NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 25361

THIRD DIVISION

Docket Number CL-25405

Eckehard Muessig, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-9836) that:

1. Carrier violated the effective Clerks' Agreement when, effective December 16, 1982, it failed and refused to honor the displacement of Clerk Edward Pollard over a junior employe to Position #513, Supervisor Switching Revenue;

2. Carrier shall now compensate Mr. Pollard the difference between the straight time rate of Position #513 and that of Position #530, and shall further compensate Claimant for any overtime worked by the incumbent of Position #513; 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 on December 16, 1982, and continuing for so long as Claimant is denied Position #513.

OPINION OF BOARD: When the Claimant's position was abolished. he attempted to displace another employe. However, his request was denied by the Carrier on the basis that he did not possess "sufficient fitness and ability" for such displacement. Thereafter, an unjust treatment investigation was held. The Carrier continued to assert, following the investigation and on further appeal, that the Claimant lacked sufficient fitness and ability for the position in question. The dispute was then progressed to this Division on both procedural and substantive grounds.

With respect to the procedural contention, the Organization asserts that "Rule 34 - Unjust Treatment" conveys the same rights of appeal to a Claimant as those provided under the disciplinary process. While there are numerous implications of this position set forth in the record, the essential procedural issue here turns on the sequence of the appeal process steps and the role of the decision-making officials in them. In this regard, the same official who originally found the Claimant not to be qualified, later testified at the hearing which was conducted by that official's Supervisor. This Supervisor, in his role as the Hearing Officer, then made the decision to deny the Claimant's appeal, thereby upholding the original decision. On further appeal, the same official who made the original decision once again found that the Claimant could not displace mother employe because, as he found in the first place, the Claimant did not possess the necessary fitness and ability.

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.

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 Employes involved in this dispute are respectively Carrier and Employes 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 in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1985.

CARRIER MEMBERS' DISSENT
TO
AWARD 25361. DOCKET 25405
(Referee Muessig)

The majority decision is palpably erroneous and requires a Dissent.

The dispute underlying this case arose when the position of the Claimant was abolished. In accordance with the Agreement, the Claimant notified the Carrier's Manager of Revenue and Car Accounting (hereinafter "Manager") of his desire to displace another employee. The Manager denied the displacement on the ground the Claimant did not possess sufficient fitness and ability. At that point, the Claimant had two options if he wished to progress his right to displace. Lhder one option, he could file a grievance claiming unjust treatment. Under this option, he would receive an unjust treatment hearing conducted by the Assistant Controller who would then determine whether the Manager's denial had been appropriate. If Claimant was dissatisfied with the Assistant Controller's decision, he could appeal to the Director of Labor Relations.

In the alternative, Claimant could file a time claim appealing from the decision of the Manager. The appeal would be taken to the Assistant Controller and, if still unresolved, the next appeal step would be to the Director of Labor Relations.

In this case, Claimant decided to pursue both procedures, unjust treatment and time claim, in seriatim. He initially requested an unjust treatment hearing which was conducted by the Assistant Controller who upheld the decision of the Manager. Under such procedure, the next appeal step would have been to the Director of labor Relations.

The Claimant, however, did not pursue his claim of unjust treatment. Instead, he filed a time claim with the Manager. The time claim was denied and, pursuant to the Agreement, was appealed to the Assistant Controller and, thereafter, to the Director of Labor Relations. No contention has ever been made that the above procedures digressed from the procedures that have been followed since the inception of the Agreement. Indeed, it was not until two months following the final conference

on the property that the Organization raised the procedural issue which the majority has found to be determinative of this case.

The procedural issue was precipitated by Third Division Award 24476, on this property, which involved a discipline dispute in which the Carrier officer who had assessed the discipline also was the first level appeal officer. The Award held that such procedure was a violation of the due process rights of the Claimant. The Organization seized upon that Award to raise the argument that there had been a procedural violation in this case because the Manager, who had initially declined the Claimant's request to displace in the proceeding that led to the unjust treatment hearing, was the same officer who denied the time claim. The Organization's position was that the denial of the time claim constituted an appeal step in the unjust treatment proceeding and thus was improper under Award 24476.

One would have assumed that to state the facts would have been sufficient to destroy the argument's validity. Unbelievably, the majority bought it lock, stock, and barrel; thus the necessity for this Dissent.

The Award is in error for several reasons. First, as the above facts clearly demonstrate, the denial of the time claim by the Manager cannot, even by tortured reasoning, be considered a step in the appeal process under the unjust treatment provisions of the Agreement. Under the Agreement. the next appeal step following the unjust treatment hearing by the Assistant Controller would have been to the Director of Labor Relations. The reinvolvement of the Manager was due solely to the election of the Claimant not to pursue an appeal following the unjust treatment hearing but, instead, to file a time claim. There is nothing in the Agreement that calls for an appeal to the Manager following a decision by the Assistant Controller.

