

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25974
Docket Number TD-25804

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

"(a) The Atchison, Topeka & Santa Fe Railway Company (hereinafter referred to as the 'Carrier') violated its Train Dispatchers' schedule working schedule Agreement, including, Article II, Section 10-b-1 (5) thereof when it used E. B. Jackson, a junior extra train dispatcher on position 6500 at 3:00 P.M. November 27, 1982, instead of claimant D. E. Pryor.

(b) Because of said violation, the Carrier shall now compensate Claimant D. E. Pryor one days pay at rate of time and one half. (what he would have earned had said violation not occurred)."

OPINION OF BOARD: The pivotal question at bar is whether Carrier appropriately applied standards of qualification in sufficient fitness and ability as required by Agreement and this Board's interpretive standards in the manner of its application. The Organization maintains that Claimant Pryor had precedence by Agreement as prescribed in Article II, Section 10-b-1-(5) to an open temporary vacancy which by Agreement violation went to a junior employe under Section 10-b-1-(6). Carrier maintained that Claimant lacked sufficient qualifications and as such, no Agreement violation occurred. That provision reads in pertinent part:

"Section 10-B-1. Temporary vacancies of less than ten (10) work days' duration will be filled in the following order of precedence:

- (5) By the senior regularly assigned dispatcher observing rest days and available under Hours of Service Law.
- (6) By the available unassigned dispatcher on his 6th or 7th day of service."

In our view of this case it is important to point out in preliminary fashion, that all facts and/or lines of argument used by either party in their Ex Parte Submissions are not properly before this Board. As firmly established by numerous Awards in this Division and codified by Circular No. 1, the case and its evidence must be joined on the property (Third Division Awards 20841, 21463, 22054). As such, we are required to reject arguments raised for the first time in Submissions, as well as the sworn affidavits addended.

In our review of this case we find substance to the Organization's contention, given the sequence of events on property. This Board has clearly established that the Carrier is entitled to assign a great deal of weight to its judgment of sufficient fitness and ability. Such judgment in fact, precedes the invocation of seniority rights. When Carrier's judgment on qualifications is challenged by claim, the burden of proof falls to the Organization to establish, by convincing competent evidence and proof that claimant is qualified.

This case at bar, however, developed on property quite differently and reverses the burden of proof. By letter of December 21, 1982, the Organization argued that a violation of Article II, 10-b-1-(5) had occurred on November 27, 1982; a violation of a seniority rule allowing Claimant to fill a temporary vacancy of less than ten (10) days. On January 3, 1983 a letter was sent by Carrier to Claimant (and others) that he was "not proficient in the manipulation and operation of the CRT and associated equipment" and would therefore lack fitness and ability to qualify for temporary vacancies of less than ten (10) days. This letter was followed by Carrier's response of January 7, 1983 to the claim indicating that Claimant lacked demonstrated fitness and ability on the CRT. Thereafter, the on property arguments relate to the Organization's position that the "alleged lack of proficiency" began on January 3rd and does not relate to the claim of November 27, 1982 and Carrier arguments that the equipment was in place and Claimant had not demonstrated proficiency.

In the instant case, we are constrained to rule for the Organization in that Article II, Section 10-b-1-(5) was clearly violated. In addition, while we recognize that this Board does not have the qualifications to technically evaluate those basic elements that constitute "sufficient fitness and ability" for CRT usage, we find nothing in the record on property to indicate that any qualifications existed prior to the claim. This Board recognizes that with the important responsibilities of effectively operating a Railroad goes acceptance of the Carrier's judgment as to qualifications in the absence of clear and arbitrary abuse of discretion. This is singularly the prerogative of the Carrier (see Third Division Awards 21385, 21119, 18802). However, we have the judicial right to decide on the merits whether Carrier was arbitrary in the exercise of its judgment.

In the case at bar, we find nothing in the record as joined on property to indicate that Claimant was or should have been on notice, prior to claim, to obtain additional skills or that failure to do so would effect his rights under Article II, Section 10-b-1-(5). The Organization was able to make a prima facie case of a rule violation. As such, the burden of proof shifts to the Carrier to establish by evidence that Claimant was on notice that he lacked qualifications (see Third Division Award 16012). Carrier did not establish to this Board's satisfaction that Claimant's training and experience were so inadequate that a reasonable person could conclude that he did not possess the skills to allow qualifications to supersede seniority Agreements in effect. Carrier arguments that Claimant could not perform the CRT work came too late to affect the claim and are largely unsubstantiated. We believe, given the record on property, that Carrier acted arbitrarily and without Agreement support when it denied Claimant temporary position No. 6500 on November 27, 1982. As such, we sustain the Claim.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy G. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of March 1986.