

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

CLINCHFIELD RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5164) that:

(a) The Carrier violated the Agreement when it refused to assign Claimant Mr. R. O. Likens to the position of Tabulating Clerk (Job No. 157) and when it refused to grant him a hearing.

(b) The Carrier shall now compensate Claimant R. O. Likens for wage and other loss he has sustained by reason of the Carrier's failure to assign him to the position of Tabulating Clerk (Job No. 157) beginning September 5, 1961, and continuing each day thereafter that the violation is permitted to exist.

EMPLOYEES' STATEMENT OF FACTS:

1. The Claimant, Mr. R. O. Likens, has seniority as a clerical employee dating from July 6, 1959. Claimant had been the incumbent of Tabulating Clerks' positions since August 12, 1959 (Jobs Nos. 152, 154 and 156).

2. Employee H. T. Brown returned from military service and displaced employee F. B. White from position of Tabulating Clerk (Job No. 156) effective September 5, 1961. White, in turn, displaced Claimant Likens from the position of Tabulating Clerk (Job No. 152) effective the same date, and Claimant was so notified by the General Auditor by letter dated August 25, 1961.

3. Under date of August 28, 1961, Claimant wrote the General Auditor as follows:

"Having been displaced by a senior employee, I desire to exercise my seniority on the position of Tabulating Clerk (Job No. 157) now held by Mr. Dean Chase last advertised under Bulletin No. 766, dated April 5, 1960."

The General Auditor replied under date of August 28, 1961, as follows:

OPINION OF BOARD: An employe returning from military service was properly reinstated to his former position and the displaced occupant of that position, in turn, properly displaced Claimant. Whereupon, under date of August 28, 1961, Claimant wrote the General Auditor:

"Having been displaced by a senior employe, I desire to exercise my seniority on the position of Tabulating Clerk (Job No. 157) now held by Mr. Dean Chase, last advertised under Bulletin No. 766, dated April 5, 1960."

The General Auditor replied:

"Referring to your letter dated August 28, expressing a desire to exercise your seniority rights by displacing the present incumbent on position of Tabulating Clerk (Job No. 157) in this department.

I regret that I cannot permit you to make this displacement, as you do not possess the necessary qualifications."

Two days later, Claimant again wrote the General Auditor. After quoting from Rules 7, 11 and 12 of the Agreement, he stated "In this case, forces are being reduced . . . and the Agreement provides that when forces are reduced, seniority shall govern . . . my seniority rights entitle me to make this displacement . . . My education and experience on positions of Tabulating Clerk . . . qualify me for assignment to the position so that I can demonstrate my ability to learn and perform all of the duties of Job No. 157 within a reasonable time." (Emphasis ours.) The letter concluded with an assertion that denial of the displacement request would "constitute unjust treatment" in which event demand was made for a hearing pursuant to Rule 23 of the Agreement. The General Auditor replied:

"You were denied the exercise of your seniority on this position because you lack the necessary qualifications, which you must have under Rule 12(a) of the current agreement. Rule 7 of the agreement, 'Promotion Basis', and Rule 11 of the agreement, 'Time In Which To Qualify', are not applicable in this case.

My refusal to permit you to displace Mr. Chase does not constitute unjust treatment under Rule 23 of the agreement, since this rule relates to discipline cases. While a hearing is not required, I am, nevertheless, granting your request to allow you the opportunity to demonstrate your knowledge of the machines required in the performance of the duties of this position.

You may appear in my office on Friday, September 8, at 2:00 P. M., to present evidence of the qualifications you believe you possess. It is your privilege to have one or more duly accredited representatives present."

Conference was held as scheduled.

THE ISSUE

The Claimant admits that when he made demand to displace the occupant of Job No. 157, he was not presently qualified to perform the duties of that job. Instead, he asserts that: (1) his seniority rights entitled him to forthwith displace the junior employe; and, (2) the Agreement provides that

having displaced the junior employee, he should be given a reasonable time "to learn and perform all of the duties of Job No. 157." The issue is whether Claimant's interpretation of the Agreement finds support in its terms; or, as contended by Carrier, Claimant, under the conditions prevailing, had to be presently qualified to perform the duties of the job to perfect a contractual right to displace the junior employee.

PERTINENT PROVISIONS OF AGREEMENT

Claimant has cited Rules 7, 11 and 12 as supporting his contentions. Rule 7 is captioned "Promotion Basis"; Rule 11 is captioned "Time In Which To Qualify." Rule 7, since the issue with which we are confronted has nothing to do with promotion, is not applicable. Rule 11, since we are not concerned with "bidding in a position", is not applicable.

The parties, on the property, appear to have agreed that Rule 12, "Reducing Forces", is applicable. The rule, in part, is as follows:

"RULE 12. REDUCING FORCES

(a) A senior employee will not be permitted to displace a junior employee, except that, when forces are reduced, employees affected will be eligible to any position to which their seniority and qualifications entitle them, . . ." (Emphasis ours.)

RESOLUTION

We make no finding whether Rule 12 is applicable to resultant displacements caused by the return of an employee from military service. Pointedly, we make no finding as to whether such displacements come within the phrase "when forces are reduced."

Assuming the proposition that Rule 12 is applicable, we note that it prescribes two conjunctive co-existing conditions for displacing a junior employee: (1) "seniority"; (2) "qualifications." The first condition is admittedly satisfied. We are, therefore, concerned only with "qualifications."

Claimant's argument is premised on the oversimplified and legally unsupportable philosophy that seniority rights vest a senior employee with the right to displace a junior. It overlooks the fact that seniority rights are not inherent, but born of, prescribed in, and circumscribed by contract.

As used in Rule 12, the word "qualifications" means qualifications as of the time, not qualifications which might be acquired in the future. Therefore, since Claimant did not possess "qualifications" for the position held by the junior employee at the time he sought to displace the junior, the Agreement does not support Claimant's interpretation of the Agreement. We will deny the Claim.

Rule 23 of the Agreement provides that "An employee . . . who considers himself unjustly treated shall have a fair and impartial hearing . . ." Clearly, if an employee "considers himself unjustly treated", the Carrier is unequivocally bound to give him a hearing, if he so requests. Its failure to do so in this case violated Rule 23. But, since the failure to give a hearing in this case was not prejudicial to Claimant's seniority rights, which is the substance of the Claim, we find this violation without probative value in the determination of the Claim on its merits.

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 Carrier violated Rule 23 of the Agreement, but did not otherwise violate the Agreement.

AWARD

Claim sustained only to the extent that it alleges a violation of Rule 23. In all other respects the Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 25th day of February 1965.