

Award No. 19129

Docket No. CL-19401

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Robert M. O'Brien, Referee

PARTIES TO DISPUTE:

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

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6972) that:

(1) Carrier violated the Clerks' Agreement when it failed to award and assign the position of Rate & Billing Clerk, #27650002, at Newton Falls, Ohio to Mr. A. S. Fabian effective August 16, 1969, and that

(2) Mr. A. S. Fabian shall be allowed overtime wages for all work performed outside the assigned hours and on rest days of position #27650002 on Saturday, August 16, Sunday, August 17, Monday, August 18, Thursday, August 21, Friday, August 22, 1969, and all subsequent dates, Thursdays through Mondays, until he is assigned to the position.

EMPLOYEES' STATEMENT OF FACTS: On March 25, 1969, Mr. A. S. Fabian displaced onto position of Rate and Billing Clerk, #27650002, at Newton Falls, Ohio, and worked said position for a period of approximately 2½ re-established and advertised for bids (see Exhibit #1), and Mr. Fabian then exercised displacement rights onto position of Yard Clerk at Haselton, Ohio. On August 1, 1969, position of Rate and Billing Clerk, #27650002, was re-established and advertised for bids (see Exhibit #1), and Mr. Fabian submitted application for his former position, but the position was awarded to an employee junior in seniority to Mr. Fabian (see Exhibit #2).

Due to the junior employee bidding off the position, it was again advertised for bids on August 22, 1969 (see Exhibit #3). Again, Mr. Fabian submitted application and again the position was awarded to another junior employee (see Exhibit #4).

Claim was properly initiated with Superintendent Huber by Division Chairman Sarlouis as follows:

"August 24th, 1969

The Clerks Committee wishes to present to you a time claim in behalf of Mr. A. S. Fabian — Yard Clerk — Haselton, Ohio. ID #1400117.

be based on seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail.

Note — The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy, or exercise displacement rights, where two or more employes have adequate fitness and ability."

Claimant had previously been assigned to the Rate and Bill Clerk position at Newton Falls, Ohio, from March 25, 1969 to June 12, 1969, prior to the abolition of such position on the latter date and, during that period of time, had unequivocally demonstrated his inability to properly perform the duties of that position.

As a result of the inability of claimant to properly perform the duties of the Rate and Bill Clerk position during the some 58 working days that occurred between March 25, 1969 and June 12, 1969, the Carrier assigned another applicant, Mr. Gary V. Price, a junior clerical employe to that position.

The Carrier has considerable medical, as well as other evidence, to further substantiate its position that claimant does not possess sufficient fitness and ability and/or adequate fitness and ability, as stipulated and required by provisions of Rule 30 in applicable agreement, so as to be qualified to properly perform the duties of the position of Rate and Bill Clerk at Newton Falls, Ohio.

The evidence, applicable rule and findings in Board Awards substantiate the position of the Carrier and, accordingly, the claim is invalid and should be declined.

OPINION OF BOARD: The position of Rate and Bill Clerk at Newton Falls, Ohio was re-established and advertised by Carrier by bulletin on August 1, 1969 and Claimant was the senior applicant. Carrier concluded, however, that Claimant did not possess sufficient fitness and ability as required by Rule 30 of the applicable Agreement, and thus Carrier did not assign Claimant to the position. Rather, it assigned a junior clerical employe to the position on August 14, 1969.

Carrier premised its determination of fitness and ability on the evaluation of three Medical Doctors who examined Claimant and found him to have a mental condition that interfered with the proper performance of his duties. Furthermore, during the 58-day period when he was previously assigned to the position in question, Claimant's work was wholly unsatisfactory, and Carrier's Agent there was forced to perform a portion of Claimant's work.

Whether an employe possesses sufficient fitness and ability for a position within the meaning of Rule 30 is a matter for Carrier to determine and such a determination once made will be sustained by this Board unless it appears that Carrier acted arbitrary or capricious in its determination. Once Carrier has determined that Claimant lacks sufficient fitness and ability, Petitioner has the burden of coming forward with evidence of probative value to support its contention as to fitness and ability.

Petitioner has failed to sustain this burden. We believe that Carrier's decision was made in good faith upon sufficient supporting evidence, and its

decision as to fitness and ability was not arbitrary nor capricious. Thus, its determination will stand, and the claim will be 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 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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of April 1972.