

Award No. 6028  
Docket No. CL-6136

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Dudley E. Whiting, Referee

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**PARTIES TO DISPUTE:**

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

**THE PENNSYLVANIA RAILROAD COMPANY**

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

(a) The Carrier violated the Clerks' Rules Agreement, effective May 1, 1942, particularly Rule 3-C-1, when it refused to permit H. N. Climenson to exercise his seniority on a tallyman's position at the Philadelphia Transfer, Philadelphia Terminal Division, Philadelphia, Pennsylvania, on January 16, 1948.

(b) H. N. Climenson, the Claimant, be assigned to this position and be compensated for all lost earnings beginning January 16, 1948, and continuously until proper award has been made. (Docket E-539).

**EMPLOYES' STATEMENT OF FACTS:** This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employees in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employees between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Title I, Section 5, Third (e) of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant is an employee of the Philadelphia Terminal Division of the Pennsylvania Railroad entitled to hold regular positions covered by the Scope of the Clerks' Rules Agreement by virtue of his Group 1 seniority in the Philadelphia Terminal Division Seniority District, of which the Philadelphia Transfer is a part.

The Claimant held a position of tallyman at the Philadelphia Transfer, Philadelphia Terminal Division, from September 1, 1947, or October 1, 1947 (there being some conflict in the record as to which date is correct) to December 27, 1947.

Many decisions of this Division support the foregoing principles. For just a few of the more recent ones, see Awards Nos. 2350, 2692, 3057, 3151, 3273 and 3573.

Another principle, almost equally well recognized, is, that once fitness and ability of an employe have been found by the Carrier to be wanting, the burden of overcoming that decision by substantial and competent proof rests upon the employe (Awards 2031, 2491, 3273)."

The Carrier submits that in determining that the Claimant was not qualified for the position of Tallyman at the Philadelphia Transfer it has met all the tests summarized in the above Award for its action was not arbitrary, capricious or unreasonable but was taken only after full consideration of all the facts involved and in conformity with both the spirit and intent of the Agreement as interpreted by the parties.

It is respectfully submitted, therefore, that the claim in the instant case should be denied.

**III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Instant Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

**CONCLUSION**

The Carrier has established that no violation of the Agreement occurred by reason of not permitting the Claimant to exercise seniority as a Tallyman at the Philadelphia Transfer and the Claimant is not entitled to any alleged loss of earnings.

Therefore, the Carrier respectfully submits that your Honorable Board dismiss the claim of the Employees in this matter.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

(Exhibits not reproduced).

**OPINION OF BOARD:** When the Claimant sought to exercise his seniority to displace a junior tallyman under Rule 3-C-1, the Carrier declined to assign him to the position on the basis that he did not possess sufficient fitness and ability. Rule 2-A-2 (a) provides:

"In the assignment of employes to positions subject to the application of the provisions of Rules 2-A-1 and 3-C-1, fitness and ability being sufficient, seniority shall govern."

Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment. The exercises of such judgment is a prerogative of the management and unless it has been exercised in an arbitrary, capricious or discriminatory manner we should not substitute our judgment for that of the management.

It is the position of the Organization that where an employe has filled a position for more than 30 days, without being disqualified under Rule 2-A-3, he must be deemed to have sufficient fitness and ability therefor. We decline to adopt such a principle in a case where the employe was informed that his services were not satisfactory during his prior occupancy of the position. Such was the case here and no other reason appearing for considering management's judgment to have exercised arbitrarily, capriciously or discriminatively, the claim is without merit.

**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 the Agreement was not violated.

#### AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon  
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1952.