

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred W. Messmore, Referee

PARTIES TO DISPUTE:

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

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that Carrier violated rules of the Agreement governing the employees' hours of service, working conditions and rates of pay effective March 1, 1947, subsequently amended by the Forty-Hour Week Agreement on September 1, 1949, when

1. Carrier denied request of Carl H. Kuntz senior applicant for position of Assistant Foreman advertised on The Baltimore and Ohio Warehouse Company bulletin No. 25, dated November 6, 1950, and awarded the position to Harry A. Schulte, a junior applicant on November 17, 1950, effective November 20, 1950, and
2. That C. H. Kuntz be assigned to the position described by bulletin No. 25 mentioned in item 1 hereof, and
3. That C. H. Kuntz be compensated for all wage loss sustained from November 20, 1950, to date he is assigned to the position of Assistant Foreman in accordance with his application therefor.

JOINT STATEMENT OF FACTS: The following position was bulletined November 6, 1950:

"BULLETIN NO. 25

THE BALTIMORE AND OHIO WAREHOUSE COMPANY

Cincinnati, Ohio
Nov. 6, 1950

"TO WHOM IT MAY CONCERN

"The following position is open for bid: Assistant Foreman 2nd and Smith Street, Cincinnati, Ohio. Hours 7:30 A. M. to 4:30 P. M. Monday thru Friday. Rest Days Saturday and Sunday. Rate \$12.55. 1 hour for lunch.

"Qualifications:

Duties: Assisting the General Foreman. Must have knowledge as to storing of merchandise, re-coopering, ability to supervise work,

used in Rule 26, and others containing similar language, does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance and assistance (Awards 2427, 3469, 4026 and 5265). However, we cannot agree with its contention that is the only issue involved now that the case has reached this tribunal for decision.

"Repeated decisions of this Division of the Board have established the rule that once fitness and ability of an employe have been found by the Carrier to be lacking, the burden rests upon the claimant to overcome that decision by substantial and competent proof. See e. g., Awards 1147, 2031, 2491, 3273, 3469, 4040 and 5147.

In the instant case we must start on the premise the Carrier made the finding which, under the rule requires the Organization to establish Gronek possessed sufficient ability and fitness to occupy the position. It supports that finding by the letter heretofore quoted and repeated assertions in its submissions on the part of those preparing them that the statements therein contained are true. The Organization vigorously insists all proof submitted by the Carrier is in the form of opinion and conclusion evidence. Assuming without deciding it is right in that contention the fact still remains the finding was made and that it must be overcome by the degree of proof required by the rule. The proof submitted by the Organization to accomplish that result is no better, if as good, as that submitted by the Carrier. * * *"

F. Summary:

The Carrier asserts its position based on competent evidence, that in the case of the claimant, fitness and ability were not "sufficient" for the position on which he had submitted bid. The Committee has nowhere in its discussion on the property contended in positive terms that the claimant actually had "sufficient" fitness and ability. All the Committee has said is that the claimant was a senior man and should have been assigned. But that in itself does not meet the qualifications of the rule.

Moreover, the Carrier has shown that under principles enunciated by this labor tribunal, the Committee at all times retained the positive burden of showing by substantial and competent proof that the claimant actually had "sufficient" fitness and ability. It is palpably evident that the Committee has not at any time met, nor attempted to meet, the particular burden placed upon them.

This claim is necessarily without merit and should be denied.

OPINION OF BOARD: The claim comes before this Board on a joint submission of the facts.

On November 6, 1950, Carrier issued its Bulletin No. 25, in which it advertised for a bid on the position of Assistant Foreman, Baltimore and Ohio, Cincinnati, Ohio. The qualifications set forth therein are as follows: Assisting the General Foreman. Must have knowledge as to storing of merchandise, reworking, ability to supervise work, keep storehouse in first-class condition, and see that regulations are carried out.

Carl H. Kuntz (claimant) made application for the position. He held Group 1 seniority as of the date of May 29, 1942. H. A. Schulte also made application for the position. He held seniority in Group 1 as of the date of July 3, 1942. The position was awarded to Schulte, whose seniority was junior to that of the Claimant Kuntz.

