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NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

JAN - 5 1995

Award No. 30631
Docket No. TD-30469
94-3-92-3-303

G. L. HART.

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

PARTIES TO DISPUTE: (American Train Dispatchers Association
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(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of G. Lorek for one (1) day's pay at the Assistant Chief Dispatcher's rate in not being offered the opportunity to work position H-3 on either July 5 or 6, 1990."

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 waived right of appearance at hearing thereon.

The basic facts of this case are not in dispute. Claimant is regularly assigned as a Relief Train Dispatcher on Desk "E" in the Carrier's Harrisburg Movement Office. On July 5 and 6, 1990, a vacation vacancy occurred in position H-3, the Assistant Chief Train Dispatcher position on Desk "H" in the same office. Neither vacancy was awarded to Claimant.

Approximately one to two months earlier, the Carrier's Altoona Train Dispatching office had been combined with its Harrisburg office. Desk "H" was a combination desk which performed duties which had been performed in both Altoona and Harrisburg. Claimant had not worked on Desk "H" since the new territory from the Altoona office had been added.

Claimant's weekly rest days were July 5 and 6, 1990. The July 5, 1990 vacancy was covered at the overtime rate by the Assistant Chief Train Dispatcher (Renninger). It is now undisputed that on July 5, the Assistant Chief Train Dispatcher was the senior available relief incumbent on a rest day. Therefore, the Organization has withdrawn that aspect of its claim which alleged that the vacancy should have been awarded to Claimant on July 5.

The July 6 vacancy was also filled by the Assistant Chief Train Dispatcher at the overtime rate. However, July 6 was not his rest day. The Assistant Chief Train Dispatcher had been assigned to position H-1 on Desk "H" and was diverted from that assignment in order to fill the vacancy in position H-3. Claimant, and not the Assistant Chief Train Dispatcher, was the senior available relief incumbent on a rest day on July 6.

Claimant filed a claim alleging that the vacancy should have been assigned to him and not to the Assistant Chief Train Dispatcher. Carrier denied the claim. The Organization appealed that denial. Thereafter, the claim was handled in the usual manner. It is now before this Board for adjudication.

The Organization maintains that its claim is supported by Rule 5, Section 2(e), which reads as follows:

"(e) Where, in the performance of extra work, no extra employees are available who can be used at the straight time rate of pay and it therefore becomes necessary to assign an employee who must be paid at the overtime rate, assignment will be made in accordance with the following order:

- '1. Available incumbent on his rest days.
2. Senior available relief incumbent on his rest days.
3. Senior available qualified train dispatcher on his rest days.'

NOTE: An employee will not be considered available for the purposes of this rule, if by performing extra work, he would not be able to work his regular assignment without violating the Hours of Service Law."

That Rule, according to the Organization, governs the assignment of extra work when there are no extra employees available for use at straight time rates of pay and it becomes necessary to assign an employee who must be paid at the overtime rate. It maintains that the Rule requires that the extra work be assigned to the senior available qualified dispatcher on a rest day, before it is assigned to a dispatcher who is not on a rest day. The Organization notes that there is no dispute that the Assistant Chief Train Dispatcher was not on a rest day on July 6. It also points out that Claimant was the senior available dispatcher on a rest day on July 6. Therefore, the Organization insists that the vacancy should have been assigned to Claimant.

The Organization rejects any suggestion by the Carrier that Claimant was not qualified to fill the vacancy because he had not received instruction about working on Desk "H" since the new territories had been added. It maintains that at least five (5) other Train Dispatchers had been used to fill vacancies on Desk "H" since the new territories had been added, without being required to re-qualify for work on that desk. The Organization contends that Claimant was as qualified as these other dispatchers to work on Desk "H". Therefore, it insists that Claimant should have been awarded the vacancy on Desk "H". The Organization argues that the Carrier acted in an unreasonable, arbitrary and discriminatory manner, in not granting Claimant the same opportunity to work on Desk "H" that it had granted to other dispatchers.

The Organization maintains that the Board should disregard Carrier's arguments that the Assistant Chief Train Dispatcher and the other Desk "H" incumbents had received instruction on the new territories and that no employee was permitted to work as Assistant Chief Dispatcher on Desk "H" without first receiving instruction concerning the Desk's new duties. It contends that those arguments were not raised by Carrier during the handling of the claim on the property. Therefore, the Organization argues that the Board may not consider these arguments in deciding this dispute.

Accordingly, and for the foregoing reasons, the Organization asks that its claim be sustained.

