

Award No. 591

Docket No. 596

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

PARTIES TO DISPUTE:

RAILWAY PATROLMEN'S INTERNATIONAL UNION, A. F. OF L.

Successor to

**NATIONAL COUNCIL, RAILWAY PATROLMEN'S UNIONS,
A. F. OF L.**

THE NEW YORK CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of employes that rule 9 was violated at Albany, N. Y. on Jan. 10, 1947, and that Patrolman J. L. Marois be paid the difference in Patrolman and Sergeant's rate from the above date on.

EMPLOYEE'S STATEMENT OF FACTS: On December 31, 1946, Position of Sergeant was posted for bidding on Bulletin No. 84 and the three senior bidders for above job were as follows:

J. L. Marois—Seniority— 4/7/1922
T. J. Dunphy—Seniority—12/1/1922
E. J. Talbot—Seniority— 6/8/1923

On Jan. 10, 1947, Bulletin No. 84A was posted awarding job to E. J. Talbot.

Protest was made on behalf of J. L. Marios on Jan. 11, 1947 and hearing held at Captain Dunn's office on Jan. 23, 1947, at which time Captain Dunn rules that job was awarded to E. J. Talbot in accordance with Rule 9—Paragraph "B" of current agreement.

Rule 9—Paragraph "B" of current agreement reads as follows:

"Assignments to such positions shall be based on fitness, ability and seniority, the management to be the judge of fitness and ability—Where fitness and ability are equal seniority in the class shall prevail. Employes shall have the right of appeal, following the same procedure provided in Rule 13."

Patrolman J. L. Marios' seniority rights were violated on the following facts—

J. L. Marois had proven fitness and ability as a Sergeant inasmuch as he had held the rate of Sergeant and fulfilled the duties of a Sergeant for several years and was reduced to the grade of Patrolman due to a reduction in forces at this point and without prejudice and was carried on the furloughed Sergeant's list until this list was discontinued—E. J. Talbot never held the rate of sergeant.

POSITION OF EMPLOYEES: This dispute has been handled with the highest officer on the New York Central Railroad designated to handle matters of this character and all data submitted has been presented to the Carrier.

Request has been made upon the carrier that this dispute be submitted jointly—Both the claim and request that this submission be made jointly has been declined.

In view of the facts submitted in this dispute, supporting the claim advanced, the fourth division of the National Railroad Adjustment Board is requested to assume jurisdiction in this matter and render an award allowing the claim herein set forth.

That all correspondence pertaining hereto is made a part of the exhibits and further that all data herein submitted in support of claim has been presented or is available to the Carrier and made a part of claim.

We respectfully request your Honorable Board to decide and sustain our claim.

Oral hearing of the dispute is respectfully requested.

CARRIER'S STATEMENT OF FACTS: On December 31, 1946 Bulletin No. 84 was posted in the Mohawk-Hudson Division, advertising a vacancy as Sergeant on the midnight to 8:00 A. M. shift.

Bids were received from Patrolmen J. L. Marois, T. J. Dunphy, E. J. Talbot and 10 others, all of whom are junior to Talbot on the Patrolmen's seniority roster.

Marois has a dating of April 7, 1922, Dunphy December 1, 1922 and Talbot June 8, 1923 on the Patrolmen's seniority roster.

Bulletin 84-A, issued January 10, 1947, awarded the Sergeant's position to Patrolman Talbot effective 12:01 A. M., January 13, 1947.

Patrolman Marios appealed this appointment under the last sentence of Rule 9 (b) which reads:

"Employees shall have the right of appeal, following the same procedure provided in Rule 13."

Hearing was set for January 16, 1947 but was referred to January 23 on request of Marois. After the hearing the Captain of Police denied the appeal.

On January 27 the Local Chairman appealed to the Chief of Police and on February 1st the latter denied the appeal.

On February 8, 1947 the Vice President of the Union appealed to the Superintendent Property Protection and on February 12 the appeal was denied by the Manager Property Protection and Safety, acting for himself and the Superintendent Property Protection.

POSITION OF CARRIER: This case is improperly before the Fourth Division. It is definitely outlawed by the provisions of Rule 16.

This case is but one of several that the Union is submitting to or unloading upon the Board at this time, and Management places all of them in this same outlawed category.

Management has been lenient and considerate in the extreme degree in overlooking the constant or recurring non-observance of Rule 16 by the representatives of this Union, but its interests are now in jeopardy through this deluge of old cases, and it must rise to the occasion and assert its rights under the rule.

“Rule 16—Time Claims.

No claims for pay or adjustments in compensation, except errors in accounting or calculating of pay, shall be considered unless filed in writing within thirty calendar days from date of occurrence on which based. Denial of any such claims by management shall constitute final disposition thereof unless appeal is taken within thirty calendar days from date of denial, said time limit to govern in each successive appeal.”

The said rule has been in the agreement without revision or change since the effective date of the first agreement with the Union. Its obvious purpose is to protect the Carrier against money claims that might be allowed to accumulate for long periods of time. There is no ambiguity in its terms and it clearly places an obligation on claimants and their representatives—

1. to file money claims in writing within thirty calendar days from date of occurrence on which based.
2. to make every appeal, if appeal is taken, within thirty calendar days from date of denial.

It clearly provides further, that unless appeal is taken within the thirty calendar days the denial of the claim shall constitute final disposition.

