

Award No. 14040
Docket No. CL-15094

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5609) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-2, 2-A-3, and 3-H-1, when it failed to award to Bertha M. Yokel, a bulletined position of Telephone Switchboard Operator, by improperly disqualifying her after she had properly exercised her seniority, and by failing to cooperate with her in her efforts to familiarize herself with the switchboard in the Telephone Exchange Office, Pennsylvania Station, Pittsburgh, Pennsylvania, Pittsburgh Region.

(b) Bertha M. Yokel should be allowed 8 hours' pay a day, commencing July 10, 1962, and continuing until the violation is corrected.

[Docket 1386]

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.

OPINION OF BOARD: Employees' claim is predicated on the allegation that the Carrier violated "Rules 2-A-2, 2-A-3 and 3-H-1," when it failed to award to Claimant "a bulletined position of Telephone Switchboard Operator . . ." These Rules read as follows:

"RULE 2-A-2.

(a) In the assignment of employees 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.

(b) Bulletined positions or vacancies will be awarded within five days following close of the advertising period, and, except when conditions beyond control of Management prevent, notice of award will be posted in places accessible to employees affected, on the second Wednesday following the posting of the advertising bulletin or on the succeeding working day when such Wednesday is a holiday.

(c) Notice of award covering bulletined positions showing position, symbol number where such number has been assigned to the position, date bulletined, the name of the employee awarded the position, and the effective date of the award, will be posted where the position was bulletined."

"RULE 2-A-3.

(a) An employee awarded a bulletined position or vacancy, or otherwise obtaining a position in the exercise of seniority, and failing to qualify within thirty days may exercise seniority under Rule 3-C-1.

(b) When it is evident that an employee will not qualify for a position, he may be removed from the position before the expiration of thirty days and be permitted to exercise seniority under Rule 3-C-1. The Division Chairman will be notified, in writing, the reason for the disqualification.

(c) When conditions develop so that an employee cannot satisfactorily perform the assigned work, he will be permitted to exercise seniority under Rule 3-C-1, subject to agreement between the Management and the Division Chairman.

(d) Employees will be given full cooperation of the department heads and others in their effort to qualify."

"RULE 3-H-1.

Prior to exercising seniority under Rule 3-C-1, an employee will, if he so desires, be allowed to post without pay on any position to which his seniority entitles him, with a reasonable amount of assistance from those qualified to give same, for a period not to exceed twenty-eight days, but seniority must be exercised within the time limit prescribed in Rule 3-C-1."

Claimant was a switchboard operator at Conway for about eighteen years prior to December 1, 1960, when she was furloughed because new automatic

switchboard equipment was installed. Although the record is not clear, she apparently exercised her seniority rights under the Agreement and was assigned to a position of Cleaner. On June 4, 1962, she was displaced from Cleaner position, Symbol JJ-4039, at the Pennsylvania Station, Pittsburgh. At that time she had the right for twenty-nine (29) days thereafter, to exercise seniority rights under Rule 3-C-1. She also had the right to post for a position under Rule 3-H-1. Rule 3-C-1(a) reads:

"RULE 3-C-1.

(a) An employee displaced from his regular position shall exercise seniority within twenty-nine days or forfeit all seniority, except as provided in Rules 2-A-7 and 3-G-1, or in cases of personal illness, unavoidable causes or inability to exercise seniority due to the fact that no position is available. In case of absence due to personal illness or unavoidable causes, the twenty-nine day period will be extended proportionately to the extent of such absence.

An employee unable to exercise seniority and desiring to protect it, will file his name and address, in writing, within five days from the date actually reduced to the furloughed list, and keep his correct address on file thereafter with the proper official (the officer authorized to bulletin and award positions). The employee will prepare three copies of such notices, retaining one copy and filing two copies with the officer referred to. Failure of the employee to do so will cause forfeiture of all of his seniority. One copy of such notices will be forwarded by the Management to the Division Chairman."

Instead of immediately exercising her seniority rights under Rule 3-C-1, Claimant posted under Rule 3-H-1 for the first trick switchboard position, at Pittsburgh and did so for a total of twenty days. During those twenty days, which took place between June 7 and July 8, 1962, Claimant was not paid, but she was entitled to and, we presume, did receive assistance from qualified employees. By posting for the position under Rule 3-H-1, Claimant implied that she needed this assistance in order to qualify for the position.

In any event, on July 9, 1962, Claimant exercised her seniority rights to position K-5008, third trick. We can assume that Claimant felt the previous posting was beneficial and that she was qualified. She worked that position from 11:59 P. M. on July 9 to about 7:20 A. M., July 10, 1962, when she was disqualified. She was later so notified by letter dated July 13, 1962. A copy of the letter, with the following appendage, was sent to Employees' Division Chairman:

"Miss Yokel was disqualified because her knowledge of the switchboard at Pittsburgh and its mechanics and connections were very limited. Even with guidance for a period of 4½ hours by the Supervisor-Telephone Switchboard Operator, Miss Yokel could not begin to cope with the situation when traffic through the switchboard increased any appreciable amount."

