NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23333
THIRD DIVISION Docket Number CL-23110

Joseph A. Sickles, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8864) that:

1) Carrier violated and continues to violate the Clerks' Rules Agreement at Chicago, Illinois commencing March 28, 1978 when it failed to assign Position No. 41440, Claim Investigator, to employe Robert W. Royer.

2) Carrier further violated the Agreement when it refused to grant Employe Robert W. Royer an investigation as per his request in line with the provisions of Rule 22(f).

3) Carrier shall now be required to recognize Employe Royer's seniority rights, assign him to Position No. 41440, and compensate him for an additional day's pay at the appropriate rate for each workday he is denied his contractual rights to that position.

4) Carrier shall be required to pay interest in the amount of seven and one-half ($7\frac{1}{2}$) percent per annum on all wage loss sustained as set forth under Item 3 of the claim until the violation has been corrected.

OPINION OF BOARD: When the Carrier advertised, by Bulletin No. 16, Position No. 41440 (Claim Investigator) in March of 1978, the Claimant complained to Carrier that the position was awarded to a "junior" employe. The Carrier replied to the Claimant that after an interview and careful consideration of all factors "...you were not awarded this position because, in my opinion, you did not possess sufficient fitness and ability to handle it."

The Employe requested an unfair and unjust treatment hearing under Rule 22(f):

> "(f) An employe, irrespective of period employed, who considers himself unjustly treated, other than covered by these rules, shall have the same right of investigation and appeal, in accordance with preceding sections of this rule, provided written request, which sets forth employe's complaint, is made to the immediate superior officer within fifteen (15) days from cause of complaint."

The Carrier responded in the negative, stating that the cited rule may be invoked only when the alleged unjust treatment is for an offense, occurrence or circumstance not covered by a rule in the agreement; whereas the Carrier based the non-assignment to the position on the specific words of Rule 7 of the agreement:

"RULE 7 - PROMOTION

Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior employe to the new position or vacancy where two or more employes have adequate fitness and ability."

The Employes contend that Rule 7 supports the Employe's contention that the position should have been awarded to him, and Rule 8 establishes a qualifying period of thirty days once an employe is assigned to a permanent vacancy. However, the Organization describes the "most important fact in this dispute" as the denial to the Claimant of the right to disprove the allegations set forth by the Carrier. Accordingly, he should have been provided with an unjust treatment investigation under Rule 22(f) when it was requested.

In its submission of the case to the Board, the Carrier reiterates its position that Rule 22(f) may only be invoked when the asserted unjust treatment is for an offense, occurrence or circumstance not covered by a rule of the agreement, and because of the fact that Rule 7 of the agreement speaks to the particular issue, the Carrier was therefore not required to grant an investigation under Rule 22(f). In this regard, certain Awards concerning disputes between these parties were cited by the Carrier, but Carrier asserts that the authors of the Awards did not understand the language "other than covered by these rules."

Be that as it may, this Board is inclined to find that the Carrier denied the Claimant the right to submit his contentions in an unjust treatment hearing. In this regard, we have considered the various Awards which have resolved disputes between these same parties, and we have noted that the Referees have concluded that in similar circumstances the Employes have been entitled to pursue their contentions, notwithstanding the phrase "other than covered by these rules." Regardless of whether the meaning of those words is "...anything but clear", as stated in Award 9415, it would seem that there comes a time when an adoption of awards between the parties establishes certain rights which may be altered only at the bargaining table and not in a proceeding such as this.

Further, we should note that our own predilections as to the potential outcome of a dispute may not control when a similar issue between the same parties has been resolved, unless the prior resolution is palpably erroneous We are not prepared to make such a finding in this dispute, and accordingly, we find that the Carrier violated the Employe's rights when it refused to grant him an investigation under Rule 22(f). Accordingly, we will sustain Claim No. 2.

The Carrier raised objection to the propriety of Claim No. 4 while the matter was under review on the property. We find no basis for sustaining Claim No. 4.

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 No. 2 and No. 3 are sustained, pursuant to the Opinion of Board.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Panka
Executive Secretary

Dated at Chicago, Illinois, this 19th day of June 1981.

DISSENT OF CARRIER MEMBERS
TO
AWARD 23333, (DOCKET CL-23110)
(Referee Sickles)

It was argued in this case that the main point at issue was:

"....does the claimant who was alleged to lack sufficient fitness and ability for assignment to Position No. 41449, Claim Investigator, have a right to an unjust treatment hearing under Rule 22(f)."

The Majority identifies this issue as "the most important fact" (p.2) in this case.

The Majority in Award 23333 concluded that the Claimant had such a right. But the Majority then proceeds to dispose of the matter as if the underlying issue, that of Claimant's qualifications for the position had been substantiated in the record. Nothing could be further from the evidence of record.