Carrier, on the other hand, maintains that Claimant was not qualified on July 6, 1990 to cover the Assistant Chief Train Dispatcher vacancy on Desk "H". It contends that other dispatchers, including the Assistant Chief Train Dispatcher, had received training concerning the new territories added to Desk "H". However, the Carrier insists that Claimant lacked any such training. Thus, it argues that although Claimant was available and on a rest day on July 6, he was not qualified to act as a dispatcher on Desk "H". Therefore, Carrier insists that it was justified in not awarding Claimant the vacancy on Desk "H".

Carrier maintains that decisions concerning the qualifications of employees are the prerogative of management. It asserts that they may not be disturbed absent a clear showing that a decision as to qualifications was arbitrary or unreasonable. Moreover, Carrier contends that the burden is on the Organization to demonstrate that the Carrier's determination regarding the Claimant's qualifications was unreasonable, arbitrary or capricious. It insists that no such showing has been made by the Organization. Therefore, Carrier argues that the Organization's burden has not been met and its claim may not be sustained. It cites numerous prior awards in support of its argument that its decision regarding Claimant's qualifications may not be disturbed unless the Organization can demonstrate that Carrier's determination was arbitrary, capricious or unreasonable.

Carrier maintains that the Board should consider its arguments regarding the training received by certain dispatchers other than the Claimant. It acknowledges that on the property the Organization claimed that several employees were permitted to work the Assistant Chief Train Dispatcher position on Desk "H" without having qualified for the duties transferred from the Altoona office. However, Carrier contends that its representative denied that assertion by the Organization. It acknowledges that the Organization then provided it with a list of five (5) Dispatchers who allegedly worked on Desk "H" without first receiving instructions on the Desk's new duties. However, Carrier insists that the list of names proves nothing. It contends that the Organization offered absolutely no evidence to support its assertion. Thus, Carrier alleges that the dispute over training was clearly dealt with on the property. It also argues that it consistently took the position that although other dispatcher had been trained and were qualified to work on Desk "H", Claimant had not been trained and was not qualified. Carrier insists that the Organization has not met its burden by presenting any evidence to the contrary.

Accordingly, and for the foregoing reasons, Carrier asks that the claim be denied.

After carefully reviewing the entire record, we are convinced that the claim must be sustained.

In the handling of this claim on the property, the Organization consistently and repeatedly asserted that other Dispatchers with the same background as the Claimant were permitted by the Carrier to work on the newly constituted Desk "H" without having received any additional training. This assertion was never denied by the Carrier. In a letter dated February 13, 1991, Carrier did state that it considered the Organization's assertion to be nothing more than an unsubstantiated rumor because the Organization had failed to provide the names of Dispatchers who were permitted to work on Desk "H" without having received additional training. The Organization promptly responded to that letter on March 5, 1991, with the names of five Dispatchers, including Renninger. Again, the Carrier failed to dispute the Organization's assertion. Thus, the Organization's assertions about similarly situated Dispatchers went unchallenged by the Carrier. Therefore, pursuant to principles of railroad labor relations, the Organization's assertion in this regard must be accepted as true.

Carrier is correct when it argues that decisions concerning the qualifications of employees are the prerogative of management. It also is correct when it insists that a determination as to qualifications may not be disturbed absent a clear showing that the determination being challenged was arbitrary, capricious or unreasonable. Moreover, there can be no doubt that distinguishing between trained and untrained employees is a reasonable basis upon which to make determinations concerning employee qualifications. It is neither arbitrary, capricious nor unreasonable.

Here, however, there is no evidence supporting the Carrier's contention that Claimant was unqualified to work on Desk "H" due to his lack of training. The unrefuted assertion by the Organization is that five other Dispatchers with backgrounds similar to Claimant's, were permitted to work on Desk "H" without having received any additional training. Thus, Carrier did not consider additional training to be necessary when it determined that these five Dispatchers were qualified to work "H". Therefore, it may not demand that Claimant receive additional training before he is deemed qualified to work on Desk "H". To impose such a requirement upon Claimant while not imposing it on other similarly situated dispatchers, is arbitrary, capricious and unreasonable.

As noted above, pursuant to fundamental principles of railroad labor relations, arguments not raised on the property may not be raised in the first instance in an adjudication before this Board. Thus, having failed to allege on the property that the Dispatchers named by the Organization had received additional training before being permitted to work on Desk "H", Carrier may not properly raise such an argument before this Board. Based upon this narrow ground, the Organization's claim is sustained.

Claimant shall forthwith be paid one day's pay at the Assistant Train Chief Dispatcher's rate.

AWARD

Claim sustained.

O R D E R

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 28th day of December 1994.