

Award No. 16547
Docket No. CL-16912

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**

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6188) that:

(a) The Southern Pacific Company violated the current Agreement between the parties when, on September 16, 1964, it arbitrarily and prejudicially disqualified employee G. A. Brice from Relief Position No. 3, Communications Department, Los Angeles; and,

(b) The Southern Pacific Company shall now be required to allow employee G. A. Brice eight hours' additional compensation at pro rata rate of position No. 3 September 14, 17, 1964, and each date thereafter until he is placed thereon; and eight hours' additional compensation at \$19.2524 per day September 15, 16, 1964, rest days of Position No. 3, account deprived of Guaranteed Extra Board rate on such days when required to break in thereon.

EMPLOYEES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date October 1, 1940, reprinted May 2, 1955, including subsequent revisions, (hereinafter referred to as the Agreement) between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and its employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter referred to as the Employees) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

Employee G. A. Brice, hereinafter referred to as Claimant, was on the guaranteed Extra Board, Master Seniority Roster No. 5, immediately prior to the time this dispute arose. With said status he bid for and was assigned to Relief Telephone Operator Position 3(T), Los Angeles PBX, Communications Department, effective September 1, 1964. Upon reporting for Position 3(T) on September 14, 1964, Claimant was told that he would be required to "break in" before being placed thereon. He broke in September 14, 15, 16 and, on September 16, was told that he was disqualified.

The position of machine operator being filled by claimant on a hold-down basis had assigned hours 3:00 P. M. to 11:00 P. M., rest days Monday and Tuesday and on Monday, August 31, 1964, claimant observed operation of the switchboard between the hours of 5:00 P. M. and 9:00 P. M. Subsequent to that date claimant made no further effort to train as a telephone operator until Monday, September 14, 1964, after he had been released from his hold-down assignment at the General Telegraph Office, at which time claimant trained at the PBX telephone switchboard between 8:00 A. M. and 5:00 P. M., that date. He also trained during those same hours on Tuesday and Wednesday, September 15 and 16, 1964, immediately following which he indicated to the Chief Telephone Operator that he wanted to work Position No. 3 commencing at 11:00 P. M. on the latter date.

During the dates of training, claimant demonstrated conclusively that he lacked the necessary dexterity and coordination and was particularly awkward with the use of his left hand, which caused him to rely too much on the use of his right hand when operating a switchboard and he was unable to handle several calls simultaneously. It became obvious to Chief Telephone Operator McCulloch that claimant was unable to work alone, which he would be required to do when relieving Position No. 533 on Thursday and Friday. Also, he would be alone for one hour when relieving Position No. 536 on Saturday and Sunday. Under such circumstances at 5:00 P. M., Wednesday, September 16, 1964, Chief Telephone Operator McCulloch advised claimant that he was disqualified in handling the duties of Position No. 3 and that he should report to the Guaranteed Extra Board for further assignment.

On October 1, 1964, the regular assigned incumbent of Position No. 3 returned from sick leave, thereby terminating temporary vacancy on that position.

4. By letter dated September 30, 1964 (Carrier's Exhibit A), Petitioner's Division Chairman submitted claim in behalf of claimant to Carrier's Superintendent of Communications for eight hours' compensation at the applicable pro rata rate of Position No. 3 beginning Monday, September 14, 1964, and subsequent dates of that assignment including additional eight hours' compensation at the Guaranteed Extra Board rate \$19.2524 for Tuesday and Wednesday, September 15 and 16, 1964. By letter dated October 22, 1964 (Carrier's Exhibit B), Carrier's Superintendent of Communications denied the claim and by letter dated October 23, 1964 (Carrier's Exhibit C), Petitioner's Division Chairman advised that the claim would be appealed.

By letter dated November 23, 1964 (Carrier's Exhibit D), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel and by letter dated December 23, 1965 (Carrier's Exhibit E), the latter denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: The incumbent of Position No. 3, Relief Telephone Operator, had been granted sick leave and by appropriate notice to clerical employees concerned, as required by Rule 33 of the Agreement, the temporary vacancy thus created was advertised for seniority bid on August 16, 1964.