Carrier thereafter, by bulletin No. 58 dated July 17, 1962, advertised position K-5008 on the third trick, and Claimant with four other employees submitted bids. Sally D. Anthony was the most senior employee among the five and Claimant was second in seniority order.

On July 27, 1962, Carrier's Superintendent-Personnel wrote to Employees' Division Chairman listing the five employees who bid for the position in their seniority order and said that while all five were experienced PBX Operators, only the two most junior employees "were qualified to operate the PBX board at Pennsylvania Station, Pittsburgh." The letter continued as follows:

"It was jointly agreed, because of the long length of service of these three senior bidders, an opportunity would be afforded Miss Anthony to train on her own time to learn the operation of this board and when she is qualified, the award of this position will be in her favor.

Similar treatment will be afforded Yokel and Kerr, either on a bid or a bump, should the situation arise where they desire to bid or become entitled to exercise seniority under the provisions of the Agreement, and want to come into this PBX office." (Emphasis ours.)

Again on August 13, 1962, Carrier wrote to the Division Chairman confirming on oral advice that Miss Anthony had withdrawn her bid and said:

"This leaves Miss Yokel next in line for this particular job. She should make herself available in this office for training beginning tomorrow, August 14, 1962. You are handling this feature."

Claimant did report for training, but refused to take a test. On September 12, 1962, Carrier again wrote to the General Chairman, in part, as follows:

"In accordance with our understanding, Miss Yokel was permitted to familiarize herself on this switchboard by observing and practicing handling actual calls. While it was agreed that training would be on first trick when a supervisor was on duty to advise or instruct the employee endeavoring to qualify, it was later agreed to let Miss Yokel post on third trick the position involved, for three nights. Miss Yokel was to report this morning at 9:00 A.M. to demonstrate on the switchboard that she could handle this position and it was agreed that you, or a representative designated by you, along with a supervisor from this office would observe the test.

This morning you advised prior to 9:00 A.M. that Miss Yokel could not properly be subjected to a test and on that basis she would not report at 9:00 A.M." (Emphasis ours.)

Employees' position is best stated in the Joint Statement dated June 25, 1963, executed by the Employees and the Carrier. It properly says that the issue "in this case is whether or not Management acted in an arbitrary, capricious and discriminatory manner in disqualifying the claimant . . ." It continues as follows:

"The claimant at first wanted to familiarize and post on the PBX board on the third trick in the Pennsylvania Station, Pittsburgh, Pa., before she exercised her seniority on that particular position, but she was refused this opportunity and was told she had to familiarize herself and post on the first trick on the PBX Board.

This is a violation of Rule 3-H-1 of the Rules Agreement, which states 'prior to exercising seniority under Rule 3-C-1, an employee will,

if he so desires, be allowed to post without pay on any position to which his seniority entitles him, with a reasonable amount of assistance from those qualified to give same for a period not to exceed twenty-eight days, but must exercise seniority within the time limit prescribed in Rule 3-C-1.'

The claimant did post and familiarize herself with the PBX board on the first trick for about two weeks.

On July 9, 1962, claimant exercised her seniority on the third trick PBX board, Pennsylvania Station, Pittsburgh, Pa.

The Division Chairman and a representative of the Carrier were present when the claimant took over the position at 12:01 A. M., July 20, 1962.

The Division Chairman remained until 2 A. M., July 10, 1962, and watched the claimant operate the PBX board satisfactorily, but the representative of the Carrier remained at least until 7:20 A. M., July 10, 1962, and gave the claimant's note saying she was disqualified at 7:20 A. M., July 10, 1962."

What occurred prior to June 4, 1962, is immaterial. We have no right to concern ourselves with Claimant's seniority rights from December 1, 1960, to that date. Although Employees allege that Claimant was refused an assignment to a Switchboard Operator position "advertised in Group 2 Bulletining No. 50, on June 20, 1961," they admit that "this matter is not involved in the instant claim."

On June 4, 1962, and thereafter, she had a right to exercise her seniority rights under Rule 3-C-1 or to post under Rule 3-H-1. It is admitted that "the Claimant requested that she be permitted to familiarize herself with the third trick position of Switchboard Operator before exercising her seniority on that position." She was entitled to that right under Rule 3-H-1. It expressly indicates, however, that Claimant was not altogether sure that she could fill that position without instruction, in spite of the fact that she had eighteen years' experience as a switchboard operator prior to December 1, 1960. She had not worked as a switchboard operator for about eighteen months prior to June 4, 1962.

Employees' statement that Claimant was not permitted to familiarize herself with the third trick position before exercising her seniority is categorically denied by the Carrier. There is no probative evidence in the record to support Employees' assertion. Employees agreed that Claimant should be given an opportunity to qualify and they agreed that instruction would be on the first trick when a supervisor was on duty.

