Award No. 1889
Docket No. CL-1892

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Norris C. Bakke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

LEHIGH VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood—

(1). Claim of the System Committee that the Carrier violated the Clerks' Agreement when on August 14th, 1941, it assigned Mr. N. R. Jacquette to vacancy covered by bulletin No. 1488 in the General Accounts Bureau, New York, and declined to consider application of W. R. Trested, the senior employe.

(2). That W. R. Trested be assigned to the position described in Bulletin No. 1488 and compensated for all monetary loss suffered.

EMPLOYES' STATEMENT OF FACTS: On August 14th, 1941, Mr. B. Frank Hendricks was designated as the successful bidder and assigned by bulletin to position in the General Accounts Bureau, New York. The vacancy thus created was bulletined August 8, 1941, No. 1488 (Exhibit "A"). The position was awarded to N. R. Jacquette (Exhibit "B") whose seniority date is February 1, 1922. The application of W. R. Trested with a seniority date of June 15, 1918 was not given consideration.

POSITION OF EMPLOYES: There is in effect an agreement between the parties bearing effective date of March 1, 1939 from which the following rules are quoted:

RULE No. 37—Seniority Rights

> "Seniority rights of employes covered by these rules to new or vacant positions, or to perform work covered by this agreement will be governed by these rules."

This rule establishes the right of employes to perform work on vacancies and new positions on the basis of seniority.

RULE No. 38—Exercise of Seniority

> "Seniority rights of employes covered by these rules may be exercised in case of vacancy, new positions or reduction in force as provided in this agreement.
>
> "Employes on extra list shall fill vacancies of three (3) days duration or less; thereafter, such positions shall be given to the senior employe applying for same at that point."

This rule provides for the exercise of seniority on new positions and vacancies.

Under such circumstances the Carrier's departure from seniority where there is a lack of adequate fitness and ability on the part of an applicant is in our opinion justified.

The position involved here, as clearly shown from the duties outlined on the Bulletin, requires substantial knowledge of and experience in general accounting of a technical character. Mr. Trested had no such knowledge or experience his previous service having been limited to local accounting on the Division. Therefore, there was ample justification for the Comptroller in choosing the junior employe with eleven years' prior experience and successful performance of the duties of the position.

The question here, in Carrier's belief, is not whether Mr. Trested could qualify if given an opportunity. It is whether at the particular time when he bid on the position his fitness and ability were adequate. It is obvious, taking into consideration the fact that Mr. Jacquette had eleven years' experience and Mr. Trested none, that Carrier was more than justified in ignoring the seniority rule. As has been said many times by your Board "Seniority cannot be applied irrespective of fitness and ability." The latter elements are of very great importance to the Carrier. (See Award 96.)

There is no evidence in this case that the Comptroller has shown bias or prejudice in making the award, and no schedule rule has been violated nor the spirit or intention thereof.

Where, as here, the issue is one of fact and not principle, and the decision is within the discretion of the appointing officer and that discretion has not been abused, this Board should not substitute its judgement for that of the Carrier.

OPINION OF BOARD: It will be noted from the position of Employes above stated that they state the principle involved in this case is the same as that in Docket CL-1891 except that in this case Trested completed the test required by the management. This might well be a distinguishing feature, as we pointed out in that case in Award No. 1888.

Another distinguishing feature is that the responsible officer stated "In declining to award the position to Mr. Trested I took into consideration only fitness and ability."

If this language had not been qualified by what followed in his affidavit, it would have been decisive against the Carrier because of being a clear violation of Rule 39.

However, neither of the distinctions mentioned would be controlling in this case. The deciding element is whether Trested was entitled to a trial at the bulletined position. This is not stressed particularly in the written statement of the Employes, but was stressed in the argument before the referee, and as now appears, properly so. Carrier on the other hand anticipated the question as noted in its position "The question here, in Carrier's belief, is not whether Mr. Trested could qualify if given an opportunity. It is whether at the particular time when he bid on the position his fitness and ability were adequate."

In support of this statement, it was argued that "Rule 50 (a) Employes awarded bulletined positions * * * will be allowed thirty (30) working days in which to qualify" has reference only to employes **awarded** bulletined positions and since Trested was not awarded the position here bulletined Rule 50 (a) has no application.

We cannot agree with this contention for at least two reasons:—(1) It would permit the Carrier to nullify the seniority rule by simply bulletining a position and awarding it to whomsoever the Carrier chose based on its judgment of "adequate fitness" without regard to seniority.

