

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes on the New York Central Railroad, Lines West, that the Carrier violated the Clerks' Agreement.

1. When under date of April 15th, 1948 the Carrier denied Mr. A. G. Beard displacement rights on Position No. 691, Head Clerk, Tabulating Machine Room, which he previously held from October 9th, 1943 to May 1st, 1946, and
2. That the Carrier be required to permit Mr. A. G. Beard to make such displacement under the provisions of Rule 19 of the Clerks' Agreement, and
3. That he, Mr. A. G. Beard, and other employes affected as a result of the Carrier's refusal to allow such displacement be compensated for all losses in wages sustained as a result of disallowing such displacement.

EMPLOYEES' STATEMENT OF FACTS: Prior to April 29th, 1941, all work performed in the Auditor of Passenger Accounts' Office at Detroit, Michigan was on manual basis.

Effective April 29th, 1941, Carrier undertook to mechanize some of their operations by first installing three International Business Key Punching Machines to handle train earnings.

As time went on, other manual operations were converted to machine operations up to 1943. Between April 29th, 1941 and July 23rd, 1943, all other changes in the operation were handled by agreement in the Auditor of Freight Accounts Office account of Carrier's inability to secure the necessary equipment in their own office during this period of time to handle these mechanized changes.

On July 20th, 1943, after having received the necessary equipment, a Machine Room was established and Position No. 189, titled Head Clerk, Tabulating Machine Room, was created at the rate of \$195.60 per month with full supervision, direct charge and responsibility for all detail machine work thus far taken over from manual operations. This position was assigned to

incurring unnecessary machine time with the result that there was a delay in completing the reports. (Exhibit 3, Page 18)

Mr. Beard was not efficient in handling the personnel under his supervision, having on many occasions ignored a clerk in charge of a group to deal directly with another clerk without informing the head of the group of his instructions, thus creating confusion and inefficiency. (Exhibit 3, Page 18)

Mr. Beard was opposed to the maintenance of records indicating the production of employes, errors that were made in punching cards, balancing pages, etc. Although he did furnish some of these records, it was with reluctance. (Exhibit 3, Page 18)

The work under Mr. Beard's supervision was not handled systematically, resulting in inefficiency. (Exhibit 3, Page 18)

The carrier did not in so many words directly advise Mr. Beard that his services as Assistant to Chief Clerk in charge of the machine room were not satisfactory and that it might be necessary to proceed to disqualify him. However, he must have known from various conversations with his Chief Clerk and Assistant Auditor Passenger Accounts that his work was not satisfactory. He was not disqualified due to the fact that there was no one available at the time having the necessary experience or training to take over the work. This was not the case on April 16, 1948, as Mr. Singer who succeeded to the position of head of the machine group December 16, 1946, had been given the necessary training and was satisfactorily performing the duties of the position.

If the carrier had not complied with the request of the General Chairman of the Clerks' Organization and endeavored to train personnel of the Auditor Passenger Accounts' Office in tabulating machine procedure, but had transferred those having experience from another department or obtained them from outside sources, it is probable that the difficulties experienced under the supervision of Messrs. Giles and Beard would not have occurred. Merely because Carrier permitted Mr. Beard to occupy the position for a period of several months during the war years, when there was a shortage of manpower throughout the country, there should be no binding obligation on Carrier to recognize Mr. Beard's right to claim this supervisory position without regard for his lack of sufficient qualifications to fill it acceptably and satisfactorily. Carrier permitted him to hold the position by sufferance because a more satisfactory employe was not available at the time. As the record shows, the duties and responsibilities have been greatly increased since Mr. Beard vacated the position, and Mr. Beard is not qualified to perform the duties and assume the responsibilities under present day conditions. Seniority rights should only be recognized where fitness and ability are satisfactory to the Carrier. Mr. Beard cannot satisfy the Carrier in these essential respects, and therefore his seniority cannot be considered the controlling factor.

The carrier should not be required to permit an employe, whose prior record on the job clearly indicates he does not have sufficient training and aptitude for the position, to displace an employe who, by actual performance currently, is demonstrating his ability, fitness and training to satisfactorily perform the duties of the position involved. If the carrier is required to take that action, efficiency will be destroyed and it will be impossible or difficult to obtain satisfactory performance in the tabulating machine group.

Claim should be denied.

(Exhibits not reproduced).

