

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

John J. McGovern, 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 (GL-5312) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-1 (a), 2-A-3 (a), 3-B-1, and the Scope Rule, when it disqualified John W. Holt on a position of Shipper and Receiver which it had awarded to him at the Bulk Oil Storage Facility, Stores Department, East St. Louis, Illinois, Southwestern Region; placed G. C. Flood, who had no Group 1 seniority, on the position; and, failed to re-advertise the position.

(b) Claimant John Holt should be restored to the position and allowed eight hours' pay a day, at the Shipper and Receiver rate of pay, for June 7, 1961, and all subsequent dates until the violation is corrected.

(Docket 1141)

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.

The Claimant, John W. Holt, has a seniority date of March 21, 1955, on the seniority roster of the Southwestern Region in Group 1. Mr. G. C. Flood has no seniority date on the seniority roster in Group 1, but does have a seniority date of June 20, 1946, in Group 2 only.

OPINION OF BOARD: This case is similar to Award 13302, involving the same parties, essentially the same central issue, but a different individual Claimant. There is also little variance between both the facts and the evidence. The same Supervisor is cast in the identical role in both cases.

Prior to June 7, 1961, the Claimant was assigned as an extra Tallyman at the East St. Louis Freight Station. He bid for a position of Shipper and Receiver at the East St. Louis Bulk Oil Storage Facility, and was awarded this position effective 7:00 A.M., June 7, 1961. He posted this position on June 6, 1961 from 9:00 A.M. to 11:40 A.M., and officially reported for duty at 7:00 A.M., June 7, 1961. The Supervisor reported to this station at 8:45 A.M., administered a written test to the Claimant, orally questioned him and declared him disqualified by 11:00 A.M.

Once an employe, through the exercise of his seniority, is awarded a new position, the Carrier has thirty days within which to make a decision as to whether an employe is qualified or is to be disqualified. We wish to make it clear that in accordance with the provisions of the pertinent rules of the Contract, the Carrier may make such a decision any time within thirty days, provided however that it has complied with the terms of Rule 2-A-3(d) which states:

"Employes will be given full cooperation of the department heads and others in their effort to qualify."

This leads us to the basic question posed by this Claim and that is stated as follows: in consideration of the facts in this case, can we say that full cooperation by the Supervisor was rendered to this Claimant? The administering of a written and oral examination and subsequent disqualification of this Claimant all consuming approximately 1½ hours, militates against the spirit and intent of the Agreement. A reasonable amount of time to enable an employe to demonstrate his ability to assume new duties and responsibilities, is inherent in the language of the contract adopted mutually by the collective bargaining agents. To permit a summary dismissal of an employe, as was done in this case, is to condone a violation of the spirit and intent of that to which both principal parties, in the exercise of good faith collective bargaining, had agreed. This we shall not do. The motivation of the Supervisor is immaterial to the decision rendered. We, in considering the evidence on this point, can do nothing but speculate. We hold however that his actions speak loud and clear regardless of his motivation. We will sustain the claim on the basis that the actions of the Carrier's representative constituted an arbitrary and capricious exercise of its managerial prerogatives. The burden of proof required in such cases has been fulfilled by the Petitioning Organization. We accordingly sustain the claim, but only to the extent described in the following paragraph.

As was stated in the opinion given in Award 13302, an analysis of the Contract fails to reveal any provisions for payment of a penalty as requested. We therefore revert to the "make whole" concept of damages. The proper damages to be assessed in this case, are the difference in pay that the Claimant actually earned and that which he would have earned had he been permitted to remain on this new job beginning on June 7, 1961 and continuing thereafter for a total period of 29 days. It is so decreed. The imposition of these damages is not to be construed as in any way endorsing a theory that Carrier has a fixed contractual obligation to permit an employe to remain on such a position for this period of time or for any other specified period of time.

That portion of the Claim wherein we are requested to restore Claimant to the position in question, is denied.

FINDINGS: The Third Division of the Adjustment Board, 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 violated.

AWARD

Claim sustained to extent of Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of April 1965.