As shown by the Joint Statement of Facts, the Brotherhood Division Chairman protested the assignment of the junior employe to the position in

a letter dated December 17, 1950, to Mr. I. W. Mead, Manager, Baltimore and Ohio Warehouse Company.

The rule the Employees contend was violated is Rule 30, which provides as follows:

"Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements under these rules shall be based on seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail.

"Note—The word 'sufficient' is intended to more clearly establish the right of the senior employee to bid in a new position or vacancy, or exercise displacement rights, where two or more employees have adequate fitness and ability."

Since it has been established that Claimant Kuntz was senior to Schulte, the only question to be decided is whether Claimant lacked sufficient fitness and ability. The Carrier contends he did lack such.

The Employees assert Mr. R. L. Harvey, Manager Labor Relations, was not personally qualified to know Claimant's fitness and ability for the involved position. This assertion is based on Mr. Harvey's decision under date of December 31, 1952, which reads in part: "As stated above, however, seniority prevails when fitness and ability are sufficient. In this case the fitness and ability of Mr. Kuntz for the position of Asst. Foreman were not considered sufficient. In view of the Manager of the warehouse, Mr. Kuntz lacks ambition, initiative, and cooperation, and ability to handle men."

From the above, it would seem that the Employees are endeavoring to say that Mr. Harvey had no acquaintance with the facts when he rendered his decision. We believe that he was fully advised of the facts. This would be true by virtue of the position he holds and the duties applied to it. However, the record fails to show that he was unacquainted with the facts.

After Mr. Mead, manager of the Warehouse Company, denied the protest made by the Brotherhood Division Chairman, as above mentioned, Mr. Mead's decision was appealed to President Smith of the Warehouse Company. On August 24, 1951, Mr. Smith rejected the protest. There was no appeal from Mr. Smith's decision.

Mr. Smith's letter to the Division Chairman of the Brotherhood, dated August 24, 1951, contained the following: "As you know, it has been the practice for years for the officer in charge to be the judge of fitness and ability, and it was Mr. Mead's opinion that Mr. Kuntz did not have the fitness and ability. (We find no evidence that such was not the practice.) It was proper for him to assign the job to Mr. Schulte." He then referred to Rule 48 of the Agreement, stating: "Grievances of this type are not properly referable to me as President of the Warehouse Company, and if you feel you have a protest, you should progress it through your General Chairman to Mr. Harvey." The claim was properly progressed as provided for by the Agreement.

The Carrier asserts, with reference to the Claimant's fitness and ability to handle the position in question, that in April, 1947, he worked as a trucker and later as a Receiving and Delivery Clerk. When he held these particular positions he had worked in the warehouse. While he was working as a Receiving and Delivery Clerk, he bid for and was awarded a lower-rated position as Assistant Stock Clerk in the office. Later he became an order clerk, also a position in the office. At the time the Claimant gave up his position in the warehouse and accepted the lower-rated position in the office, he was questioned as to his motives surrounding his election to accept the lower-rated position. At that time he complained that the work in the warehouse was too heavy and strenuous. None of the positions he has since held in the

office have demanded the degree of supervisory ability required of the assistant foreman in the warehouse. He has not worked in the warehouse since 1947.

To show the background of the Claimant, the Employees introduce a letter received from him. We summarize the pertinent parts of the letter. Claimant states he started to work at the Baltimore and Ohio warehouse in April, 1941. His duties consisted of loading and unloading cars. The Company not having a licensed fireman, he volunteered to fire the boiler, which was not in good working condition. This was a dangerous job. He relieved Delivery and Receiving Clerks that were ill or on vacation. He was sent to Brighton Station and 619 Bay Miller Warehouse in charge of a crew of men to unload cars of soap. The warehouse wanted a man to work in the shipping department who could read and write and knew the location of every item in the warehouse. He was given the job. He worked there until he entered the military service in December, 1942. He was discharged therefrom in March, 1946. When he returned from the service he was informed that he could take one of the several receiving and delivery positions, or wait for a new opening as a Receiving and Delivery Clerk handling only General Foods, "our largest account." He waited for this position. He stated that he received many compliments from the General Foods Company on the handling of their account. He further stated: "I then bid on the position of Assistant Stock Clerk, which was less pay, but with a better chance of advancement. Soon after I bid on the Order Clerk's job, which I am still working. I have never refused to work overtime. When the position of Assistant Foreman was put up for bid, I put in my bid. I was called to Mr. Mead's office. He and Mr. Verst, General Foreman, wanted to know why I had placed a bid on this position. I told them it was a much better one than mine, it paid more money and there is more of a future to it. As Asst. Foreman I would be in line for the job of General Foreman. Mr. Mead informed me that he wanted Harry Schulte to have the position, and the only thing he had against me, I closed my office too early." He then explained the reason why he closed his office at 4:20 P. M., which has been noted in the reading of the record. In addition, he set forth other matters that are not relative to a decision in this case.