OPINION OF BOARD: The facts in this docket insofar as pertinent to a disposition of this claim are briefly as follows:

Prior to April 15, 1948 when Claimant A. G. Beard was notified of his displacement on position #787 by a senior employe, he sought to exercise displacement rights on position #691 Head Clerk Tabulating Machine Room. This latter position was substantially the same as

one previously designated as position #189 bearing the same title and on which Mr. Beard had worked from October 9, 1943 to May 1, 1946 when he was displaced thereon by an employe returning from military service. Carrier declined to permit Mr. Beard to make the displacement on the ground that it was felt that he did not have the necessary qualifications.

Despite the extremely lengthy record and the many contentions of the parties with respect to the qualifications or lack of qualifications of Mr. Beard to fill the position, this whole dispute hinges upon the force and effect to be given to Rule 19 (Displacement) of the applicable Agreement which reads as follows:

"Employes displaced, or whose positions are abolished, may exercise displacement rights within ten days. Such employes will be given opportunity to qualify at their own expense."

Awards of this Board with respect to the proper interpretation of promotion and displacement rules are legion. Briefly stated, the general rule of those Awards is that the Carrier in the first instance has the right to determine the fitness and ability of the employe for the position sought and that this Board will not substitute its judgment for that of the Carrier in the absence of bad faith, arbitrariness, capriciousness, bias or partiality. However, in none of those Awards, so far as we can determine, has the Board had occasion to consider a rule worded quite like the one involved herein. Generally speaking, the displacement rule under consideration in those Awards is expressly tied in with the promotion rule, so that there is no doubt that sufficiency of fitness and ability is a condition to the exercise of the right of seniority in displacement.

That superior seniority gives an employe some right to displace under Rule 19 when he himself is displaced or his position is abolished, is implicit in the Rule as can be gathered from other rules of the Agreement. Implicit also, in employer-employe relations, is that management's field of discretion in judging the qualifications of its employes for particular positions is limited only to the extent to which it has limited itself by Agreement. Hence, the question arises as to what extent Carrier has limited itself in the exercise of that discretion under Rule 19. We should be very hesitant to imply a limitation in the absence of express language to such effect for we recognize that the Carrier is primarily charged with the efficient and safe operation of the railroad and interference with its selection of competent and efficient employes would greatly impede it in discharging that responsibility. Nevertheless, the wording of the rule in providing that the displaced employes will be given an opportunity to qualify AT HIS OWN EXPENSE, reasonably and logically leads to the conclusion that its intentment is to afford a considerable protection in service retention to the senior employe who is displaced or whose position is abolished. In requiring him to prove his qualification at his own expense it contemplates a correlative protection to the Carrier in the event of his failure to qualify. That latter condition is absent from the promotion rule. Thus it appears that Rule 19 apparently contemplates somewhat greater emphasis on seniority than the promotion rule of the Agreement. Hence, the Carrier has restricted itself in the exercise of its discretion by agreeing to give considerable weight to seniority when an employe seeks to make a displacement under the Rule, although we cannot say that it has surrendered its right to judge his fitness and ability. It follows in this instance that this Board in contemplating the merits of this claim should review the record, not only from the standpoint of determining whether the Carrier in its refusal to permit Claimant to displace, in accordance with Rule 19, has been guilty of bad faith, arbitrariness, capriciousness, bias or partiality, but as well from the standpoint of determining whether Carrier's action has been reasonable in the light of the weight attaching to Claimant's seniority.

The record reveals that for over two and one-half years Claimant filled the position on which he seeks to displace and at a time when its duties were

approximately the same as at present and, further, he has filled other responsible clerical positions for many years. At no time during his incumbency of the position was he advised that his services were unsatisfactory. This, in our opinion, raises a logical presumption of his capacity. (See Award 402 decided by this Board without a Referee.) It seems unreasonable to now state that he is unqualified or at least not be allowed an opportunity to prove his qualification. If, as Carrier contends, his being out of touch with current procedures on the position as developed over the last eighteen months would render him incapable of performing the duties of the position, Carrier will be fully protected for Claimant's ability or lack of ability to acquaint himself with the new procedures can easily be determined during the trial period. It follows that a sustaining Award is in order with respect to Claims 1 and 2. Claim 3 will be sustained to the extent that Claimant be compensated for all wage loss if able to qualify for the position (Award 402).

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 thereon;

That the Carrier and the Employee involved in this dispute are respectively carrier and employee 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 Carrier violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 17th day of February, 1950.