

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25503
Docket Number CL-25353

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
(
(The Belt Railway Company of Chicago

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9831) that:

1. Carrier violated the effective Clerks' Agreement when, effective October 26, 1982, it failed and refused to honor the displacement of Clerk Kenneth E. Nesewich over a junior employe to Position #30, Chief Clerk-Car Accounting;

2. Carrier shall now compensate Mr. Nesewich the difference between the rate of Position #30 and that of Position #36, Chief Per Diem Clerk, and shall further compensate Claimant for any overtime worked by the incumbent of Position #30 and shall further compensate Claimant interest at the rate of one and one-half per cent (1 1/2%) per month on all monies due, commencing October 26, 1982, and continuing for so long as Claimant is denied Position #30.

OPINION OF BOARD: Claimant was displaced from Position #530, Assistant Head Clerk-Wheelage on October 25, 1982. He advised the Carrier of his wish to displace a junior employe in Position #30, Chief Clerk-Car Accounting in the Car Accounting Department. The duties of Position #30 are specified as follows:

"Supervise, direct and assist all functions of office personnel in the closing of open records, per diem adjustments, discrepancy claims, tracers, interchange corrections and the preparation of per diem, reclaim and mileage statement. Such other clerical duties as may be assigned. Knowledge of per diem, switching, car service, reclaim and demurrage rules is required."

The Claimant was advised orally by the Manager of Revenue and Car Accounting that he would not be permitted to make this displacement, and this was confirmed in writing with the following statement:

"A review of your previous work assignment and previous work record indicate to me that you are not qualified to perform the duties of Chief Clerk-Car Accounting.

I therefore must decline your displacement notice on this position."

On the Claimant's behalf, the Organization then requested a hearing under Rule 34, UNJUST TREATMENT, "for the purpose of proving Mr. Nesewich's fitness and ability to perform service on Position #30". This request was granted, and a hearing was conducted by the Assistant Controller. Following the hearing, the Assistant Controller found no basis for "unjust treatment".

Rule 34 reads as follows:

"An employe who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing appeal and representation as provided in Rules 26, 27, 28, 29, 30 and 31, if written request which sets forth the employe's grievance is made to his immediate superior within sixty (60) calendar days of the date of cause of complaint."

Rule 27 reads as follows:

"The right of appeal by employes or their duly accredited representatives in the regular order of succession up to and including the highest official designated by the Management to whom appeals may be made is hereby established. When appeal is taken, further hearing shall be granted, if requested, of the official to whom appeal is made. Appeals will be registered within sixty (60) days after decision is given and a copy furnished official whose decision is appealed. In either instance hearings or decisions on appeals will be given within sixty (60) calendar days after appeal is received.

NOTE: The word 'hearing' means the employe's right to be heard and not a formal investigation."

The Organization did not appeal the matter further on the basis of "unjust treatment", but rather initiated the time claim here under review, claiming rule violation in the Carrier's failure to permit the Claimant to displace on Position #30. This, in turn, was progressed in the usual fashion, commencing at the initial step, calling for a response by the Manager of Revenue and Car Accounting. The Manager's denial was then progressed through the steps of the claims procedure to this Board.

After a conference on the property following decision by the Carrier's highest designated officer, the Organization referred the Carrier to Award No. 24476 in which a claim involving the same Carrier and Organization was sustained on procedural grounds. Award No. 24476 states in part:

"We do look askance, however, when the same hearing officer also serves as a witness since this very action pointedly destroys the credibility of the due process system. In a similar vein, we look askance when the first step grievance appeals officer is also the same person who assessed the discipline.

The independent review and decision at each successive appellate level, whether it is two or three step appeals process, is plainly lacking when the same person judges the discipline he initially assessed. It is a contradiction in terms, which nullifies the hierarchal review process.

In the instant case, we cannot agree that claimant's appeal was progressed in accordance with the manifest standards of fairness and due process set forth in Rule 27. The grievance appeal should have been reviewed by another person."

The Organization argues that the reasoning of Award 24476 should be followed here, in view of the Manager of Revenue and Car Accounting's multiple roles -- denying the displacement; serving as witness in the "unjust treatment" hearing; and then denying the time claim at the first step.