It is contended by the Employees that the record indicates favoritism on the part of the warehouse manager to the junior employee, Schulte. Award 3538 is cited. It reads in part: "A presumption of undue favoritism to the son arises under such circumstances and casts the burden on the Carrier to overcome it with affirmative evidence showing that Claimant did not have necessary fitness and ability to perform the work of the position. This has not been done by a preponderance of the evidence." The facts in the above cited award bear no likeness to the facts in the instant case. The Claimant in that case was a senior employee. She requested that she be allowed to exercise her seniority over the position of clerk in the office of the Comptroller, held by an employee admittedly junior to her. The request was refused by the Carrier because the service being performed by the occupant was temporary work which could be completed on a certain date. Rule 8 was involved, which is quite similar to Rule 30 in the instant case. The record in the cited award disclosed that the occupant of the position was the son of the comptroller, the official charged with the duty of deciding the question of Claimant's fitness and ability. (That is why the presumption arises as above stated.) That is not the situation here. The cited award is not in point.

Award 3469 is cited by the Employees to sustain their contention. In that case the senior employee had 18 years' service in the various bureaus in the office, with the last three years in the Passenger Interline Bureau. The bid was on a position titled group head, Passenger Redemption Bureau, in the office of the Auditor of Passenger and Station Accounts. The record disclosed that he was sufficiently familiar with rates, divisions, and passenger work, had been assistant to bureau heads in several departments, and possessed the basic knowledge of rates, divisions, and interline fares, which constituted valuable experience when issuing refunds; also, he exercised supervisory duties on occasions. To the writer's mind there was no doubt of the senior employee's fitness and ability in the cited case to fill the position to which he aspired and bid on. The award is clearly distinguishable from the instant case.

Other awards have been cited by the Employees, which have been considered. It would unnecessarily lengthen this opinion to point out the distinction between the facts set forth therein and the facts in the instant case. They are not in point.

In cases of this nature we cite the following as pertinent and applicable. "It is the general rule, as established by awards of this Division, that in the first instance the employer must be judge of the fitness and ability of an employe if there is nothing in the rules of the parties' agreement abrogating it." Award 6143, 5603, 4918, 2350, and 2031 of this Division.

As stated in Award 5417: "Repeated decisions of this Division of the Board have established the rule that once fitness and ability of an employe have been found by the Carrier to be lacking, the burden rests upon the claimant to overcome that decision by substantial and competent proof." Citing Awards 1147, 2031, 3272, 3469, 5147, and 4040 of this Division in support thereof.

"The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance." Award 4011. See, also, Awards 4758, 3523, 3477, 2577.

We cannot substitute our judgment for that of the Carrier in matters of this kind. Our function is limited to a review of the Carrier's decision to ascertain whether it was made in good faith upon sufficient supporting evidence, or whether it was the result of capricious or arbitrary action without reasonable support in the record before us.

In the instant case, the Employees have failed to prove that the Claimant had fitness and ability to fill the position here involved, or that the Carrier acted in a biased, arbitrary, capricious, unreasonable, or prejudicial manner in denying the position to the Claimant.

From a review of the record, and for the reasons given herein, the claim is 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 Employees involved in this dispute are respectively Carrier and Employees 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 3rd day of December, 1954.