

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24421
Docket Number CL-24282

George S. Roukis, 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-9498)
that:

(1) Carrier violated the Clerks' Rules Agreement in Milwaukee, Wisconsin when it failed and/or refused to award Sectional Stockman Position No. 51400 to employe R. J. Boguszewski.

(2) Carrier further violated the Clerks' Rules Agreement when it denied him the right of investigation in line with the provisions of Rule 22(f).

(3) Carrier shall now be required to compensate Employe R. J. Boguszewski an additional eight (8) hours at the pro rata rate of Sectional Stockman Position No. 51400 for April 14, 1980 and continuing for each workday of that position until the violation is corrected.

(4) Carrier shall further be required to pay interest in the amount of seven and one-half (7½) percent on all monies due as stated in Item (3) above, payable on each anniversary date of this claim.

OPINION OF BOARD: Claimant, who has a March 25, 1968 seniority date, is the regularly assigned occupant of Clerk Position No. 07180 which is assigned from 7:00 A.M. to 3:30 P.M., Monday through Friday, with Saturday and Sunday rest days. On March 11, 1980 Carrier issued Bulletin No. 105 advertising Sectional Stockman Position No. 51400 which was subsequently awarded to a junior employe. Claimant submitted a letter to Assistant Agent E. M. Nowicki, dated March 28, 1980, requesting an unjust treatment investigation, pursuant to Rule 22(f) because he contended he was the oldest bidder for the position. The Assistant Agent declined his request by letter dated April 14, 1980 on the grounds that Rule 22(f) may only be invoked when the alleged unjust treatment is for an offense, occurrence or circumstance not covered by a rule in the Clerk's collective agreement. Mr. Nowicki stated in part that:

"I am advised you were not awarded the position to which you refer by reason of specific Rule 7 and 9 of the Clerks Rules Agreement; therefore, you are not entitled to a hearing under Rule 22(f), in that said rule is inapplicable to you and/or your case."

This response was further appealed in accordance with Agreement procedures and is presently before this Division for dispositive determination.

In reviewing this case this Board must note that we have exhaustively considered this same issue involving the same parties on several occasions and have consistently found for the aggrieved employee. In fact, Third Division Awards Nos. 23283, 23333 and 23923, which are recent decisions, pointedly addressed this adjudicative issue, and uniformly held that affected employees were entitled to unjust treatment proceedings under Rule 22(f) or prior similar rules, when denied positions because of alleged lack of fitness. Other Third Division Awards which upheld this judicial construction are 8233, 9415, 9854, 18922, 21615, 22442, 22443, 23050 and 23064. In Award 23064, officially dated June 30, 1982, we held in pertinent part that:

"This is not the first time that this issue was presented to this Board. Awards of this Division, involving these same parties, have been issued by resolving many of the questions of when an unjust treatment hearing is required. Clearly, it is now established that such a hearing is appropriate, and an employee is entitled to receive one provided he or she requests it in a timely fashion, when the allegation is that the employee lacked fitness and ability to perform the job."

We find no unique or distinguishable characteristics herein which would reasonably suggest a factually different situation, nor do we find any compelling logic developed through well established case law that would warrant a variant conclusion. Instead we find a consistent, coherent body of precedent decisions which have painstakingly considered this same question and the verdict in each case has been for the Claimant. In view of this judicial symmetry, we are constrained by the force of our decisions to observe strictly the principle of Res Judicata and thus, we must find for Claimant. We will sustain parts 1 and 2 of the claim and direct that Carrier compensate Claimant the difference between what he earned and what he would have earned, if any, when Carrier failed to comply with the Agreement. We find no justification for interest penalty and this portion of the claim is rejected.

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 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 15th day of June 1983.