(2) Prior awards show that this is not permitted under the rules. In Award No. 333 Referee Corwin says:—"Rule 36 of the agreement, (viz., the agreement effective between the Southern Pacific Company (Pacific System) and the Clerks' Organization as of date Feb. 1, 1922) which must be construed in connection with the others, seems certainly to assume that an employe should be allowed to bump off a junior even though he might not be immediately as capable, for it offers him the opportunity to qualify himself within a reasonable time and demonstrate his ability." We admit this rule is not identical with Rule 50 (a) in the agreement before us but it was clearly intended to serve the same purpose.

Referee Sharfman in Award No. 1147 recognized this when he said "Even on the assumption that the rule dealing with 'time in which to qualify' (which, by its express terms, refers only to 'employes entitled to bulletined positions') should be deemed to be applicable * * * it would be necessary to establish the existence of reasonably sufficient fitness and ability before the obligation would attach to the Carrier to afford an opportunity to the applicant to qualify for the positions." The Carrier in Award No. 1558 recognizes this apparently when in its "position" it quotes with approval the above language of Referee Sharfman in Award 1147. And it is fair to say that Referee Garrison in Award 1588 recognizes that the two rules must be construed together. (Admitting again that the rule XX of the Santa Fe involved in Award No. 1588 is not identical in language with the instant Rule 50 (a).)

But in Award No. 1369 this Board sitting without a Referee had before it the Chicago and Northwestern Agreement which reads:—"Employes awarded bulletined positions" will be given a trial and assistance to help them qualify and the Board went the whole route in giving the claimant a chance to qualify although it was careful to guard the award by saying "Based solely on the facts and circumstances of this case" but the award definitely recognizes that the language relied on by the carrier here does not require separation of Rules 39 and 50.

From the above discussion it seems a fair deduction to pronounce then as a rule to be followed in this and similar cases, what Referee Sharfman said: viz., "it would be necessary to establish the existence of **reasonable sufficient fitness and ability** before the obligation would attach to the Carrier to afford an opportunity to the applicant to qualify for the positions."

Now, applying that to the case at hand. We think Trested showed by his statement of qualifications in his letter to Bayfield that he possessed "a little extra" reasonable sufficient fitness for the job bulletined. It will be noted that Bayfield himself describes the position as clerical and the principal requirements were "familiarity with Double Entry Bookkeeping and have a working knowledge of the Uniform Classification of Accounts as prescribed by the Interstate Commerce Commission." The other items were all relatively simple accounting items such as would be found in a job advertised at $155.20 a month. Surely giving Trested a try at this job would in no way impair the efficient operation of the railroad. Against such a claim the Carrier is protected by Rule 41 which says, "When an employe bids for and is awarded a position, his former position will be declared vacant and bulletined * * * and will not be eligible to the position vacated by him until same shall have been bulletined and declined by all employes in that seniority district, or is advertised a second time." No employe is going to think lightly about trying to get a job he cannot handle.

However in the absence of anything but a suspicion of bias on the part of the Carrier we think no monetary loss should be recovered by Trested, but rather that he be assigned to the position as of August 1, 1942 and given the 30 days trial as provided in Rule 50.

Our conclusion therefore is that the Carrier violated the agreement and that claim (1) should be sustained, and (2) sustained as to the awarding of the position to Trested as indicated, otherwise denied.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

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;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That claim (1) should be sustained, and (2) sustained as to the awarding of the position to Trested as indicated, otherwise denied.

AWARD

Claim (1) sustained, (2) sustained in part but denied as to monetary recovery, with appointment as of August 1, 1942.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 28th day of July, 1942.

DISSENT TO AWARD NO. 1889, DOCKET CL-1892

The incongruity of the Opinion of Board in this case appears when considered, as automatically it needs be, with the preceding case, Award No. 1888, Docket CL-1891, to the Award and Docket of which it makes reference, and with the next preceding Award, No. 1887, Docket CL 1893, to which in turn Award No. 1888 made reference.

Note that the instant Opinion, in its fourth paragraph, discards the distinction between the two cases, CL-1891 and CL-1892, and by its treatment thereafter discards totally the bases of the contentions of the two parties to these cases, viz.: (1) The question of whether or not the claimant was qualified for appointment to the position, and (2) whether or not there was bias or prejudice exhibited, substituting therefore, as basis for the Opinion's decision, its interjected base that "The deciding element is whether Trested was entitled to a trial at the bulletined position."

Having interjected such base, and having assumed, as the whole tenor of the Opinion shows, prima facie both the inclusion of the undiscussed rule, 50 (a) and conclusion that it had been violated, the Opinion proceeds thereafter in successive paragraphs to justify its conclusion by citing and relying upon four (4) former Awards of this Division.