At the bottom of Page 2 of the Award, the Majority speaks of rights and the continuance of rights that have been confirmed by prior award determinations. While the Majority has focused on the asserted right to a Rule 22(f) hearing, the Majority has totally ignored the underlying issue in this case which was, is and continues to be the Carrier's right to make the determination of an employee's qualifications. This has been confirmed in many awards of this Division involving the same parties: Awards 9947 (Rose); 17141 (Devine); 18802 (Ritter); 21119 (Lieberman); 21385 (McBrearty); 22442 (Sickles); 23064 (Sickles).

In Award 21119 this right was stated:

"Both parties agree that this Board has held consistently over the years that the current possession of fitness and ability is an indispensable requisite which must be met before seniority rights become effective for a promotion. It is agreed further that Carrier's judgment of fitness and ability will prevail unless it can be shown to have been arbitrary and capricious. In addition, we must reiterate a long held principle that Carrier is not obligated to give an employe a trial

"on a position when it has determined that he is lacking in fitness and ability (see Awards 12394, 16480, 18025 and 18651)."

In this case there was no attempt to rebut or challenge the Carrier's determination of qualification on the property. In fact, there were five (5) other employees, senior to the Claimant, who were not considered qualified.

In deciding Claimant's qualification without demonstrating that the Carrier's determination was in error, this award has exceeded the jurisdiction of this Board by issuing a conclusion upon which there is no basis in the record. The Majority then compounds its error by awarding that Claimant be placed on the position as if he was contractually entitled to the assignment. Such disposition exceeds our jurisdiction - Third Division Awards 10867 (Kramer); 12336 (Englestein); 13840 (Coburn); 15521 (Kenan). This is all the more glaring in the absence of evidence that Claimant was qualified.

If, as the Majority has concluded, the Claimant had a right to a 22(f) hearing, then the appropriate remedy should have been as stated in Third Division Award 8233 (Lynch) between these same parties:

"....this Award holds Carrier violated Rule 22(g) only by failing to grant Claimant an investigation. We have not held that Carrier's disapproval of Claimant for Service was not justified....There is no evidence before us that such action on Carrier's part was violative of the Agreement."

Recent Award 23066 (Sickles) concluded:

"Accordingly, while we do not disturb the Company's basic contractual rights to disqualify in general terms, nonetheless in this particular case we find that the Claimant should be given a reasonable opportunity to qualify on the next position to which his seniority would entitle him, and we direct the Carrier to grant him that opportunity." (Emphasis added)

To provide that an employee be given the contractual opportunity to demonstrate his qualification, or as the Employees argued on the property, to give the "employe his day in court to disprove any and all of the Carrier's allegations...." should then have been the result provided by Award 23333. Instead, the Majority reached a conclusion that is predicated upon assumption, not evidence.

We dissent.

P. V. Varga

W. F. Euker

D. M. Lefkow

J. E. Mason

J. R. O'Connell

Serial No. 311

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 to AWARD NO. 23333

DOCKET NO. CL-23110

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Chicago, Milwaukee, St. Paul and Pacific Railroad Company

Upon application of the Carrier involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to the meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

It is well settled that the purpose of an interpretation is to explain the Award as originally made and not to make a new Award.

The original Award (upon which an interpretation is sought) held that the Carrier violated the agreement.

In its request for an interpretation, the Carrier seeks to review the correctness of the Award and to question the basis for same. A request for an interpretation is not the vehicle to use to accomplish that result. We have again reviewed Award No. 23333 and find that the reasoning is clearly set forth therein.

Referee Joseph A. Sickles who sat with the Division as a neutral member when Award No. 23333 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 27th day of January 1983.

LABOR MEMBER'S ANSWER
TO
CARRIER MEMBERS' DISSENT
TO
AWARD 23333, DOCKET CL-23110
(Referee Sickles)

Most of what is contained in the Carrier Members' Dissent was considered and rejected by the Majority in arriving at the decision to sustain claims numbered 2 and 3; however, it is the utmost in sophistry for the Dissenters, in view of this record, to write:

> "In this case there was no attempt to rebut or challenge the Carrier's determination of qualification on the property."

when, in fact, Claimant was denied each and every attempt to demonstrate that Carrier was wrong regarding his fitness and ability from the inception of this dispute!

The "adjustment" of this dispute exceeded no jurisdictional limits and, in view of the facts of record, was a most fitting conclusion and vindication of Claimant's rights which had been denied him since March 28, 1978.

Since March 28, 1978 Claimant clearly was denied the right to work the position sought and denied the payment which working that position would have given him. There was ample justification to sustain claim number 4 and thus pay Claimant for the loss of the use of that money he should have had beginning March 28, 1978, however, the Referee decided otherwise.

The Award, as rendered, is quite correct and the Dissent does nothing to detract from the soundness thereof.

J. C. Fletcher, Labor Member