

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22220
Docket Number CL-22099

Irwin M. Lieberman, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-8439) that:

(1) Carrier violated the effective Clerical Agreement, particularly Rules 25(b) and Rule 47(a) when it refused to allow Claimant Van Wesner to exercise his seniority and displace to a position held by an employe junior to him.

(2) Carrier shall compensate Claimant Van Wesner in addition to what he received on the dates of this claim, an additional 8 hours' pay at the pro rata rate of pay of Basic Clerk No. 1 for each work day of that position and compensation for overtime worked on the position of Basic Clerk No. 1 for April 26, 1976, through May 21, 1976.

OPINION OF BOARD: On April 12, 1976, Claimant's assigned hours as Bill Clerk were changed from a starting time of 1:00 P.M. to a starting time of 3:00 P.M., effective April 15th. On April 19th, at the instruction of management, Claimant began to work on a vacated position of Chief Bill Clerk with a starting time of 3:00 P.M. (the position had become vacant due to the incumbent displacing as a result of changed starting time). On April 23rd Claimant notified Carrier of his intention to displace to Basic Clerk #1 and acknowledged that training would be required on data processing equipment; Claimant's notification indicated that he desired to displace effective April 26th. By letter dated April 26th Carrier acknowledged Claimant's displacement memo and indicated that he would be advised of the effective date and training would be arranged. On April 27th Claimant requested that his displacement become effective May 3, 1976. On April 30th he was informed that he would be advised at a later date when the displacement would become effective in order to avoid work force disruption. The Claim herein was initiated on May 1st because Claimant was allegedly improperly held off the position of Basic Clerk. On May 4th Claimant was informed that his claim was denied since training was not available and further the new incumbent of Claimant's old position required training by him.

On May 4th the Basic Clerk being displaced by Claimant was notified of his displacement; he exercised his right to the Chief Bill Clerk position on May 13th. On May 20th Claimant was advised to report to his new position of Basic Clerk on May 24th. These facts are not in dispute.

The relevant rules, relied on by Petitioner state:

"RULE 25. TIME IN WHICH TO QUALIFY.

* * * * *

(b) Where the use of data processing equipment is a requirement, employees otherwise possessing sufficient fitness and ability, will, if necessary, be given training comparable to that given at time of initial installation of equipment. Employees in training shall be paid the pro rata rate of the position to which assigned."

"RULE 47. CHANGING ASSIGNED STARTING TIME OR ASSIGNED REST DAYS.

(a) Regular assignments shall have a fixed starting time and the regular starting time shall not be changed without at least thirty-six hours' advance notice to the employees affected. When the established starting time of a regular position is changed one hour or more for more than five consecutive days, or is changed in the aggregate in excess of two hours during a period of a year, or the assigned rest days are changed, the employees affected may within ten days thereafter, upon twenty-four hours' advance notice, exercise their seniority rights to any position held by a junior employee. Other employees affected may exercise their seniority rights in the same manner."

Carrier also relies on Rule 55 which provides:

"RULE 55. PRESERVATION OF RATES.

Employees temporarily assigned or permanently assigned to higher rated positions shall receive the higher rates while occupying the said position; employees temporarily assigned to lower rated positions shall not have their rates reduced.

"A temporary assignment contemplates the fulfillment of the duties and responsibilities of the position during the time occupied, whether the regular occupant of the position is absent or whether the temporary assignee does the work irrespective of the presence of the regular employee. Assisting a higher rated employee due to a temporary increase in the volume of work does not constitute a temporary assignment.

This rule will not apply where absent employee is paid on account of sick leave."

