

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Elwyn R. Shaw, Referee

PARTIES TO DISPUTE:

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

CHICAGO & NORTH WESTERN RAILWAY COMPANY

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

(a) The carrier violated the meaning and intent of existing rules by refusing Walter Ohlerich, with seniority date of April 21, 1923 the right to exercise seniority to position of stock clerk held by C. Spada whose seniority date is June 14th, 1933 and

(b) That Walter Ohlerich shall be permitted to exercise his seniority to the position held by C. Spada and he shall be compensated for the difference between \$5.60 per day, what he earns and \$6.95 per day, rate of the stock clerk's position, retroactive to February 17th, 1941.

EMPLOYEES' STATEMENT OF FACTS: On January 27th, 1941, an agreement was reached between the Director of Personnel for the C. & N. W. Railway Company and the General Chairman for the Brotherhood permitting the transfer of certain work from the Chicago Shops, seniority district 70-A to Ravenswood, seniority district 100. Due to the fact that only a portion of the work on some of the positions was to be transferred and that the work on the positions would be re-arranged after the given number of positions has been transferred to district 100—it was agreed that the employees affected by the abolishment of their positions in district 70-A would, if they so desired, be permitted to make application for any of the new positions created in seniority district 100 or exercise their seniority in district 70-A. Mr. Walter Ohlerich who had been employed as a clerk in the General Storekeeper's office since April 21st, 1923 was affected through this transfer of work and he indicated he desired to displace C. Spada in his own seniority district 70-A who held position No. 30-11, stock clerk in the lumber yard, assigned to handle stock class Nos. 4—parts and signs; 18—car forgings; 20-C—car forgings; 30—framed lumber only.

Mr. Ohlerich was denied the right to displace C. Spada on position No. 30-11 and under protest displaced to a position in seniority district 100, said position carrying a rate of \$5.60 per day. Mr. Ohlerich was not given an opportunity to demonstrate whether or not he was qualified or might qualify, even though he had worked in the department for 14 years and a Mr. Sherman who was his junior and who had not worked on a stock clerk's position for 14 years was permitted to displace to an identical position as that desired by Mr. Ohlerich. M. Sherman was stock clerk in 1926 and had charge of stock classes 1-C, 14, 25 and 26 and at the present time is handling stock classes 2, 21-A, 22, 23 and 26-B, the stock he is now handling is stock that he has had to familiarize himself with.

supervising officers, had the necessary fitness and ability to perform the duties of a given position were assigned thereto, local forces did not give the employes the necessary instructions and assistance in the performance of their work with a view that the employe would become discouraged and give up the position and someone more favorable to supervisors and employes in a local community would eventually be assigned to the position, and for this reason the rule was changed as indicated, and by its language that part of the rule dealing with being furnished necessary instructions and assistance with a view of educating and qualifying the employe to perform the work applies only after the employe is awarded the position, and is not a factor in determining whether the employe has the necessary fitness and ability for assignment to the position.

The railway company reiterates its previous statements that the facts of evidence and Ohlerich's previous service with the railway company fully sustain the railway company's position in this case.

OPINION OF BOARD: This controversy arises from certain changes in seniority districts made by the Chicago and North Western Railway Company in and near Chicago. From these changes it became necessary for Claimant Ohlerich to displace an employe from his old seniority district or transfer to a new one.

Ohlerich indicated his desire to displace one C. Spada, stock clerk, in his own seniority district, and the Carrier denied him this privilege, notwithstanding his seniority to Spada, because the Carrier decided that Ohlerich had not the necessary fitness and ability. Ohlerich thereupon exercised his alternative right and transferred to the new seniority district.

A decision in this case hinges upon certain rules of the Agreement and a determination of the principles of construction applicable thereto.

Rule 16 provides:

"Promotions will be based on fitness, ability and seniority; fitness and ability being sufficient, seniority will prevail."

Rule 18, which is also called in question, among other things provides as follows:

"Employes awarded bulletined positions will be furnished all necessary instructions and assistance with a view to educating and qualifying them to perform work required thereon, and will be allowed thirty days in which to qualify when it will not interfere with efficient or economical operation, or cause undue impairment of the service. * * *"

The seniority date of Walter Ohlerich was April 21, 1923 and the seniority date of C. Spada, whom Ohlerich wishes to displace, is June 14, 1933, thus giving Ohlerich more than 10 years' seniority over Spada. It was agreed that the rules of seniority apply to displacements in the same way as to new or bulletined positions, and it was thus apparent that if seniority alone is to be considered there can be no question about Ohlerich's right to displace him. The question reduces itself to a determination of who has the right to determine Ohlerich's fitness and ability for the position he seeks and to what extent that determination must be controlled by a consideration of Rules 16 and 18 taken and considered together.

