

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24132
Docket Number CL-23761

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: { Brotherhood of Railway, Airline and Steamship Clerks,
{ Freight Handlers, Express and Station Employees
{ Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-9281) that:

1. Carrier violated the effective Clerks' Agreement when it arbitrarily and capriciously disqualified Clerk D. H. Rust from the position of Clerk, Trainmasters' Office, Albion, Pennsylvania, effective March 16, 1979:

2. Carrier shall now compensate Mr. Rust for each and every day that he is denied the position of Clerk, Trainmasters' Office commencing sixty (60) days prior to June 11, 1979, and continuing for as long as the violation exists.

OPINION OF BOARD: Claimant, D. H. Rust, was employed by Carrier as a Transportation Department Clerk on July 31, 1978. On January 29, 1979, Carrier advertised, by Bulletin No. 631, the position of Clerk, Trainmaster's Office, Albion, Pennsylvania. Since no employee with seniority rights to the position applied for the job, it was assigned to Claimant on Sunday, February 4, 1979.

After working on the job for twenty-nine days (in addition to two days as a student), Claimant was notified by Assistant Supervisor Assignments R. C. Gould that he was disqualified from the position, effective close of work, March 16, 1979. This notice was received by Claimant via letter, dated March 17, 1979.

The Organization contends that the disqualification of Claimant from the position of Clerk, Trainmaster's Office violated the Agreement, particularly Rules 28, 30 and 35. Those Rules, insofar as they are relevant, read:

"RULE 28 - PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS

(b) Employees covered by this Agreement shall be in line for promotion. Promotions, assignments and displacements shall be based on seniority, fitness and ability; fitness and ability being sufficient seniority shall prevail.

RULE 30 - ADVERTISING POSITIONS

(c) Positions advertised under paragraph (a) of this rule (30) shall be filled as follows:

1. By the senior qualified applicant holding seniority rights on the department roster affected.

2. Applications received or on file from qualified employees holding seniority rights on other department seniority rosters for the advertised position shall be considered on the basis of their seniority rights.

3. In the event positions are not filled under Sections 1 and 2 above, positions may then be filled by appointment, except as otherwise provided in Rule 36.

"RULE 35 - FAILURE TO QUALIFY

(a) Employees entitled to advertised positions or those exercising displacement rights shall be allowed (30) working days, with full opportunity, in which to qualify and failing, shall retain all of their seniority rights, may bid on any advertised positions, but shall not displace any regularly assigned employees.

Employees will be given reasonable cooperation in their efforts to qualify.

(b) When it is definitely determined that employees are not qualified for positions they must be removed before expiration of the thirty (30) day time limit, provided the Local Chairman is given reasons therefor in writing."

The Organization contends that Carrier acted unfairly in disqualifying Claimant from the clerical position. It argues that the position was a rather complicated one, yet on only one occasion was Claimant informed by Supervisor Gould, or any other Supervisor, that Claimant was making errors on the job.

The Organization also points out that since Claimant was assigned to the position, Carrier had a greater responsibility to assist him than if he had bid for it.

Furthermore, the Organization relies on the statements of R. D. Hill, a clerk in the Trainmaster's Office with thirty-seven years' seniority. In Hill's opinion, Claimant's work "was nearly satisfactory as any other clerk that has experience on the job."

In addition, the Organization maintains that Supervisor Gould was biased against the Claimant and, therefore, could not objectively evaluate his performance.

Accordingly, the Organization seeks the reinstatement of the Claimant to the position of Clerk at the Trainmaster's Office, effective March 16, 1979. In addition, the Organization asks that Claimant be compensated for each day he is denied the position of Clerk, Trainmaster's Office, effective sixty (60) days prior to June 11, 1979 and continuing for as long as the violation exists.

Carrier, on the other hand, argues that the claim should be denied for both procedural and substantive reasons. As to the procedural issue, the Carrier points out that a separate claim for monetary damages was filed by the Organization on June 11, 1979. Rule 21 of the Agreement requires that claims be filed

within 60 days "from the date of the occurrence on which the claim or grievance is based." Claimant was disqualified on March 17, 1979 (effective March 16, 1979): the claim for monetary damages was first made on June 11, 1979. Thus, according to Carrier, the monetary claim is clearly untimely.

As to the merits of the claim, Carrier argues that Claimant received extensive supervision by his supervisor R. C. Gould or other experienced personnel for a total of 24.1 work days during Claimant's trial period.

According to Carrier, the record clearly shows that despite such supervision, Claimant consistently made errors concerning the calling of crews and the marking of crew boards.

Thus, in Carrier's view, despite Carrier's "reasonable cooperation", Claimant simply did not make sufficient progress to indicate his ability to handle the duties of the position. Accordingly, Carrier was fully justified in removing him from the position at the end of the qualification period.

As to the procedural issue, we find Carrier's position persuasive. It is true as the Organization argued, that its claim for monetary damages (dated June 11, 1979) was not a wholly new claim. However, it is new to the extent that it seeks a relief which is separate and distinct from that sought in the original claim. Furthermore, the Organization itself recognized this by filing an additional claim on June 11, 1979. If the Organization believed that the original claim encompassed monetary damages, it would not have sought to add a separate claim for them.

Furthermore, this grievance is not a continuing violation as the Organization maintains. On March 16, 1979, Claimant was disqualified from his position. This was a single and finite act and is, therefore, not in the nature of a continuing violation. Thus, the Organization's claim for compensatory damages is denied on procedural grounds.

With respect to the merits of the claim, we must uphold the Organization's position. It is true that Carrier has wide latitude in evaluating its employees during their qualification periods. It is also true that Supervisor Gould's notes show that Claimant made a number of errors while on the job. However, the record indicates that on only one occasion (February 26, 1979) did Gould inform Claimant of the errors Claimant allegedly made. He was not counselled or warned sufficiently, in fact, after that incident, Claimant was told on March 5, 1979 that "he was improving; that he did a good job." Thus, as far as Claimant had reason to know he was performing adequately. Carrier's officials led him to believe that he was not in jeopardy.

The record also indicates that Carrier failed to adequately explain the requirements of the job to Claimant. Without these it would be difficult for Claimant to know if he was performing adequately.

For the foregoing reasons, it appears to us that Carrier did not afford Claimant a fair and "reasonable opportunity" to fulfill the duties of position of Clerk, Trainmaster's Office, Albion, Pennsylvania. Accordingly, if Claimant still desires the position, he shall be provided forthwith an opportunity, consistent with Rule 35, to qualify for the position.

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 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 violated.

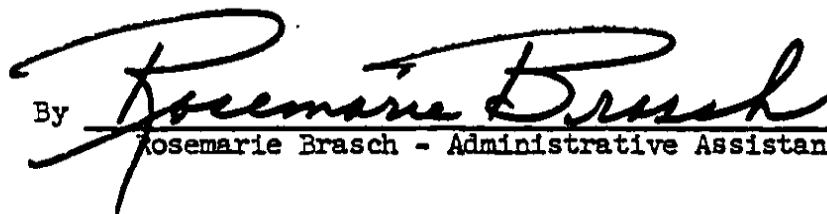
A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

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

