 1973. Therefore, it is our position that the case before us is invalid.
2. In the 'Position of Employees' in the Joint Submission, last paragraph, a claim for compensation is asserted. However, no claim for compensation has been handled as provided in Rule 7-B-1(a) (presented to the employee's immediate supervisor within 90 days) and, therefore under Rule 7-B-1(b) cannot properly be entertained or allowed.
3. In the 'Position of Employees' it is also asserted that O'Neill should be 'returned...with seniority and other rights unimpaired.' However, the issue of O'Neill's seniority has been neither timely nor properly handled under the Agreement and cannot be properly entertained or allowed. In this regard, if considered to be handled under Rule 7-A-1, you will note that the subject of seniority was not appealed in the Division Chairman's letter of January 3, 1973, quoted hereinabove. Even if it were to be considered that the subject of the appellant's seniority was covered by the appeal - and it was not - then our exception in Paragraph No. 1 would apply.

"Under date of January 3, 1973, the Division Chairman wrote the Superintendent of Labor Relations:

'In accordance with Rule 6-A-1 of the Clerks Agreement, we hereby appeal from the decision of Mr. V. H. Green, Superintendent Stations - East of December 21, 1972, upholding the original decision of disqualification concerning Mr. M. J. O'Neill, Clerk, Boston, Mass., Fact Center.

Please advise a time, place and date we may meet to discuss this matter.'

The appeal was heard in a meeting on January 18, 1973, and denied by the Superintendent-Labor Relations in a letter that same date.

On January 23, 1973, the Division Chairman asked a Joint Submission be prepared in this case. A Joint Submission was prepared dated March 19, 1973."

The Joint Submission of Facts referenced supra is part of our record and reads in pertinent part as follows:

"Claimant, prior to the instant dispute, had a Group I seniority date of October 28, 1969 on the Boston Division clerks' roster No. 131.

On September 20, 1972, by Bulletin No. 33 a temporary position described as Job 111, General Clerk at the Boston, Massachusetts, FAC Terminal was bulletined for bid with the following duties:

'Sequence waybills, operate microfilm & recordal machine, answer correspondence, complete 1204 reports and other duties as assigned.'

Claimant subsequently was awarded and assigned to the position on October 9, 1972. He remained on the position through the close of business October 27, 1972 whence he was removed after being notified by the Supervising Agent that he was being disqualified from the position under Rule 2-A-5 of the Clerks' Agreement.

Claimant took exception to the decision of the Supervising Agent considering himself being unjustly treated and thereupon requesting a hearing under Rule 7-A-1 of the Clerks' Agreement.



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If he had a grievance relative to Carrier's interpretation of that Rule and consequent forfeiture of his seniority on November 16, 1972, he was required by the Agreement at Rule 7-B-1 to file that claim and exhaust the appeal machinery on the property before invoking our jurisdiction in that matter. Our record, as noted supra, does not support Claimant's assertion that the Rule 3-C-1(c) allegation was processed properly and in tandem with the dispute over his initial disqualification. We hold that only the latter part of the instant claim properly is before us for disposition on the merits and the Rule 3-C-1(c) portion of the claim is dismissed for want of jurisdiction.

Turning to the merits of Claimant's contested disqualification, we have reviewed the record carefully and find not one scintilla of evidence that Mr. O'Neill was the victim of "discrimination, prejudice or bias" as alleged in his claim. Carrier has adduced substantive evidence to show that the disqualification was based upon inadequate performance in Job No. 111 and absent speculation and conjecture we cannot ascribe to the Carrier's supervisors the bad faith motivation upon which Claimant bases his claim. Claimant has failed to develop probative direct evidence on this point nor does the record support Claimant's argument that discrimination per se may be inferred from Carrier's conduct. We must deny that part of the claim seeking reinstatement and back pay for disqualification from Job No. 111.

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 Employee involved in this dispute are respectively Carrier and Employee 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 not violated.

A W A R D

Claim dismissed in part and denied in part as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 29th day of September 1977.