

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25839
Docket Number CL-23486

Herbert Fishgold, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9259)
that:

"(1) Carrier violated the Clerks' Rules Agreement at St. Paul, Minnesota, when it failed and/or refused to award Local Storekeeper Position No. 55070 to employe M. R. Gilman.

(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 M. R. Gilman an additional eight (8) hours at the pro rata rate of Local Storekeeper Position No. 55070 for December 8, 1978 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 (7 1/2) percent on all monies due as stated in Item three above, payable on each anniversary date of this Claim."

OPINION OF BOARD: On December 13, 1978, the Organization submitted on Claimant's behalf, during his absence due to vacation, a request for an Unjust Treatment Hearing under the provisions of Rule 22 (f) of the applicable Agreement. The occurrence giving rise to the request was the Carrier's action awarding Storekeeper Position 55070 to an employee junior to Claimant. The Carrier denied the Claim, based on the requirement that such a Claim must be filed by the employee and because the treatment complained of was covered by Rule 7 of the Agreement. On December 20, 1978, the Organization again submitted a request for hearing, which was accompanied by Claimant's request for such a hearing. The request was again denied by the Carrier, on December 22, 1978.

On February 15, 1979, Claimant filed a Claim as a result of the Carrier's failure to award him the position and, further, for its failure to accord him the right to an Unjust Treatment Hearing under Rule 22 (f). The parties were unable to settle the Claim on the property and it was brought before the Board.

The Organization asserted that the Carrier violated the Agreement by awarding the position to an employee junior to Claimant, since the Agreement requires that seniority governs the award of positions, fitness and ability, which the Organization asserts Claimant possessed, being sufficient.

The Organization asserted that the Carrier further violated the Agreement by refusing to accord him an Unjust Treatment Hearing with regard to its action awarding the position to another employee.

The Carrier asserted that the Claim is untimely, since the occurrence on which it is based occurred on December 4, 1978, the date the position was awarded to the junior employee and since the applicable Agreement requires the filing of claims within 60 days of the occurrence. It asserted that Claimant was not entitled to an Unjust Treatment Hearing, since such hearings are allowed only when the occurrence is not covered by a specific Rule in the Agreement. The Carrier also argued that the Organization's request for an Unjust Treatment Hearing was improper, since it was not filed by the Claimant, as required by Rule 22 (f), and the request filed by the Claimant on December 20, 1978, was untimely, since it was not made within 15 days from the occurrence, as the Agreement requires. In addition, the Carrier argued that Claimant is not entitled to recover lost compensation, since she has never proven that she had fitness and ability to do the job. The Carrier argued further that, in any event, no interest on any monetary Award should be awarded under Board precedent.

Board precedent is clear, and should be recognized as such by the parties, that an Unjust Treatment Hearing is required when timely requested, whether or not the alleged occurrence is also covered by a specific Rule in the applicable Agreement. See, e.g., Award 24610 by this Referee ("To echo the most recent Awards so holding, 'we are persuaded that this issue had been resolved once and for all'"). See also the numerous Third Division Awards cited therein.

The Carrier's contention that the request for an Unjust Treatment Hearing was untimely because not filed by the Claimant within fifteen days from the date of the occurrence on which the request was based, even though Claimant was on vacation at the time the position was awarded to the junior employee, the Organization gave notice within the fifteen day period, and Claimant filed his request within fifteen days of his return from vacation, must be rejected. The Carrier was on notice of Claimant's request through the Organization's request to it of December 13, 1978. Further, the Claimant himself filed within fifteen days of his return from vacation. The Board concludes that, under such circumstances, the request for Unjust Treatment Hearing was not untimely.

With regard to the Carrier's assertion that the Claim was untimely, the Carrier misperceives the nature of the Claim, which was to appeal the Carrier's denial of Claimant's request for an Unjust Treatment Hearing. That denial was issued on December 22, 1978, less than 60 days from the date of the filing of the Claim. The Board holds, therefore, that the Claim was timely.

The Carrier asserts that the Claim appealed was different than the Claim first presented. The Board has reviewed the two statements of the Claim and finds no substantive discrepancy in the two documents which would have misled the Carrier as to the nature of the Claim. Accordingly, the Carrier's argument in this regard must be rejected.

Having concluded that Claimant was improperly denied an Unjust Treatment Hearing to demonstrate his entitlement to the position and having further concluded that the Claim was timely and proper, the Board concludes that the Carrier violated the Agreement. The Board turns now to the remedy for the Carrier's violations. Rule 22 (e) of the applicable Agreement provides, in part, that if the requesting party is vindicated, he shall be "paid for all time lost less any amount earned in other employment." Such a remedy is specifically contemplated by the Agreement. It is not a penalty payment. Numerous Third Division Awards have so held. Rather, an Award which makes an employee whole for the Carrier's violations of the Agreement is both appropriate and contemplated by Rule 22 (e).

The Carrier's argument that Claimant is not entitled to compensation for the underlying denial of position because she never demonstrated fitness and ability must fail. Claimant's inability to demonstrate fitness and ability results from Carrier's violation of the Agreement in failing to afford Claimant an Unjust Treatment Hearing. To deny compensation to Claimant because of the Carrier's violation of the Agreement would be to reward Carrier for its breach. This the Board declines to do.

There is, however, no basis upon which to Award interest on the monetary Award. That portion of the Claim is denied.

For the reasons set forth herein, that portion of the Claim which seeks a declaration that the Carrier violated the Agreement by failing to afford Claimant an Unjust Treatment Hearing is sustained, as is that portion of the Claim which seeks monetary compensation, less interim earnings from other employment. Interest on the pay for time lost, less interim earnings is, however, denied.

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.

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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: *Nancy J. Dever*
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 13th day of January 1986.