Claimant herein, who had no experience as a telephone operator, was the senior applicant. According to Carrier Claimant said that if he was assigned to the vacancy "he would break in and qualify himself for the telephone operator job before endeavoring to take over the assignment." According to Clerks he "was told that he would be required to 'break in' before being placed thereon."

On August 31, 1964, Claimant observed operation of the switchboard between the hours of 5:00 P. M. and 9:00 P. M. He was awarded the position by bulletin dated September 1, 1964 and assigned to it on September 14, 15 and 16, 1964, hours 8:00 A. M. to 5:00 P. M. and trained on those dates. On the latter date he indicated to the Chief Operator that he wanted to work the position starting at 11:00 P. M. that date. On the same date the Chief Operator wrote to the General Superintendent of Communications:

"Mr. G. A. Brice is not qualified to take over 3rd relief assignment effective date, September 16, 1964, at 11:00 P. M. (P. S. T.) Have notified him accordingly."

On October 1, 1964, the Chief Operator wrote to the General Superintendent of Communications:

"Mr. G. A. Brice was awarded 3rd Relief Position by bulletin, September 1, 1964. He was unqualified for position as he had never worked in the Los Angeles exchange. He was on a hold down in HU office at the time he bid.

He called up August 31, 1964, about 5 P. M. (P. S. T.), wished to come in on his own time to train. He stayed until about 9 P. M. (P. S. T.), per report of night supervisor. He was released from HU office at 11 P. M. (P. S. T.) September 13. He reported to me Monday, September 14, at 8 A. M. (P. S. T.) and trained the following days:

September 14 - 8 A. M. to 5 P. M. (P. S. T.)

September 15 - 8 A. M. to 5 P. M. (P. S. T.)

September 16 - 8 A. M. to 5 P. M. (P. S. T.)

Under no circumstances was he qualified to take over the 3rd relief by September 16 at 11 P. M. (P. S. T.). He was rather awkward with his left hand and operated mostly with his right hand.

The all night shift in Los Angeles is handled by one operator from 11 P. M. to 7 A. M. (P. S. T.). The 3rd relief assignment requires two all night shifts a week. The chief dispatcher makes a number of important calls during the night, also trainmaster, etc. There are times when derailments happen during the night. All operators should be fully trained, know how to handle all calls when they arise.

It really takes more than three days and a half to qualify on any large PBX. In time, with more training, he could qualify and perhaps be a good operator. (Emphasis ours.)

I told him September 16 at 5 P. M. that he was disqualified for the 3rd relief position at 11 P. M. (P. S. T.), and to report to Mr. Moreland at 5:59 A. M. (P. S. T.) on September 17.

For further information, the incumbent of 3rd relief position on temporary basis returned from sick leave October 1, 1964. However, Mrs. Lodeema De Lon was displaced from her temporary No. 553 position and made a displacement on temporary 3rd relief position, effective September 30 at 11 P. M. (P. S. T.), displacing junior operator on holddown and Operator C. McGriff who had 3rd relief position on a temporary assignment. Therefore, the assignment notice of October 1, 1964, should be canceled."

Clerks contend that Claimant having been assigned to the position the Carrier was obligated to give him a reasonable time within which to qualify and to cooperate in his efforts to qualify. It cites Rules 28, 33 (e) and 36 as supporting its contention.

Carrier's defenses are: (1) Clerks and Claimant admit that at the time of the advertising of Position No. 3 Claimant was not possessed of fitness and ability to perform the duties of the position; (2) Carrier's judgment as to Claimant's qualification may be set aside only on proof that it was arbitrarily or capriciously exercised — and it was not so exercised; (3) a bidder for an advertised position must be possessed of fitness and ability to perform the position as of the time he files application — lacking in this he has no right by virtue of seniority to be placed on the position and be given a reasonable time within which to qualify. Carrier relies on Rule 28 and says that Claimant having failed to meet the requirements of that Rule the other Rules cited by Clerks are not applicable.