Before showing the utterly mistaken conception of the Awards which the Opinion cited, let it here be noted, to complete the record, that the Opinion completely ignored the following Awards cited and discussed in the argument before the Referee: Awards Nos. 82, 96, 98, 110, 275, 324, 346, 396, 592, 632, 1009, 1441, and 1479, which had held, in brief, that unless there was evidence of bias or prejudice this Division could not substitute its judgment for that of the Management, and that initial action in choice of personnel is a prerogative as well as a duty and responsibility of Management, in respect to which this Division is not vested with authority to substitute its judgment.

Let the reasons why those Awards were ignored be unexplored. It will suffice to show the incorrect and confused apprehension of the four Awards upon which this Opinion and decision does rely.

First, Award No. 333: The quotation from that Award of itself contained the words "should be allowed to bump off a junior," definitely indicating that which the Opinion ignores, i. e., that in the case covered by Award No. 333 the claimant himself had been bumped off (displaced) from his former position, and that by another rule, 41, in the Agreement there involved was given stipulated rights to displace a junior employe. In the instant case it was a vacancy to which more than 100 employes, constituting the roster in this district, could bid on the basis of seniority rights. That distinction, and the realistic conception that the parties to these Agreements recognize the fairness to all employes and Carrier alike in restricting the trial period of their qualifying rule so as not to admit that which this Award would introduce, that is, a trial to any and all employes who may wish to bid upon seniority alone, was wholly and in true unrealism ignored.

It may be accepted that the "Qualifying" rule in both cases has the same purpose. The rule in the instant case provides for a qualifying period for "Employes awarded bulletined positions, or exercising displacement rights." The rule involved in Award No. 333 is not stated thus affirmatively, though Award No. 333 fairly may be presumed "to assume" that the rule provided for a qualifying period for the employe involved in that case who was "making a displacement." It may equally as fairly be presumed to assume that Award No. 333 would have extended that assumption to cover also "An employe who is assigned to a bulletined position," as well as one who "makes a displacement."

If the instant Opinion thus relies upon Award No. 333 to give effect to the "Qualifying" rule, where in that case the employe involved was one exercising a displacement, it could not, without extending Award No. 333 and the rule there involved, and without extending the provisions of the rule involved in the instant case, have come to the conclusion that the right to a trial on the position was extended to the claimant here, who was an applicant for, but not an employe "awarded," the bulletined position.

Ignored also from Award No. 333 were the following words of more pertinent application to the instant case than they were in the case of Award No. 333 because here the claimant was not one who had acquired displacement rights by virtue of another rule. The ignored words are here quoted:

> "The determination of the question of fitness and ability must rest largely in the management and, as we have recently held, it should not be disturbed and that of the division substituted for it, if reasonable minds might differ in reaching a conclusion."

There is no quarrel with the adoption of logic and reasoning from former decision as basis for subsequent Opinion, but it is respectfully submitted that when distinctive elements are ignored, and partial extracts utilized to give effect which the whole logic and reasoning of the preceding Opinions would not give, not only quarrel with but expose of such measures is imperative.

Award No. 1147: Here again there is limited quotation giving a meaning exactly contrary to the meaning of the Opinion and Award in that case, if, apparently as it is, that Award is cited for the purpose of supporting the Award in the instant case. This needs no further demonstration than to quote from the Opinion of Award No. 1147, from the exact point where the extract from that Opinion in the instant Opinion ends. For ready reference the extract itself is here repeated:

> "Even on the assumption that the rule dealing with 'time in which to qualify' (which, by its express terms, refers only to 'employes entitled to bulletined positions') should be deemed to be applicable * * * it would be necessary to establish the existence of reasonably sufficient fitness and ability before the obligation would attach to the Carrier to afford an opportunity to the applicant to qualify for the positions."

The Opinion of Award No. 1147 continued immediately with these words:

> "Under these requirements of the Agreement the carrier was under no compulsion to permit the claimant to displace the junior employes; and since the evidence of record does not disclose any abuse of discretion on the part of the carrier in concluding that the claimant did not possess sufficient fitness and ability, there was no violation of the Agreement. The positions involved have been clearly shown to require substantial training and experience of a technical character, and at the time of the claimant's applications his training and experience, in their bearing upon the duties of the positions, were so limited as to afford ample support for, and in the opinion of the Board fully to justify, the judgment of the carrier that the claimant did not possess sufficient fitness and ability for the positions. In these circumstances there was no violation of the Agreement, and no obligation thereafter rested upon the carrier to provide qualifying tests for the claimant. The proposals and counter-proposals for such qualifying tests disclosed of record never matured into agreement of the parties, and hence this aspect of the proceeding provides no ground for altering the conclusion reached on the basis of the rules of the Agreement."