The question thus presented to the Referee in this case is by no means a new one before this Board. A consideration of the former awards which have been made here gives a greater appearance of disagreement among Referees than actually exists. Practically all of these awards are limited by their very terms to facts presented by the record then under consideration. Employes refer to Awards Nos. 65, 333, 1369 and 1449 while the Carrier refers to Awards Nos. 96, 98, 110, 275, 396, 592, 632, 1009, 1147, 1441, 1588 and 1889.

It will be of little value in the decision of this case to attempt an exact analysis of each and every one of these awards because it is possible to take them and by segregating language from its context to arrive at any conclusion which might be desired. It is important to notice however that each of them is based upon its own peculiar facts and there does not appear to have been made any real effort to establish a general and binding rule. It is certain that these various awards indicate the diversity of opinion among Referees and it is possible to say that they, taken as a whole, tend toward a destruction of the vital rule of *stare decisis*, and in doing so it is the opinion of the present Referee that both the Brotherhoods and the Carriers are left in a position of uncertainty which breeds trouble and will cause constant disagreements to be appealed to this Board in the future. It is recognized among jurists that a rule must be certain and known to everyone and that this is nearly as important as that it should be just. No Superintendent in a railroad division and no General Chairman in any Brotherhood can with any certainty advise those to whom he is responsible what should be done in any particular case unless he may place some degree of reliance upon the decisions of this Board being followed in the future, and the opinion in this case is written in the sincere hope that it may tend toward the degree of stability which the actual welfare of all the parties to these agreements in the actual working in the field requires.

In the present case it is admitted by both parties that the Employer is the first judge to determine fitness and ability. This would necessarily be so unless the Carrier should renounce all ordinary attributes of management, and it follows from the bare statement of this rule that when the Carrier has made a decision as to fitness and ability the employe has the burden of showing some matter in the record to overcome that decision. The record in this case shows nothing at all about Mr. Ohlerich's fitness and ability except his service record. From that it appears that he entered the service in 1909 and for a year and 10 days acted as an engine crew caller; that for approximately the next year he acted as a freight brakeman and that thereafter for a short time as a switchman. For about 40 days in 1913 he acted as an office clerk in the Store Department of the Chicago shops, and thereafter for nearly three years as a boilermaker's helper. From 1923 to 1941, except for short periods out of service because of force reduction, he acted as an office clerk in the Store Department of the Chicago shops. The Carrier points out that during his entire period of service he has never occupied any position which would qualify him as a stock clerk.

In order to fill that position he would have had to have a knowledge of posts and signs, of car forgings both iron and steel, all fabricated or shaped steel for passenger and freight cars including brakes and couplers, built up bolsters and all the parts thereof, brake beams, car roofs and parts thereof, of cast steel bolsters and coupler yokes, and of framed timber. There is nothing in Mr. Ohlerich's service record to indicate that he had any familiarity whatever with these materials and parts, and if he had any such knowledge it was his duty to present evidence thereof to this Board having the burden of determining his fitness and ability.

It appears from the record that the question of giving this position to Mr. Ohlerich was gone into quite thoroughly and interviews between the Representatives of the Clerk's Organization, Personnel Officers of the Company, and the Assistant General Storekeeper were held. It was deliberately decided after full conference that Mr. Ohlerich lacked the necessary fitness and ability and that the General Storekeeper was of the opinion that it would result in an undue impairment of the service to place Mr. Ohlerich in that position even for a limited time.

The present Referee is of the opinion, after reviewing all of the prior decisions submitted to him, that certain true general rules are applicable to a situation of this kind and that it has been the intention of this Board and

previous Referees sitting with this Board to follow these general rules, notwithstanding isolated language in some of the awards. It is a general rule that in the first instance the Employer must be the judge of the fitness and ability of an employe and that to hold otherwise would destroy the basic attributes of management, and there is nothing in the agreement to contradict this elementary rule, but the very fact that there is an agreement touching on the subject necessarily modifies it to some extent, and as to that modification we are of the opinion that it requires the Carrier's action to be free from fraud, caprice and unreasonableness. Within the limits of honesty and good faith and without the absence of fraud, caprice or unreasonableness the Carrier must be permitted to determine the question of fitness and ability.

It follows from this statement of the rule that if an employe complains of Carrier's decision and seeks to have a review or upset by this Board he has the burden of coming in and showing to us that fairness and good faith have been violated, or that the decision has been fraudently, capriciously or unreasonably made. No such showing has been made in this record.

It is apparent that Rule 18 cannot apply except in connection with Rule 16, and to give it the effect which is here sought would be completely to abrogate Rule 16. In the absence of the fitness and ability required by Rule 16 there would be nothing upon which Rule 18 could operate.

The Board finds that the claimant in this case has not produced evidence to show his fitness and ability for the position which he seeks and there is no reason for disturbing the decision of the Carrier.

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 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 claimant in this case has not produced evidence to show his fitness and ability for the position which he seeks and there is no reason for disturbing the decision of the Carrier.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of October, 1942.