

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Chicago and North Western Transportation Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood
(GL-10109) that:

1. Carrier violated the Agreement Rules, particularly Rule 8, when it disqualified Mr. J. A. Walsh from Position #002, Roadmaster's Clerk at Cedar Rapids, Iowa, without affording Claimant Walsh the sixty (60) days in which to qualify for said Position #002, and

2. Carrier shall now be required to compensate Claimant Walsh for all time lost as a result of the disqualification, as well as the difference in the rate of pay beginning with date of November 7, 1984, and for each day thereafter until such time as this matter is resolved."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On October 1, 1984, Claimant began his sixty calendar days "time in which to qualify" period for the position of Roadmaster Clerk at Cedar Rapids, Iowa. The Organization contends that Carrier improperly disqualified Claimant from the position in violation of Rule 8 of the Agreement. Rule 8 reads in pertinent part:

"Employees entitled to a position under schedule rules will be allowed sixty calendar days in which to qualify ... This will not prohibit employees being removed prior to sixty calendar days when manifestly incompetent. Employees will be given full cooperation of department heads and others in their efforts to qualify."

The Organization argues that Carrier did not establish that Claimant was manifestly incompetent. It further argues that three payroll errors does not constitute proof that Claimant did not possess the skills required to perform the job. The Organization contends that the incumbent Clerk worked with Claimant for seven days and on November 7, 1984, he was advised that he was disqualified. As such, the Claimant was never shown to be "manifestly incompetent", did not receive full cooperation of department heads and was removed without benefit of the sixty calendar days in which to qualify for the position.

Carrier maintains that Claimant was properly disqualified from his position in accordance with schedule rules. It argues that Claimant was given an adequate degree of training for the position and was afforded full cooperation to assist him in meeting the requirements of the job. It contends that during the Hearing, Claimant acknowledged that he made several errors on important documents which is conclusive evidence that he is "manifestly incompetent." As such, it maintains that Claimant demonstrated his incompetence and was properly disqualified. Accordingly, it asks that the Claim be denied.

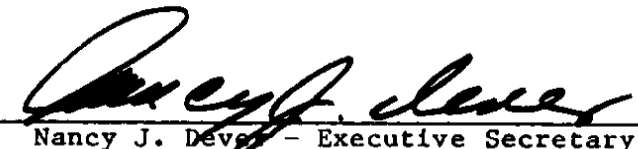
After a review of the record evidence, this Board concludes that we must uphold the Organization's position. While it is true that Claimant made three errors on Carrier documents, such occurred during the first payroll period that Claimant worked the position. The intent of Rule 8 is to afford the opportunity to employees to qualify for assignments that their seniority entitled them to hold. A complete review of the record evidence does not establish that Claimant was failing to learn the position or could not do so, if provided with proper supervision. This Board cannot find clear and convincing evidence that Claimant was properly trained or advised of any inadequacies in his work.

Therefore, on the record as a whole, the Organization has provided sufficient evidence to substantiate that Claimant was not manifestly incompetent. Accordingly, Claimant shall be restored to Position #002, Roadmaster's Clerk and provided with a full sixty calendar day training. During such period, he shall receive full cooperation of department heads and others in his efforts to qualify for the position.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of September 1989.

LABOR MEMBER'S CONCURRENCE AND DISSENT TO

AWARD NO. 28101, DOCKET CL-27287

(REFEREE M. F. SCHEINMAN)

The Majority Opinion has correctly analyzed the facts of the case and determined that the Carrier violated the Agreement for which there must be a remedy. Unfortunately, that remedy is a compromise which encourages the Carrier to further violate the Agreement.

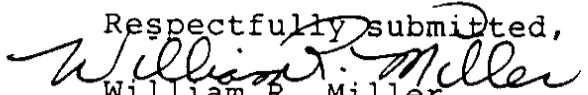
The Majority first states that we must uphold the Organization's position because there was no proof that Claimant was properly trained or advised of any inadequacies. Therefore based upon the entire record which includes an Unjust Hearing the Referee fashioned a remedy which restored the Claimant to Position #002, Roadmaster's Clerk allowing him a full sixty calendar days training with full cooperation of supervisors and others in his efforts to qualify for the position. To that extent the remedy was fine, the problem however, is it did not go far enough.