Carrier argues primarily that Rule 47 (a) does not contain a time limit in which Carrier must make the assignment requested by the employee. In the absence of such a proviso, Carrier states that it has the right to make the assignment within a reasonable period of time and cites a number of Third Division Awards in support (20070, 23319, 3942, 2881, and 2174). Carrier also argues that it maintained Claimant in his old position properly in order to train his replacement and further that there was no one available to train Claimant in the data processing functions of his new position. Additionally, Carrier asserts that it had the right under Rule 55 to temporarily assign Claimant to his old position for the purpose of training the replacement. Carrier states that a total of seven other employees, other than Claimant, required training under the provisions of Rule 25 (b) at the same time and that to have acceded to Claimant's request would have resulted in untenable and absurd consequences. It is argued that Carrier, under the circumstances, employed a reasonable interpretation of the Agreement in its actions with respect to Claimant.

The Organization pointed out that Claimant's seniority rights were blatantly ignored by Carrier in this transaction. It is argued that Rule 47 (a) is clear and unequivocal and that Claimant had the right to the new position at the time he exercised his seniority rights. This right was in no way abrogated by Rule 55 (or its application) according to the Organization; in addition it is pointed out that no defense based on Rule 55 was raised during the handling of this dispute on the property. The Organization also states that the line of awards cited by Carrier (supra) all deal with bidding situations and are not comparable to the dispute herein.

While we recognize the fact that Carrier had serious personnel problems at the time of the displacement move by Claimant, it must be noted that the entire matter was as a result of Carrier's own decision to change the starting times by two hours...and it was not initiated by the employees involved in the various moves.

Petitioner is correct in that the prior cases cited by Carrier dealt with assignments resulting from bids rather than from the exercise of seniority due to displacement, or other reasons. However, Carrier is correct in the point of view that a contract must be construed in a reasonable fashion. We take no issue with the principles expressed in the awards relied on by Carrier; we merely question the applicability of those principles to this dispute. It is noted in passing, that the Bulletin Rule in the applicable Agreement (Rule 15) provides that an employe awarded a bulletined position will be transferred to such assignment within seven calendar days after issuance of the assignment bulletin.

There have been a series of prior disputes before this Board involving displacements or the exercise of seniority and the effective date of assignments pursuant to such moves. Two such awards are particularly analagous to this dispute. In Award 12459, which dealt with a rule almost identical with Rule 47 (a) herein, Carrier waited two days to implement the displacement. The Board held:

"It being admitted that Claimant, within the time specified in Rule 35 (b), gave 36 hours' notice of displacing prior to September 12, the only issue is whether Claimant had an absolute right to displace the junior employe on that date.

Rule 35 (b) is unqualified and unequivocal. We find that Claimant's right to displace the junior employe on September 12, having satisfied the prerequisites, was absolute. Carrier's refusal to permit Claimant to exercise this vested right violated the Agreement."

In Award 12224, again a similar situation to that herein confronted the Board. In that case, the Board held:

"Seniority is one of the most basic essentials of a collective bargaining agreement. Without some secured right to job priority, there would be no need for such an agreement; there would be no need for effective labor-management consultation. Claimant had contractual seniority rights to displace a junior employe when his position was abolished. Such rights accrued on September 21, 1958. He should have been permitted to displace a junior employe on September 22, 1958. Since he was not permitted to do so until a week later, he is entitled to forty (40) hours straight time pay at the hourly rate of the job to which he was assigned on September 29, 1958."

In this dispute, Carrier had a series of significant training problems. However, it should not have solved its problems at the expense of Claimant's rights. A practical solution could well have been the immediate assignment of Claimant to the Basic Clerk position and then the exercise of Carrier's prerogatives under Rule 55, including Claimant's temporary transfer. However, Carrier did not choose to assign Claimant to the position his seniority entitled him to for several weeks. This was not reasonable, on balance, since Carrier had other alternatives, including that indicated above. In addition, Carrier's actions were contrary to Rule 47 (a) and the interpretations contained in prior awards. Consequently, the claim must be sustained. However, Claimant will only receive compensation from May 3rd, the date he asked that his displacement should become effective, to May 24th.

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

That the Agreement was violated.

A W A R D

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 15th day of November 1978.