

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22707  
Docket Number CL-22558

Richard R. Kasher, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees  
(  
(Chicago, Milwaukee, St. Paul and Pacific  
( Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-8569) that:

1) Carrier violated, and continues to violate, the Clerks' Rules Agreement in Chicago, Illinois, commencing on December 31, 1976 when it failed to assign Employee J. M. Aniciete to an Assistant Bureau Head position held by an employee with less seniority.

2) Carrier shall be required to recognize J. M. Aniciete's seniority, promotion and displacement rights to Assistant Bureau Head positions, assign him to the position which he sought on December 31, 1976, and compensate him for an additional eight (8) hours pay at the rate of \$58.9476 for each work day he is denied displacement rights in District No. 71.

3) Carrier shall pay employee J. M. Aniciete interest at the rate of 7½% compounded annually on the anniversary date of this claim for amount due under Item (2) above.

OPINION OF BOARD: Claimant was displaced from his position as an Assistant Bureau Head by a more senior employee. At the time, there was another Assistant Bureau Head position occupied by an employee junior to the Claimant.

Claimant's supervisor notified him of the second position but expressed some concern over the Claimant's ability to do telephone work associated with that position. The supervisor also notified the Claimant of a Tracing Clerk position and asked him if he would like to be temporarily assigned to that position.

The Claimant requested the temporary assignment; made a written application for the same position; and, ultimately, was awarded the Tracing Clerk job. This is the only position for which the Claimant made a written application.

On two previous occasions where the Claimant was displaced he completed the appropriate forms for exercising his seniority. On a third occasion he protected his rights through a phone call.

However, in this case Claimant subsequently requested an unjust-treatment investigation under the provisions of Rule 22(f). That hearing and an appeal hearing were held. Claimant's position was denied.

It is the Organization's position that the Carrier violated the agreement "when it failed to assign the Claimant to an Assistant Bureau Head position held by an employee with less seniority."

The Organization states that the Claimant was "denied the basic concept of seniority, promotion and displacement rights." The Organization cites Rule 3, which provides employees the right to exercise seniority in the case of a reduction in force; Rule 7, which provides that promotions "shall be based on seniority, fitness and ability" with a special emphasis on the rights of senior employees where "fitness and ability are sufficient"; and, Rule 12, which provides, in part, that:

"(a)...Employees whose positions have been abolished or who are displaced through the exercise of seniority may, fitness and ability being sufficient, exercise seniority within fifteen (15) days from the date affected; if seniority is not exercised, the employee will be furloughed and will be recalled to service as per Rule 12(d).

...A declaration of an employee's intent to exercise seniority is not, in itself, sufficient to constitute the actual exercise of seniority. In addition, he must actually occupy and perform service on the position on or before the fifteenth (15th) day following the date he was affected unless, after filing declaration of intent in writing, he is prevented from doing so...."

The Organization also alleges that the Claimant was denied due process in that the unjust-treatment investigation was not, and could not be conducted fairly and impartially. The Organization argues that the hearing officer was "the head of the very department wherein the unjust treatment occurred"; the hearing officer "had to" issue a decision in support of his subordinates; the hearing officer refused to step aside when requested to do so; the Claimant's supervisor authorized the selection of the hearing officer; and, the hearing officer (as supervisor to the Claimant's supervisor) was actually self-appointed.

On the merits, the Organization argues that "the Claimant was not allowed to make the displacement which he desired and that to do so in writing would have been an exercise in futility." The Organization adds that the "telephone problem" is, in fact, discrimination based on the Claimant's being Philippino.

The Organization also questions the qualifications of the senior employe who replaced the Claimant. It is stated that the senior employe "never worked in the office of the Manager of Revenue Accounting."

As a remedy, the Organization calls for full back pay, with interest.

The Carrier argues that Rule 12 is clear -- a declaration of intent must be filed in writing -- and that the Claimant failed to do so. The Carrier further notes that, on three previous occasions, the Claimant did properly give notice of his intent to exercise his seniority rights.

The Carrier stresses that it had no duty to assign the Claimant to the Assistant Bureau Head position. Rather, the Claimant had a duty to make his desires known in writing. The Carrier adds that the Claimant was never told if he could or could not have the position, just that it was available.

The Carrier also argues that the Claimant was never forced to take the Tracing Clerk position, "but was merely advised...that if he wanted the position on a permanent basis, he would have to protect himself by bidding on the position." This the Claimant did.

The Carrier notes that the Claimant's fitness and ability is not at issue. It is purely a matter of his failure to make written application. The Carrier stresses that to sustain the claim would be in direct conflict with the Agreement.

The Carrier also protests the Claimant's demand for full back pay, noting that the Claimant has been working full-time in the Tracing Clerk position. At best, the Carrier argues, the Claimant could receive the difference in rates.

The Carrier denies the applicability of Rule 3 and 7 in this case. Rule 3, the Carrier notes, does not apply since the Claimant made application for a vacant position. Rule 7 is argued to be inapplicable since the provisions of Rule 12 were not first met.

The Board finds that the Agreement clearly states that, in order for the Claimant to exercise his seniority, he had to make a declaration of intent in writing. In the Statement of Claim, the Organization alleges that the Carrier violated the Agreement "When it failed to assign /the Claimant/ to an Assistant Bureau Head position held by an employe with less seniority."

Since the Claimant did not make a written declaration of intent, the Organization has a burden of proving that there were improper substantial mitigating circumstances which prohibited or restricted the Claimant's ability to exercise his contractual rights. This has not been proven.

The Organization argues that the Claimant was intimidated and that to have complied with the contractual requirements would have been an exercise in futility. We do not find that there was intimidation in this case. The Claimant has filed declarations of intent before. If he felt intimidated this time he still should have made the declaration and then protested the Supervisor's actions if he believed he was unjustly treated or that his Agreement rights were violated.

The Organization also argues that the Claimant was discriminated against by virtue of his national origin. This is not the forum to consider such an issue.

While the hearing officer and the Organization were sometimes at odds during the hearing, the Board finds that the substance of the Organization's arguments were fully addressed by the Carrier. The hearing officer was not the head of the department where the allegedly unjust treatment occurred; the hearing officer was appropriately requested as an outside party; and, he was not self-appointed. And, we do not find the lack of a full and fair hearing.

In conclusion, the Board finds that the Carrier did not violate the Agreement when it "failed to assign /the Claimant/ to an Assistant Bureau Head position held by an employe with less seniority."

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;

Award Number 22707  
Docket Number CL-22558

Page 5

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Pauls  
Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1980.