As pointed out to the Referee in oral presentation an Award which sustains the Organization's position in regards to Rule 8 also sustains our argument that the Carrier issued an incorrect decision regarding Rule No. 22 (Unjust Treatment Rule). Rule 8 & 22 go together like hand and glove. If you sustain one you sustain the other as well. Thus it logically follows that not only did the Board determine that Rule 8 was violated, but so was the decision rendered after the Hearing conducted in accordance with Rule 22. Rule 22 (a) grants the Claimant the same privileges as Rule 21, which clearly means that if the final

decision of the Carrier is not sustained the Claimant is to be made whole for loss of earnings. This Board determined years ago, in Lead Decision Award No. 13837, that where a rule provides for payment of a violation of the Agreement, that it is not within our privy to determine payment or nonpayment of a violation, but that instead we are obligated to compensate the Claimant as the rule requires. Rules 8 and 22 were violated and they require the Claimant to be made whole for loss of earnings. The rule does not leave to the Board's discretion the determination of monies owed, but instead requires enforcement of the rule.

It is commonplace within the industry that the Claimant be made whole for loss of earnings in fitness and ability cases and whenever, in those isolated instances the Board fails to make a Claimant whole for loss of earnings, we are sending an incorrect message to the Carrier. We are telling them that it is permissible to go ahead and violate the Agreement if it is economically advantageous because the chances are we won't make you pay for the violation.

The compromise offered in this decision is not palatable and will lead to the promulgation of further grievances. It is because of such we concur in part, but strongly disagree with the failure of Award 28101 to sustain that portion of the Claim which requested compensation.

Respectfully submitted,

William R. Miller
Labor Member N.R.A.B.

DATE: September 19, 1989

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
AWARD 28101, DOCKET CL-27287
(Referee Scheinman)

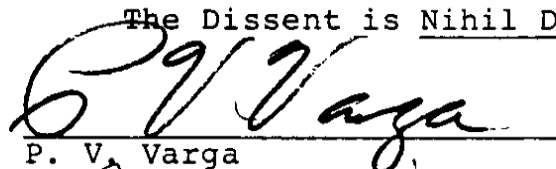
Dissenter asserts that the remedy provided in this case, "is a compromise" and he doesn't like it.

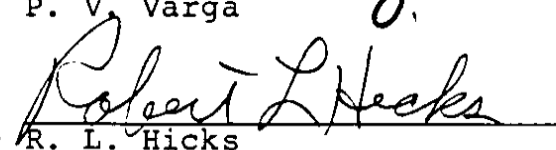
However, the basis for the objection comes not from the Referee's perceived misapplication of the facts or the contract, but that the Referee did not rely on an argument FIRST RAISED in "Oral presentation" before this Board.

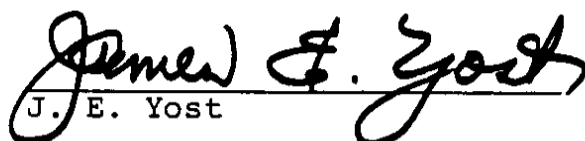
Obviously, such an argument was not raised/handled "on the property" and as the NRAB has pointed out to the Industry and the Parties, its function is to review the on-property record. Dissenter's contention is a nullity.

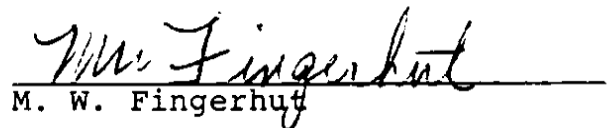
Secondly, Dissenter asserts that, "Rule 8 and 22 go together like hand and glove" and that it is "commonplace within the industry" to provide additional compensation. Again, the Claim submitted to this Board concerned Rule 8 and Claimant was accorded a hearing with right of appeal under Rule 22. The conclusion made in Award 28101 was that "...Claimant was not manifestly incompetent" and was entitled to "a full sixty calendar day training." That is what is provided by Rule 8.

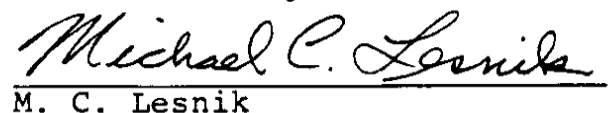
The Dissent is Nihil Dicit.


P. V. Varga


R. L. Hicks


J. E. Yost


M. W. Fingerhut


M. C. Lesnik