Second, if the above were not sufficiently onerous, the majority compounded the error by holding that inasmuch as the denial of the time claim by the Manager constituted an appeal step, its inclusion in the appeal process was of such magnitude

as to, ipso facto, deprive Claimant of his right to due process, relying upon Award 24476. While the purpose of this Dissent is to comment on the Award of the majority in this dispute, the majority's reliance upon Award 24476 requires us to comment on that Award as well. The rationale for the holding in Award 24476 was not that there was any provision in the Agreement or the parties past practice that required the result but simply on the basis of an esoteric concept of "procedural due process", the source of which remains shrouded in mystery. The Board in Award 24476 appeared to perceive some inequity in following the requirements of the Agreement and past practice and was determined to remedy such perceived wrong. The fact that the Board does not have the jurisdiction to dispense its own brand of industrial justice was immaterial. As stated in Fourth Division Award 3490:

> "Any rights which an employee has during a discipline investigation flow not from the Constitution, but solely from the collective bargaining agreement negotiated under the Railway Labor Act. This has been firmly established by both courts of law and this Board. (See Clark V. S.C.L., 332 F. Supp. 380, 381 (N.D. Ga., 1970); Edwards V. St.L.-S.F., 361 F. 2d 946, 953 (7th Cir. 1966); Third Division Award 15676; Second Division Awards 6963, 6381 and 1821)."

The majority here, taking its cue from Award 24476, has no difficulty in finding a failure of due process without citing any provision of the Agreement to support its position and in the face of uncontroverted evidence of past practice that is directly contrary to the requirements established under the Award. Indeed, the majority's total reliance upon what it found to be a procedural defect, found it unnecessary even to consider whether such defect had produced any deficiency in substance. Third Division Award 19063, which held that it was not improper to have the same official assess discipline and be the first appeal officer, is particularly instructive in this regard. The Board stated:

> "We have considered the cited Rules in the Agreement and the Awards urged by both parties. We are unable to perceive how, in the circumstances of this case, Claimant was dealt with unfairly. We affirm Awards 15714 and 16347 noting that it was alleged without refutation that this is the established method of handling discipline cases on this property."

To the same effect, also see Third Division Award 20077 and 25381.

As detailed above, the Claimant's action in instituting a time claim on top of his unjust treatment grievance served only to increase the number of steps in the processing of his grievance. In no way did it impair any of his tights.

Finally, it is important to note that while the majority in this case relied upon Award 24476, it went beyond that Award in extending the non-Agreement, non-past practice requirement of "procedural due process" to appeals under the unjust treatment provisions of the Agreement. We know of no precedent for such extension and, for all the reasons set forth herein, we are confident that the Award in this case will not serve as a precedent as well.

M. W. FINGERHUT

W. F. EUKER

T. F. STRUNCK

P. V. VARGA

J. E. YOST

LABOR MEMBER'S ANSWER

TO

CARRIER MEMBER'S DISSENT

TO

AWARD 25361, DOCKET CL-25405
(REFEREE MUESSIG)

The Carrier Member's Dissent warrants an answer to not only what it says, but to what it ignores.

The central issue at question involved whether or not the Claimant had sufficient fitness and ability to displace a Junior Employe.

The decision rendered in Award 25361 clearly recognizes the fact that:

1) Claimant had sufficient fitness and ability, and
2) Notwithstanding Claimant's qualifications for the position, the instant case could be settled on the basis of stare decisis in that the appeal procedure was violated as it was in Award Nos. 24476 and 24547 involving the same Parties and the same Rules.

The progression of events started with the initial displacement and were as follows:

1) Claimant's displacement was denied by Mr. J. McGuire, Mgr. Rev. & Car Acct.

2) Claimant then requested an Unjust Hearing to Mr. Ostrowoski, Asst.Controller and Mr. Mc Guire's immediate superior.

3) The Hearing was then held at which time Mr. McGuire appeared as a Witness against the Claimant. Upon completion of the Hearing, Mr. Ostrowoski reaffirmed Mr. McGuire's original decision.

4) Pursuant to the Agreement, an appropriate Claim for loss of earnings and appeal of Mr. McGuire's original decision to deny Claimant's displacement and Mr. Ostrowoski's reaffirmation of that decision was made to the proper Officer to receive such; namely, one Mr. McGuire.

Majority opinion clearly recognized that the Appellant Officer should be an objective person not directly involved in the dispute. Mr. McGuire could hardly be considered such in this instance:

1) He was the original Accuser; and

2) Witness against Claimant; and

3) Last but not least, to think he might overturn his Superior's decision which reaffirmed his prior decision is unthinkable.

Any chance for success at the first Appellant Step was non-existent. By no stretch of the imagination could this procedure be considered as having been an Appeal. The identical issues of

the decision maker, acting as Appellate Officer, was ably handled in Award No. 24476 and Award No. 24547.