The pertinent provisions of the Agreement read:

"RULE 28.

ASSIGNMENTS AND DISPLACEMENTS

Assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient seniority shall prevail.

NOTE: In exercising seniority rights Rules 27 and 28 contemplate that the senior employe will be awarded the position unless it is obvious that he cannot qualify. Employes shall be given cooperation in their efforts to qualify."

"RULE 33.

ADVERTISING AND ASSIGNING POSITIONS

(e) Assignments will be made and notices issued within eight (8) calendar days after closing date of receiving applications and successful applicant will be placed on position as soon as practicable, provided however, that if said applicant is not placed on his newly assigned position within fifteen (15) calendar days from the date of assignment notice, he shall be paid the established rate of either his

newly assigned position or the position on which he works, whichever rate is the greater, and in addition thereto a penalty allowance of one dollar (\$1.00) per work day until placed on his newly assigned position."

"RULE 36.

FAILURE TO QUALIFY

An employe who is assigned to a permanent position or makes displacement, and fails, within a reasonable time, to demonstrate fitness and ability, shall vacate position on which disqualified. . . ."

Of crucial import in the resolution of this dispute is Carrier's admission in a letter from Carrier's General Superintendent of Communications to Clerk's District Chairman, under date of October 22, 1964 that "Clerk Brice was assigned to the relief position involved on September 14, 15 and 16th, 1964. . . ." Also, the Chief Operator's statement in her letter of October 1, 1964, *supra*, that Claimant "was awarded 3rd Relief Position by bulletin, September 1, 1964."

We first examine Rule 28, *supra*. We agree with Carrier's interpretation of that Rule — supported by many Awards of this Board — that an applicant for assignment to an advertised position has no contractual right predicated on seniority to the position unless contemporaneously he possesses fitness and ability to perform the duties of the position. But, we hold that Carrier must exercise its judgment of fitness and ability prior to making an assignment. When it makes an assignment it must be conclusively presumed — side agreements, if any, between an individual applicant and Carrier notwithstanding — that, in the Carrier's judgment, assignee had the requisite fitness and ability within the contemplation of Rule 28. Once the assignment is made Carrier may not attack the assignee's fitness and ability as of the time of the assignment. Consequently, the assigned employe is contractually entitled to: (1) be placed on the advertised position within the time prescribed in Rule 33 (e), *supra*; and (2) be given a reasonable time to qualify with Carrier's cooperation (Rule 36 and Note to Rule 28, *supra*). Were the Carrier to assign an applicant not possessing fitness and ability to an advertised position it would be destructive of the contractual seniority rights of other applicants having those prerequisites and violative of the Rule.

With the above findings as a premise the issue in this case becomes whether Claimant was given a reasonable time within which to qualify with Carrier's cooperation. The question is answered in Carrier's Chief Operator letter to the General Superintendent of Communications, dated October 1, 1964, *supra*, wherein she said:

"It really takes more than three days and a half to qualify on any large PBX. In time, with more training, he (Claimant) could qualify and perhaps be a good operator."

We find that Claimant after assignment to the position was not given a reasonable time to qualify with Carrier's cooperation. We, therefore, will sustain paragraph 1 (a) of the Claim.

Paragraph (b) of the Claim is a prayer for monetary damages suffered by Claimant.

The vacancy on the position to which Claimant was assigned terminated on October 1, 1964.

We will award Claimant monetary damages from September 17 to September 30, 1964, inclusive, computed in accord with the formula prescribed in Rule 33 (e) of the Agreement, *supra*. To the extent that the prayer in paragraph (b) of the Claim exceeds such amount it is denied.

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 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 the Agreement.

AWARD

Claim sustained with monetary damages to the extent prescribed in the Opinion, *supra*.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 2nd day of August 1968.