

Award No. 9324
Docket No. CL-8632

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Martin I. Rose, Referee

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 Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-2 and 3-C-1 (a) when the Carrier disqualified Edgie Wallace as a Foreman at 30th Street Mail Shed, Philadelphia, Pennsylvania, Philadelphia Terminal Division, on December 29, 1953.

(b) The Claimant, Edgie Wallace, should be compensated for all monetary loss suffered by him because of this disqualification commencing December 29, 1953, and continuing until adjusted. (Docket E-1014)

EMPLOYEES' 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, except as amended, 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 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.

Edgie Wallace, the Claimant, held a regular position of Station Baggage-man at 30th Street Mail Shed, Philadelphia, Pennsylvania, Philadelphia Terminal Division, as of December 24, 1953, on which date his position was

the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a record of all the same.

(Exhibits Not Reproduced.)

OPINION OF BOARD: Claimant held a regular position as a Station Baggage-man (Group 2), 30th Street Mail Shed, Philadelphia, Pennsylvania. On December 24, 1953; this position was abolished. On December 28, 1953, Claimant expressed his desire to displace Foreman Wachter on the 4:00 P. M. to 12:00 midnight tour of duty at the location mentioned and was interviewed by Assistant Superintendent of Mails, Bostick from about 4:00 P. M. to 6:30 P. M. At approximately the latter time, Mr. Bostick permitted the Claimant to undertake supervision of the outbound operation and Foreman Henry, regularly assigned to those duties, was reassigned elsewhere at the location.

On December 29, 1953, Claimant was advised that he could not displace Mr. Wachter on the foreman assignment. This action of the Carrier was disputed by the Employees and the dispute was processed on the property without settlement. It is appealed here.

The Employees contend that the Carrier violated Rule 3-C-1 of the applicable Agreement by denying Claimant the right to displace Foreman Wachter on the inbound operation and requiring him to assume the duties of Foreman Henry on the outbound operation, and that the disqualification of the Claimant violated Rule 2-A-3 of that Agreement.

The Carrier relies on Rule 2-A-2 (a) of the Agreement and contends that on December 28, 1953, Claimant was allowed to assume supervision of the outbound operation as a test of his ability to perform the duties of Foreman Wachter and that this test disclosed that he lacked the ability to perform them satisfactorily; and, as a result, he was not permitted to displace Foreman Wachter.

The principles established by this Division for the resolution of a dispute like the one here are so well settled that reference to them without discussion is sufficient. Award 6143 states:

"It is the general rule, as established by the awards of this Division, that in the first instance the employer must be the judge of the fitness and ability of an employee if there is nothing in the rules of the parties' agreement abrogating it. We find no such rule. In fact, the following language of Rule 16 'if they possess sufficient fitness and ability,' preserves it. Therefore, unless it is made to appear that the action of the Carrier was unreasonable, arbitrary or capricious its determination will be sustained. This burden rests upon the Claimant. See Awards 2031, 2350, 4918, 5238, 5417, and 5603 of this Division."

Our task is to review the record presented here on the basis of these principles. In this connection, it is noteworthy that this Division has recognized the importance of seniority to the employees and the carriers as well as its obligation under the Act to give effect to the rules provided by parties in their agreement with respect thereto. (See Awards 1508 and 4531.)

Rule 3-C-1, referred to by the Employees, provides, in part, in paragraph (a) that:

"An employe displaced from his regular position shall exercise seniority within twenty-nine days . . ."

Rule 2-A-2 (a), relied on by the Carrier, reads as follows:

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

It is clear from Rule 2-A-2 (a) and the nature of the regular position held by Foreman Wachter that when Claimant sought to displace Mr. Wachter in accordance with Rule 3-C-1, the Carrier was entitled to determine the Claimant's ability to supervise the outbound operation; and nothing in the Agreement restrained the Carrier from making such a determination initially. While on December 28, 1953, the date on which the Claimant sought to exercise his seniority by displacing Foreman Wachter, the latter was actually supervising the inbound operation, it is undisputed that, as incumbent of the foreman position, Mr. Wachter supervised the inbound operation on two days of the week and that he supervised the outbound operation on three days of the week. It is also undisputed that Claimant had never supervised the outbound operation although he had supervised the inbound operation while acting as a temporary foreman during Christmas holiday seasons. Clearly, if the Carrier had acquiesced in Claimant's desire to displace Foreman Wachter, the latter would have been "an employe displaced from his regular position" which included supervision of the outbound operation on the days mentioned. (See Rule 3-C-1.)