The Dissent again argues that when the Claimant's displacement was not honored, that he had two alternatives - one to ask for an Unjust Hearing or the other - to file a monetary grievance. Their position is an "either/or choice" which is contrary to the Agreement and historical practice on the Property.

When the Parties adopted the Agreement, they agreed to an Unjust Hearing Rule which provides the same protection as the Investigation Rule. The hearing was to be a mutual tool to resolve disputes such as this case in the quickest manner possible. If and when the Unjust Hearing failed to resolve the matter, the Organization, as they have historically always done, would then file an appropriate Time Claim for failure to honor the displacement and loss of earnings. This is the same procedure that has always been followed in these matters as well as Investigation Hearings. The Dissent's argument that the Organization should have merely appealed the Unjust Hearing Decision without a request for monetary damages would be ridiculous as it would carry no significance, if sustained. To grieve their dissatisfaction, the Organization or Claimant are obligated to file a grievance. When employes are dismissed, suspended, or disqualified, it is an obligation upon the part of the Organization to request monetary damages. To do any less would make us remiss in our responsibilities. The Dissent's rationale is illogical.

To further compound their error, the Minority Dissent also

takes exception to Award No. 24476 and states on Page 3, the following:

"... the source of which remains shrouded in **mystery."**

Award No. 24476 was not shrouded in mystery but based upon a long line of Third Division Awards such as 8431 and 9832, which have clearly stated that the same standards of fairness and due process as set forth in Rule 27, as well as the intent of the Railway Labor Act, require that the grievance appeal should be reviewed by an independent officer and failure to do any less is in violation of the Agreement.

Longtime Railroad Carrier Advocate at the National Railroad Adjustment Board and now a Referee, Mr. Paul C. Carter, dealing with the same issue and same property, put it well in Award No. 24547:

> "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 appeal 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."

Contrary to the Minority Dissent,Award No. 25361 is not based upon some mystical revelation anymore than its predecessors **on** the same Property **were.** The Dissent registers an erroneous view to a long line of Awards rendered by this Board, just a few of which have been cited.

The Dissent continues to ignore the explicit language of the Unjust Treatment Rule 34 that states:

> "An employe who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing and representation as provided in Rules 26 27, 28, 29, 30 and 31,..." (Underlining our emphasis).

Last, but not least, the Dissent attempts to infer that a foul was committed when the Organization, in the handling of the dispute on the Property, wrote the Carrier with a copy of Award No. 24476 and set forth its position. Such a statement is contrary to the facts. The Organization wrote the Carrier with reference to the new Award in hope it might help resolve the instant dispute. The case was still properly being handled on the Property.

Award 25361 is correct and is in complete conformity with the above-cited precedent Awards of the Third Division on the Property as well as countless others. The Dissent does not detract from the sound reasoning rendered in this Award.

William R. Miller

William R. Miller, Labor Member

Date April 25, 1985

Serial No. 328

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 25361

DOCKET NO. CL-25405

NAME OF ORGANIZATION: Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: The Belt Railway Company of Chicago

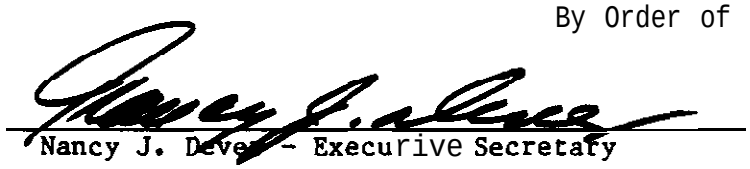
Award No. 25361 sustained the Claim in question. However, it denied a portion of Part 2 of the Claim relating to interest on the monies claimed.

This Interpretation arises because the Organization contends that the Claimant is due compensation for the difference "... between the rate of Position #513, the position he sought to displace to; and Position 11530, the position that he ultimately displaced to. commencing December 16, 1982, and for each and every day thereafter until the Claimant is actually placed on Position 11513". In addition, the Organization seeks compensation for the Claimant in a" amount equivalent to the overtime earnings paid to the employe the Claimant sought to displace.

With respect to these contentions, the Board notes, since it is relevant to our Interpretation, that the portion of the Claim which we sustained dealt with the displacement of a junior employe. Moreover, our Interpretation is based on reasonable inferences about what would have occurred had the Claimant been placed in Position #513 on December 16, 1982. Within the framework of the foregoing, we find the Carrier's arguments persuasive. Accordingly. the Claimant is to be paid the difference between the pay rate of Position No. 513 and whatever position he occupied for the period December 16, 1982 to June 30, 1983, inclusive, in addition to "any overtime worked by the incumbent of Position No. 513" during that period.

Referee Eckehard Muessig, who sat with the Division as the Neutral member when Award No. 25361 was adopted, also participated with the Division in making this Interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1986.