The strained and distorted use of Award No. 1147 for support of the immediate Award is emphasized by the following exposition of further disregard in this case:

The rule in Award No. 1147 which provided for a 30-day qualifying period was restricted to "Employes entitled to bulletined positions;" the rule in the instant case is restricted to "Employes awarded bulletined positions, or exercising displacement rights." The decision in Award No. 1147 was not upon that qualifying rule. The decision there denied the claim because the Opinion of the Board fully justified "the judgment of the carrier that the claimant did not possess sufficient fitness and ability for the positions." That decision was upon the seniority, fitness and ability rule of that Agreement, the equivalent of which was also in the instant case and Agreement, but as heretofore noted, was discarded by this Opinion through the interjection of the 30-day qualifying rule.

As to the place of the 30-day qualifying rule in Award No. 1147, let the last sentence from the paragraph of that Award above quoted speak again for itself:

> "The proposals and counter-proposals for such qualifying tests disclosed of record never matured into agreement of the parties, and hence this aspect of the proceeding provides no ground for altering the conclusion reached on the basis of the rules of the Agreement."

In plain words, so far as qualifying tests or periods were concerned, Award No. 1147 says that as the parties did not by their proposals come to a matured understanding, the rules of the Agreement prevailed; i. e., agreement supplementing the qualifying rule in the schedule Agreement was necessary to give such right to a claimant.

That misconception of Award No. 1147 finds its immediate counterpart in the next reference in the instant Opinion to Award No. 1369, rendered by this Division without the aid of a Referee (as even it was observed by the Opinion). Note the distortion of the understanding which formed basis of Award No. 1369 by the limited quotation therefrom and the comment upon it. The abbreviated extract omits the immediate introduction of the Opinion of Board in Award No. 1369 which states:

> "Based solely on the facts and circumstances of this case, including the understanding reached by the parties on November 21, 1939, and confirmed by Mr. Pangle's letter of November 25, 1939, relative to allowing claimant to demonstrate her fitness and ability to perform the duties of Position 271-6 etc."

Note that that basis for Award No. 1369 is in complete harmony with the expression above quoted from Award No. 1147, wherein Referee Sharfman found that there was no maturity of agreement in the specific case before him to give the involved claimant a qualifying test; it was such maturity of agreement by the November letters noted in the case of Award No. 1369 which provided the base that enabled agreement by the members of this Division in its rendition of Award No. 1369,—a base that is here ignored and distorted by the instant Award.

As to the reference to the fourth Award, No. 1558: When the Opinion says that the Carrier there "quotes with approval the above language of Referee Sharfman in Award 1147" it need only be said that there is no fear that the Carrier involved in Award No. 1558 ever intended to quote with approval the distorted meaning which the instant Opinion gives to Award No. 1147.

In conclusion, it needs be said that, notwithstanding the injudiciousness of discarding all of the elements and the involved rules which the parties had discussed and used when presenting the case to this Division and of substituting therefor by interjection of another rule found in the Agreement, this Division is doubtlessly not exceeding its prerogatives and authority either with or without a Referee sitting as a Member, but when that is done, as is disclosed in the instant case, by discarding the many sound Awards which were available for guidance to sound decision here, and distorting the meaning of the few Awards by taking limited extracts therefrom and commenting incorrectly in regard thereto, it can only be said, with all the emphasis that can be given to words, that sound decision and just Award is impossible. Such is the result here.

There is sense, consistency and the foundation of equitable and uniform standard for employes and management alike in the composite of the Awards rendered on this Third Division in respect to particular questions such as the one presented by this dispute, viz., the correct and proper application of the rules governing selection of employes for positions that become available. The progressive though halting development in establishment of such a standard on the question presented by this dispute has continued through 8 years of the activities of this Division, and it exists in the Awards that were argued before the Referee in this case,—the thirteen (13) which were ignored and the four (4) which were cited by the Opinion regardless of whether those Awards were in sustainment or in denial of the claims. The Opinions which formed their basis, though likely susceptible of criticism, as are all opinions, on the whole give symposium of sound and uniform expression of logic and reasoning that is unmistakable as to meaning and effect, as will be disclosed by a review of them.

The errors and the illogical expressions of this Award will appear when contrasted with the composite of all that will be found in these former Awards, and will but emphasize the need for independent and original review of all that is of record on the question when it may again be presented for consideration.

This Award, resting wholly upon incorrect interpretation of a low minority of all Awards upon the question presented by this dispute could not of itself be other than an incorrect and an unwarranted Award.

/s/ C. C. Cook
/s/ C. P. Dugan
/s/ A. H. Jones
/s/ R. F. Ray
/s/ R. H. Allison