The record unequivocally shows that on the evening of December 28, 1953, Mr. Bostick permitted Claimant to supervise the outbound operation to determine whether he was able to perform such duties. The Joint Submission dated February 11, 1955 states, in part, under "Position of Company" as follows:

"* * * To develop whether Wallace possessed the necessary fitness and ability to perform the duties of the Foreman position, the Asst. Supervisor interviewed him and, at Wallace's insistence, permitted him to demonstrate his fitness and ability by assuming the role of Foreman. * * * Wallace had never supervised the Outbound operation, and, the Ass't Supervisor was dubious of Wallace's ability to handle this work. * * * Foreman Henry, who had already set up all regular assigned outbound cars * * * was reassigned to the Inbound operation by the Ass't. Supervisor after once more being assured by Edgie Wallace he could take over and handle the Outbound Operation. * * *"

These statements are consistent with, and, in effect, confirmed by statements of Claimant in his letter dated April 15, 1955, to the General Chairman that:

"* * * When he returned to the office, he started to talk and began asking questions about the position of a foreman. Knowing that I could perform the duties of Foreman D. W. Wachter, he asked about the outbound operation. * * * I told him that I could work the operation the same as the other. * * * finally he said to me, if I send you on the outbound could you handle the operation. I told him I could. After two and one-half hours had

past, he told me to go on the outbound and tell Foreman Henry to come to the office. * * * The next day, December 29, 1953, when I reported for work, Mr. Bostwick called me in the office and told me that I could not do the job. I asked him what happened. Mr. Bostick continued to say I couldn't do the job. I asked him if he was disqualifying me because he didn't think I could do the job and he said yes. * * *

For these reasons, it appears from the record that the Carrier's determination of Claimant's lack of ability to supervise the outbound operation rests on his actual performance of those duties.

The Carrier's version of the results of such work by the Claimant is described in the aforementioned Joint Submission, and the Employees seek, on the basis of Claimant's aforementioned letter to the General Chairman, to explain or deny events or incidents referred to by the Carrier and on which Mr. Bostick founded his determination that Claimant's performance was unsatisfactory. Conflicts of such nature cannot be resolved or evaluated here. (See Awards 6367, 9046, 6430, 4068, 8431, 9230.) Nor can we conclude from the record that the time during which the Claimant was permitted to supervise the outbound operation, in itself, undermines the Carrier's determination even though it may be viewed as a strict application of the Rule. (See Award 6352.)

We come therefore to Rule 2-A-3 which is also relied on by the Employees. The language of paragraph (a) of that Rule clearly indicates that it applies to "an employee awarded a bulletined position or vacancy or otherwise obtaining a position in the exercise of seniority."

The record establishes that on December 28, 1953, Claimant was not "an employee" who obtained "a position in the exercise of seniority." Manifestly, he did not displace Foreman Wachter. Nor did he displace Foreman Henry. As stated above, the record shows that Claimant was permitted to supervise the outbound operation and Foreman Henry was reassigned to determine Claimant's ability to perform such duties. There is no evidence that, as a result of these events, Foreman Henry became "an employee displaced from his regular position." The fact that Claimant was paid at the Foreman's rate for his services on December 28, 1953, is without probative value. Since Claimant was permitted by Mr. Bostick to put in his time on that date as foreman on the outbound operation, the Carrier was obligated to pay Claimant for such time at the foreman's rate even though the assignment was made to determine his ability to perform such duties.

Because, for the reasons indicated, Claimant is not "an employee . . . obtaining a position in the exercise of seniority" within the meaning of paragraph (a) of Rule 2-A-3, paragraphs (b), (c) and (d) of Rule 2-A-3 are also inapplicable in this case. For the same reasons, Awards like Awards 2638 and 4730, cited by the Employees, are not apposite.

There is no evidence that Claimant either desired to, or did, in fact, "post" under Rule 3-H-1, on a position of foreman "prior to exercising seniority under Rule 3-C-1". (Rule 3-H-1.) On the contrary, the record establishes beyond question that "on December 28, 1953, I (Claimant) requested to displace Foreman D. W. Wachter * * *" in the exercise of seniority. (See Claimant's letter to General Chairman.)

Finally, we cannot say that it has been made to appear on the record that the Carrier's decision that Claimant lacked ability to supervise the out-bound operation is arbitrary or capricious. (See Awards 6143, 6489, 5802.)

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 as jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claims (a) and (b) are denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty,
Executive Secretary

Dated at Chicago, Illinois this 31st day of March, 1960.