In discussion before the Board, the Organization noted Third Division Award 25361 issued on March 29, 1985, and again involving the same parties. The Organization argued that this Award provided mandatory guidance for the Board in its considerations here. Award No. 25361 involved a displacement matter and connected Award No. 24476 (a disciplinary matter) in the following fashion:

"The Organization argues that the appeal process utilized by the Carrier fatally deprived the Claimant of his due process rights. In support of its position, among other things, it relies upon this Division's Award 24476. The Carrier, on this point, argues the case before us is not one of discipline. Consequently, for this and other cited reasons in the record, Third Division Award 24476 is not controlling.

While this Division has upheld the appropriateness of Carrier's officials service in a multitude of roles, given the facts and circumstances of this dispute, we find that this general principle has been stretched to an unreasonable degree. 'Rule 34 - Unjust Treatment' provides for: '...the same right of investigation, hearing appeal and representation as provided by Rules 26 *** and 31, if written request which sets forth the employee's grievance is made to

'his immediate supervisor within sixty (60) calendar days of the date of cause of compliance'. Under the essential facts herein, the original deciding official again became a part of the appeal process when he later ruled on a decision earlier rendered by his Supervisor, the independent review provided by the parties' contract is plainly lacking on a number of counts. Accordingly, while we do not easily find on technical violations, the error here deprived the Claimant of basic due process and we sustain the claim. However, we do not award that portion of Part 2 which claims interest."

In reviewing this procedural argument, the Board has no basis to question the rationale involved in Award No. 24476. The difficulties involved in multiple roles of Carrier representatives in disciplinary matters have been reviewed in countless previous awards. Depending on the entire circumstances, this may or may not lead to the conclusion that the Claimant (subject to loss of employment or other disciplinary penalty) did not receive a proper hearing, leading to a sustaining award on that basis alone.

While Award No. 25361 may be bottomed on the particular facts and circumstances therein, the Board does not find that the use of Award No. 24476 is appropriate here. The Board finds the so-called "multitude of roles" here was virtually preordained by the procedures required in Rules 34 and 27. At the "unjust treatment" hearing, the Manager of Revenue and Car Accounting necessarily was the Carrier's witness, since it was his judgment on which the initial displacement refusal was based. Had the Organization determined to pursue the question of "unjust treatment", Rule 34 would have provided further review of the matter at a higher Carrier level by an official not directly involved in the incident.

The Organization instead exercised its right to initiate a time claim. Under Rule 27, this was necessarily directed to the same Manager of Revenue and Car Accounting. The question now became whether or not applicable rules had been violated. While, as the Organization points out, a denial would be anticipated, the Claimant's rights were fully preserved in appealing the matter beyond this level.

In summary, the rights of the Claimant enumerated in Rule 34 were preserved in the hearing conducted by the Assistant Controller. The subsequent time claim, based on an alleged rules violation, followed the normal course prescribed by the parties for such claims.

As to merits of the claim, the Claimant's displacement's rights are governed by Rule 8, which reads as follows:

"RULE 8 - PROMOTION BASIS

Employees covered by these rules shall be in line for promotion. Promotion, assignment, and displacement 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 rights of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

The Claimant was senior to the occupant of Position #30. The Organization correctly points out that the issue is not the comparative fitness and ability of the incumbent and the Claimant, but rather whether the Claimant had "sufficient" fitness and ability. The Carrier determined, both before and after the "unjust treatment" hearing, that the Claimant did not have sufficient fitness and ability to assume the position of Chief Clerk-Car Accounting. The description of the responsibilities of the position show that it requires not only knowledge but supervision of a variety of other Clerical positions in the Car Accounting Department. The Claimant had not occupied any of the Car Accounting Clerical positions nor, although he testified to the contrary, does it appear that his previous responsibilities included any substantial degree of supervisory experience. The Manager of Revenue and Car Accounting was well aware of the Claimant's background at the time the request for displacement was made. The subsequent hearing did not bring to light any evidence to demonstrate "fitness and ability" not already known to the Carrier. There is no question, but that the Chief Clerk must be familiar with a wide variety of procedures and rules. Without any prior experience in the Car Accounting Department, there can be no reasonable expectation that the Claimant would be prepared to perform the job without extensive on-the-job experience, certainly in excess of 30 days.

Rule 16 reads in pertinent part as follows:

"(a) Employes entitled to bulletined positions or exercising displacement rights will be allowed thirty (30) calendar days in which to qualify, and failing, shall retain all their seniority rights and may bid on any bulletined position, but may not displace any regularly assigned employe."

