

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20361  
Docket Number CL-20334

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steam-  
ship Clerks, Freight Handlers, Express  
(and Station Employees

[Harbor Belt Line Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brother-  
hood (GL-7379) that:

(a) The Harbor Belt Line Railroad violated the current Clerks' Agreement when on May 11, 1971 it failed and refused to allow employe Patti Lucas to displace employe J. Harvey from Position No. 503, Cashier; and,

(b) The Harbor Belt Line Railroad shall now be required to allow Patti Lucas eight (8) hours' compensation at the pro rata rate of Position No. 503 each date May 12, 1971 through May 21, 1971 in addition to any other earnings compensated for service performed on such dates; and,

(c) The Harbor Belt Line Railroad shall be required to pay interest at 7% per annum compounded annually on the anniversary date of claim.

OPINION OF BOARD: Claimant, with a seniority date of May 24, 1968, was an extra clerk and was filling a temporary vacancy on Position No. 512, ATSF Correction Clerk. That vacancy terminated on May 10, 1971 and by letter dated May 11, 1971 Claimant requested to displace a junior extra clerk on Position No. 503, Cashier, effective May 13, 1971. The request was denied with the notation: "Dis-allowed, account not qualified." Claimant had worked two short vacation periods in 1968 and 1969 (for a total of seven days) on Position No. 503. It should be noted that subsequently, by letter dated September 1, 1971, Carrier informed Claimant that she was then qualified for position No. 503.

Petitioner relies primarily on Role 25 and its notes which provides as follows:

**"PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS**

Promotion, assignments and displacements under these rules shall 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 make a displacement where two or more **employees** have adequate fitness and **ability**.

**NOTE:** This rule contemplates that the senior employe will be awarded the position unless it is obvious that he **cannot** qualify."

**Further,** Petitioner states that Rule 27 (f) provides that an employee who makes a displacement should be given a reasonable time to demonstrate fitness and ability **and** will be given cooperation in the effort to qualify. The Organization contends that Claimant was adequately qualified to fill the position, that she had been trained in the position and that Carrier had failed to show that it was "**obvious**" that she could not qualify, as required by Rule 25. Finally, Petitioner argues that Carrier had acted in an arbitrary and capricious manner when **Claimant was** denied the opportunity to demonstrate her capacity for the new position.

Carrier states that Claimant from May 24, 1968 to **May 12,** 1971 had worked only **153½** days due to medical leave. After returning from leave on December 31, 1970, she did not choose to displace either of two junior employee trainees which **would have** given her a better opportunity to qualify for all positions. **She** worked in **1968** for three days and in 1969 for four days in Position 503, both **over** holiday periods. Carrier states that on both of the **above** occasions, Claimant only "partially **filled the** position of **Cashier....and** was not qualified to work **alone** and perform that work **fully.**"

Wer **many** years thfs **Board** has held consistently that it **is** Carrier's prerogative to determine the **fitness and** ability of an employe **for a** position and such determination **will** be sustained unless it appears that Carrier was arbitrary **or** capricious **in** its **actions** (Awards 15494, **16360, 19129** and others). When Carrier determines that Claimant lacks fitness and ability, **as** in this **case,** Petitioner has the burden of proof to establish Carrier's **error:** that Carrier's action was arbitrary and capricious.

In the dispute **before** us the facts presented by Petitioner **relate** only to the two short assignments filled by Claimant **in 1968** and 1969. Petitioner has **failed** to sustain its burden **of proof** and the subsequent qualification of Claimant does not lend **weight** to its **argument.**

We find therefore upon the **entire** record, that Carrier's decision **was made in** good faith, **and** it will not be disturbed. The determination of fitness and ability **will stand.**

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** the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: ' A. W. Paulson

Executive Secretary

Dated at Chicago, Illinois, this **23rd** day of August 1974.

LABOR MEMBER'S DISSENT TO AWARD 20361  
(Docket CL-20334)  
(Referee Lieberman)

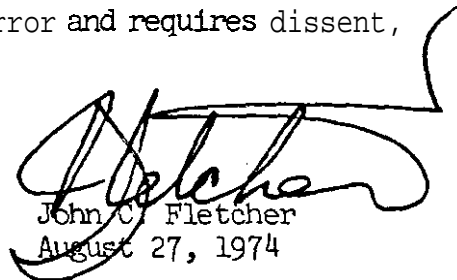
The tragedy in Award 20361 lies in the failure of the Carrier Members and Referee Lieberman to afford even the slightest weight to the second note to Rule 25 reading:

"This rule contemplates that the senior employe will be awarded the position unless it is obvious that he cannot qualify."

It was not obvious that claimant could not qualify for the position sought. In fact, she was subsequently given written notice that she was considered qualified even without ever working the position in the interim period.

The Awards cited in the opinion of Board are not decisive to a determination in the instant case because none involved a rule containing a note similar to the second note to the rule under consideration here.

Award 20361 is in palpable error and requires dissent,



John C. Fletcher  
August 27, 1974