Claims are filed initially—in writing within thirty calendar days—with the Captain. The avenues of appeal are—

- First, to the Chief of Police
- Second, to the Superintendent Property Protection
- Third, to the National Railroad Adjustment Board.

The rule specifically provides that the time limit of thirty calendar days shall “govern in each successive appeal.”

That requirement was not followed in this case and, therefore, when the Union failed to appeal to the Board within the time limit such failure constituted “final disposition” as the rule definitely says.

Such rules have been commonly referred to as “cut off rules”. All of the divisions of the N. R. A. B. have decided cases under such rules and has quite generally given effect to them. There is no need here to burden the record with numerous citations but a few typical cases will suffice:

- Fourth Division—Awards 183, 218, 493, 550
- Third Division—Awards 3414, 3502, 3819, 4384
- Second Division—Awards 463, 474, 1136.

The Fourth Division must give effect to our Rule 16 too. This Carrier has no way of compelling the Union to observe and comply with the time limits insofar as submissions to the Board are concerned. Its only recourses are—

1. reliance on the Fourth Division to give effect to Rule 16 in cases like this one.
2. application to the appropriate court for declaratory judgment.
3. resort to injunctive processes.

The Carrier is loath to follow either recourse 2 or 3 except as a last resort, but now that this issue is before the Fourth Division the Carrier places its reliance on the Board to give effect to the cut off rule, as it did in Awards 183, 218, 493 and 550, and dismiss this claim.

Without prejudice to its stand on that issue, the Carrier presents below its arguments on merits.

Carrier's position in this case will be based upon the following principal points:

1. Rule 9 was not violated as the Union charges.
2. The Union seeks to usurp managerial prerogatives.
3. Rule 16 was violated by the Union.

Each of these points will be discussed hereinafter.

1. RULE 9 WAS NOT VIOLATED AS THE UNION CHARGES.

In their Statement of Claim the Employees charge that "Rule 9 was violated at Albany, New York on January 10, 1947."

Rule 9 has the caption "Advertising and Bidding" and contains sections identified by letters (a) to (h) inclusive. The Employees are not specific in their reference to the particular sections or portions of Rule 9 that they allege were violated by the Carrier.

There was in fact no violation of any provision of Rule 9. The vacancy as Sergeant was properly advertised in conformity with Section (a). Section (b) reads as follows:

"Assignments to such positions shall be based on fitness, ability and seniority the Management to be the judge of fitness and ability. Where fitness and ability are equal, seniority in the class shall prevail. Employees shall have the right of appeal, following the same procedure provided in Rule 13."

In the order of their seniority, bids were received from Patrolmen Marois, Dunphy and Talbot. As between these 3, neither Marois nor Dunphy had fitness and ability equal to Talbot's and in fact the Captain of Police decided that neither Marois nor Dunphy has sufficient fitness and ability to fill the supervisory position of Sergeant. Talbot, on the other hand, had adequate fitness and ability and accordingly was awarded the vacancy.

The claimant in this case is Marois. In denying the appeal on February 12, 1947 the Manager Property Protection and Safety stated:

"Only one applicant had been a Sergeant previously—J. L. Marois. His service as Sergeant was not satisfactory, there being numerous entries on his record card, all of which were made while he was a Sergeant. His fitness and ability are not considered equal to those of Talbot."

The original decision and the sustaining decisions on appeal reflect the right of Management to judge fitness and ability as specifically provided in the first sentence of Rule 9, b).

It must be apparent from the foregoing discussion that Rule 9 was not violated as the Union charges.

2. THE UNION SEEKS TO UNSURP MANAGERIAL PREROGATIVES.

When the rules of the agreement were negotiated Management insisted on reserving the right to be the judge of fitness and ability of applicants for positions either through bid or displacement. Rules 9 (b) and 10 (b) fully protect such right, but in this case we find the Union seeking to usurp that managerial right and asserting that seniority must govern regardless of Management's right to be the judge of fitness, ability and qualifications. In other words, the Union is here seeking to delete from the agreement the provisions that require an applicant to have fitness and ability for a position on which he is the senior applicant or have necessary qualifications for a position that he desires to acquire through the exercise of displacement rights.

The Adjustment Board cannot amend the rules and therefore this claim is entirely improper.

3. RULE 16 WAS VIOLATED BY THE UNION.

Carrier has hereinbefore presented general arguments with respect to Rule 16, Time Claims. The Statement of Employees' Claim shows that the Union is asking "that Patrolman J. L. Marois be paid the difference in Patrolman and Sergeant's rate from the above date on," the date referring to January 10, 1947. As hereinbefore shown, the claim was denied by the Manager Property Protection and Safety on February 12, 1947, 2½ years ago, and it is therefore clearly apparent that the Union is violating Rule 16 by carrying the claim to the Adjustment Board at this time.

The facts and arguments herein presented have been made known to the representatives of the Union in conference or through correspondence.

Carrier desires a hearing.

(Exhibits are not reproduced.)

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

The carrier and the employe involved in this dispute are respectively carrier and employe 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.

The parties to said dispute were given due notice of hearing thereon.

The record shows claimant failed to progress his case to this Division as required by rules of the current agreement and, therefore, it must be considered closed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST: R. B. Parkhurst
Secretary

Dated at Chicago, Illinois, this 14th day of October, 1949.