The Organization would read this as if any employe seeking to make a displacement must be granted 30 days in an attempt to qualify. Previous Awards, however, have given this a more limited meaning, applicable to the rights of an employe once gaining a position through bulletin or displacement. Award No. 24478 states:

"A review of awards indicated that it has been consistently held that the term 'fitness and ability' means that there is a reasonable probability that the employe would be able to perform all of the duties of the position within a reasonable time (Award 5348). This does not mean that prior performance is a necessity (Award 13850) but that the employe must have the potential (Award 14762). By the same token, an employe obviously lacking fitness does not have to be given qualifying time."

See also Award Nos. 10689, 13968, 14976, and 16480.

In making its decision on the Claimant's fitness and ability, the Carrier did not reach an arbitrary or capricious judgment concerning the requirements for this highly responsible position. The Board has no basis to disturb the results.

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 not violated.

A W A R D

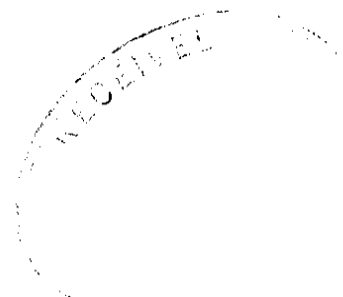
Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of June 1985.



LABOR MEMBER'S DISSENT TO
AWARD NO. 25503, DOCKET NO. CL-25353
(REFEREE HERBERT L. MARX, JR.)

The Majority has erred in this instance as the Award is contrary to the established precedence set forth on the property in Awards 24476, 24547 and 25361. That ill conceived reasoning is found in the following language on Page 4:

"While Award No. 25361 may be bottomed on the particular facts and circumstances therein, the Board does not find that the use of Award No. 24476 is appropriate here. The Board finds the so-called 'multitude of roles' here was virtually preordained by the procedures required in Rules 34 and 27. At the 'unjust treatment' hearing, the Manager of Revenue and Car Accounting necessarily was the Carrier's witness, since it was his judgment on which the initial displacement refusal was based. Had the Organization determined to pursue the question of 'unjust treatment', Rule 34 would have provided further review of the matter at a higher Carrier level by an official not directly involved in the incident. (Emphasis theirs).

"The Organization instead exercised its right to initiate a time claim. Under Rule 27, this was necessarily directed to the same Manager of Revenue and Car Accounting. The question now became whether or not applicable rules had been violated. While, as the Organization points out, a denial would be anticipated, the Claimant's rights were fully preserved in appealing the matter beyond this level." (Emphasis ours).

The Majority has incorrectly concluded that since the Employees initiated a time claim based upon the "Unjust Hearing" decision rather than merely appealing that decision, that this constituted a new action which separated the appeal process from the Hearing. Such is not the case; it is standard policy throughout the railroad industry that when a discipline or unjust hearing decision is rendered which is negative to the Claimant's

behalf, that a claim will be instituted to protect the grievant's rights.

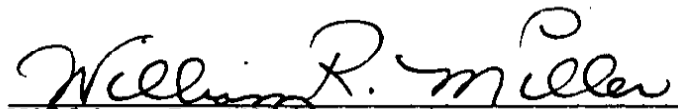
As pointed out in discussion, the same exact principle and manner of progression of the grievance was followed in precedential Awards 24476, 24547 and 25351. In fact, the same Appellant Officer found to have violated the Claimant's right to independent review in Award 25351, dealing with an exact same situation, was guilty in this instance as well.

The Claim in this instance was for failure to honor the displacement and loss of earnings. To merely have appealed the Carrier's decision, without a request for monetary damages, would be ridiculous as it would carry no significance, if sustained. To grieve their dissatisfaction, the Employees or Claimant are obligated to file a Grievance. If we were to follow the Majorities's rationale, then Claimants found to be unjustly treated as was the Claimant in this instance in not being allowed to displace the junior employee, would not be made whole for loss of earnings. When Employees are dismissed, suspended, disqualified, or disallowed a displacement or bid, it is mandatory upon the part of the Employees to request monetary damages. Failure to do so would make the Employees remiss in their responsibilities. The Carrier's argument was an attempt to divert this Board's attention from the fact that an independent appellant handling of this case was denied. Unfortunately, that smokescreen prevailed in contradiction to

the precedential Awards already rendered on this property.

The record reflects the fact that the Claimant had the minimum requirements necessary to be allowed to displace and that independent and objective appeal of the case was denied.

The case law authority on this issue on the property required a sustaining award. The Majority erred in not so finding. We must, therefore, strenuously Dissent to Award No. 25503 and emphasize that Awards out of the norm have no precedential value.


William R. Miller, Labor Member

Date June 18, 1985