Nonetheless, Claimant posted for the first trick position; she was instructed for twenty days; she thereafter exercised her seniority rights to position K-5008, third trick; she was assigned to that position; she was disqualified.

We have considered Rule 2-A-2 and 2-A-3, involving the same parties, in many cases before this Board. It is a well established principle that it is the prerogative of management to determine sufficient fitness and ability. See Awards 14011, 12994, 9324, 8196, 6352, 6028 and others. It is also a well

established principle that the burden of proof is on the Employee to show that Carrier was arbitrary, capricious and discriminatory when it disqualified Claimant.

In Award 12394 Claimant was offered an opportunity to take an examination to determine her qualifications. She refused to take the test. In that Award we said:

"Since fitness and ability have been held not to mean that one must have demonstrated ability in the past by having had experience or that one must be able to demonstrate ability in the future by qualifying, the only fitness or ability must be inherent at the time of application, according to the judgment of the Carrier."

Claimant was a qualified switchboard operator at Conway. But she had not worked as such for about eighteen months prior to July 10, 1962. Further, there is no denial that the switchboard at Pittsburgh was more complicated. The mere fact that she was a qualified switchboard operator is not conclusive evidence that she was qualified to operate any and all switchboards. There is no proof that she was qualified to operate the switchboard on the third trick at Pittsburgh.

The fact is that the Employee agreed that Claimant should be instructed on the first trick. She was so instructed. Even if she was only permitted to observe and not operate the board (and that is not so), that is no good reason for the refusal to take the test. If the proposed test had been unfair, the Employee could then have produced evidence to show that such test was arbitrary, capricious and discriminatory.

On the basis of all the relevant evidence in the record, there is no violation of Rules 2-A-2, 2-A-3 and 3-H-1. There is no merit to the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December 1965.

**LABOR MEMBER'S DISSENT TO AWARD 14040,
DOCKET CL-15094**

Award 14040, Docket CL-15094, is clearly in error. The Referee chose to ignore, or not consider, the violation of Claimant's rights under Rule 3-H-1 and permit arrangements made subsequent to the violation to prevail over the plain and unambiguous language of that rule.

Compliance with Rule 3-H-1 would have placed Claimant with the Operator on Position K-5008. Rule 3-H-1 clearly provides that an employee desiring to exercise seniority will be allowed to post on any position her seniority entitles her to and further provides that she is to be given a reasonable amount of assistance from those qualified to give such assistance. The position sought and the one Claimant's seniority entitled her to and which she wanted to post on was K-5008. Clearly the rights flowing to Claimant from Rule 3-H-1 were denied her and the record plainly shows that the Supervising Operator refused to permit Claimant to post on Position K-5008.

The fact that after Claimant had been subjected to the type of treatment evidenced in the record; and, after Claimant had been denied her contractual rights to post on the position of Telephone Switchboard Operator, Symbol K-5008, other arrangements were made, did not alter the facts of the case, and should not have been considered by the Referee as doing so.

The basis for the claim arose prior to such arrangements being made and Claimant's right to post and to receive competent assistance on Position K-5008 had already been denied her. Those facts are plainly set out in the Joint Statement quoted in the Award and were never refuted.

Carrier's actions in denying Claimant her contractual right to post on Position Symbol K-5008 clearly constituted arbitrary and capricious treatment and prejudiced Claimant's opportunity of becoming sufficiently acquainted with the duties and responsibilities of the position of her choice so that she could satisfactorily handle them at the time of her "sudden death" trial on July 9, 1962.

Carrier's action in this case was not substantially different from that in the case which resulted in Award 13574. There this Carrier was required to make the Claimant whole for earnings lost and give the Claimant opportunity to qualify for the subject position in accord with Rule 2-A-3. No different decision should have been reached in this case.

I therefore dissent to this erroneous award.

D. E. Watkins
Labor Member
1-12-66

**CARRIER MEMBERS' ANSWER TO LABOR MEMBERS'
DISSENT TO AWARD 14040, DOCKET CL-15094
(Referee Dolnick)**

A careful study of the record and pertinent correspondence in the Opinion, disproves Dissentor's comments on this decision. Rule 3-H-1 was fully complied with in this case and the Petitioner apparently agreed because no objec-

tion was taken until over two months after the Claimant was disqualified. In the meantime, other agreements had been reached entitling her to post for a second time. Presumably had Carrier permitted her to take over the position in September with out an examination, the claim filed on September 13 and made retroactive to July 10, 1962, would not have been presented. However, the Carrier insisted that Claimant take a test as agreed upon, and the Claimant refused. These are the facts which precipitated the present claim, not any matter relating to the particular trick upon which Claimant was to post.

In any event, Claimant did post on both first and third trick as the facts show, and she was afforded assistance in compliance with Rule 3-H-1.

No error has been shown.

W. F. Euker
R. A. DeRossett
C. H. Manoogian
G. L. Naylor
W. M. Roberts