

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35338
Docket No. MW-33319
01-3-96-3-809**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier disqualified employee N. L. Harris from the position of assistant foreman-timekeeper on SPG Force 6XT1 for the 1995 production season [System File 21 (66) (95)/12 (95-1103) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. L. Harris ‘... should be reinstated to the Time Keeper position, considered qualified, paid for all time lost, including overtime, and have his record cleared of all reference to the Carrier’s claim that he failed to qualify for this position.’”**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

According to the record, the Claimant exercised his seniority to assume an Assistant Foreman-Timekeeper position with System Production Gang 6XT1 on August 1, 1995. The person who had been doing the timekeeper work, who had bid off the gang, was held over to provide on-the-job training to the Claimant. It is undisputed that the Claimant had performed timekeeping functions in the past. It is also undisputed, indeed the Claimant confirmed in his testimony, that the responsibilities of a timekeeper on the large gang had grown considerably in the years leading up to the instant dispute. The gang's staffing numbered approximately 60 individuals.

Although there is significant conflict in the testimony about the nature and amount of training assistance the Claimant received, he did receive some assistance on most workdays. By August 29, however, the gang's Supervisor determined that the Claimant had not demonstrated the requisite level of proficiency in timekeeping functions to be retained in the position.

Whether and to what extent the Claimant may have lost work time due to the loss of the timekeeper job is not clear from the record. It appears that he was able to quickly exercise his seniority to another Assistant Foreman position on the same gang, which carried the same rate of pay. Nonetheless, the Claimant's General Chairman submitted a request, dated September 7, 1995, for an Unjust Treatment Hearing pursuant to Section 2F of the separate Agreement between the parties ("SPG Agreement") pertaining to the use of System Production Gangs. The request was written to the Carrier's Director of Employee Relations.

By its explicit terms, Section 2F applies to "Employees assigned by bulletin to SPG positions on which not previously qualified, . . ." As noted previously, however, the Claimant assumed his Timekeeper position not by bulletin, but by exercise of seniority. Via letter dated September 15, 1995, the Carrier scheduled an Unjust Treatment Hearing for September 25, 1995. It was postponed one day and relocated to accommodate the Claimant's travel distance.

On October 16, the Carrier issued a letter informing the Claimant that a review of the Unjust Treatment Hearing transcript confirmed that he had failed to qualify as a Timekeeper. It asserted that he had been afforded a fair opportunity in which to qualify. According to Section 2F of the SPG Agreement, it was the Carrier's burden to prove, at the Unjust Treatment Hearing, that the Claimant "... failed to show sufficient aptitude

...” within a 30 calendar day qualification period. The Carrier’s determination was made on the 29th day.

The Organization advanced a number of procedural objections to the Carrier’s handling of this dispute. Most of them arise out of the Organization’s assertions that the Carrier failed to abide by various requirements found in Rule 39 of the former Seaboard Coast Line Agreement. The Organization contended that Rule 39 applied by virtue of Section 12 of the SPG Agreement. The Carrier, on the other hand, maintained that Section 2F of the SPG Agreement controlled. In its view, Section 2F did not impose the kinds of time limitations and other procedural requirements found in Rule 39. It also maintained that the instant dispute was not a discipline situation.

After careful review of the record, we must reject the Organization’s procedural objections based on the applicability of Rule 39. The initial portion of SPG Section 12 reads as follows:

Section 12 - National Agreements

“When not in conflict with the provisions of this agreement, terms and conditions of employment on SPGs not specifically stipulated herein shall be governed by the provisions of applicable National Agreement rules on the subjects ...” (Emphasis supplied)

Section 2F of the SPG Agreement provides for an Unjust Treatment Hearing upon failure to qualify for an SPG position. To obtain such a Hearing, an affected individual must request a Hearing within ten calendar days from the date of disqualification. This ten-day limit is the only procedural requirement expressed in Section 2F.

The Organization provided no bargaining history surrounding the meaning of either Section 2F or Section 12 of the SPG Agreement. The Board notes also that SPG Section 12 is not a model of clarity.

In light of the foregoing factors, we make certain observations without deciding the questions on the merits. It would appear that Rule 39 does not apply. Its procedural requirements appear to conflict with those expressed in SPG Section 2F. In addition, it appears that Section 2F has stipulated, albeit minimally, what the procedural requirements are for an Unjust Treatment Hearing under the SPG Agreement.

Moreover, if Section 2F does not control, then the Organization's request for an Unjust Treatment Hearing was misdirected. Rule 39, Section 3 rather clearly requires that such requests be addressed to the Division Engineer or the Engineer of Bridges.

It may well be that the negotiating parties did intend for Rule 39 to supplement Section 2F. On the state of this record, however, we are unable to reach that conclusion without indulging in an impermissible degree of speculation and conjecture. Our finding on this point, therefore, is that the Organization has not satisfied its burden of proving the applicability of Rule 39 to the facts at hand.

The Organization's remaining procedural objection pertains to the conduct of the Unjust Treatment Hearing. It maintains that the Claimant was denied a fair and impartial proceeding as a result of the Hearing Officer's refusal to allow the Organization to attempt to show that the Carrier's determination of the Claimant's aptitude was improperly influenced by racial discrimination. The Hearing Officer specifically refused to permit questions of witnesses on this subject and he precluded them from responding to such questions.

We agree with the Organization's objection on this point. In this regard, it is noted that Section 21 of the SPG Agreement explicitly prohibits unlawful discrimination based on race as well as other criteria. Absent truly unusual circumstances, and none have been cited on this record, it is usually always a proper subject of cross-examination to attack the credibility of a witness by showing that testimony was impermissibly influenced by racial bias or prejudice. To be a fair and impartial Hearing, the Hearing Officer must permit a reasonable amount of inquiry into such subjects. It may well be that the line of inquiry does not lead to anything of substance. But this is a determination that must be made after hearing and properly considering the testimony that emerges. On this record, by foreclosing even the possibility of such influence in advance, the Hearing Officer denied the Claimant a fair and impartial Hearing. We so find.

To the foregoing finding, however, the Carrier may contend that the Claimant, himself, did not allege racial discrimination when asked how he felt unjustly treated. It is important to note the sequence of events when considering this argument. The Claimant's testimony came after the point in the proceeding where the Hearing Officer had made his ruling. The Hearing Officer had already made it abundantly clear that he would not allow testimony concerning racial discrimination. Thus we are confronted by the following questions that cannot be answered by this record: Did the Claimant fail to

claim racial discrimination because there was none, or did the Claimant fail to claim it because he had been intimidated and stifled by the Hearing Officer?

Given our finding herein, we must provide a proper remedy despite the lengthy passage of time between the events in question and this Award. We approach the remedy issue from the standpoint that the Claimant was improperly removed from the timekeeper functions because no fair and impartial Unjust Treatment Hearing has been held to show otherwise.

As noted previously, it does not appear that the Claimant suffered a significant pay loss. To the extent that he did lose work time, however, between the time of his removal and his exercise of seniority to a like paying position, the Carrier is directed to make him whole. Further, the Carrier is directed to expunge from his employment records all references to disqualification, or failure to qualify, as a timekeeper related to the instant dispute. Finally, the Carrier may not use the instant dispute in any manner whatsoever to deny the Claimant the ability to bid on or exercise his seniority into a similar Timekeeper position in the future. Should the Claimant gain such a future position, he will be subject to whatever qualification Rules apply at that time.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of February, 2001.