

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21544
Docket Number CL-2284

Robert J. Ables, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station **Employees**

PARTIES TO DISPUTE: (

(Pacific Fruit **Express** Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-7969, that:

(a) The Pacific Fruit **Express** Company violated the current Clerks' **Agreement** when it ruled that disqualification of Mrs. **Marva** J. Bell was justified by evidence adduced at investigation held August 7, 1974, and,

(b) The Pacific Fruit Express Company shall now be required to allow Mrs. **Marva** J. Bell eight hours' compensation at Rate of Senior Audit Clerk Position R-69 starting July 19, 1974 and continuing each day thereafter until she is reinstated to said position.

OPINION OF BOARD: Claimant had a **full** and fair opportunity to present her **views** in the investigation stage and to **learn** from the Carrier the basis for her disqualification as a Senior Audit Clerk; therefore, there is no basis to sustain Claimant's objections as to the procedure by which she was disqualified.

On the merits, Claimant bid for and was awarded the job of Senior Audit Clerk on March 19, 1974. Four months later, the Carrier disqualified Claimant from her job, effective July 18, 1974, relying on Rule 8. This **rule** provides:

"Rule 8 Failure to Qualify

(a) An employee, who is assigned to a bulletined position or displaces another employee and fails within a reasonable time to demonstrate his fitness and ability, shall vacate the position on which disqualified and may displace either the junior assigned employee, **if** there is one in the bureau (if no bureau, the office) or station in which the position on which employee fails to qualify is located, or displace the junior assigned employee in the seniority district; provided that a clerk

"may displace the junior assigned clerk, if there is one, before being required to displace the junior assigned employee."

Clearly management has the responsibility to determine whether an employee who is assigned to a bulletined position has demonstrated the required fitness and ability for the job. Absent an arbitrary decision by the **Carrier** and so long as the employee has had a reasonable time to demonstrate his or her fitness **and** ability to perform the job, the burden rests on Claimant to show by a preponderance of the evidence that she is in fact fit and able to do the required work.

The Claimant has not met this burden. The length of time in which Claimant had to qualify for the job was reasonable and the direct and specific testimony of **supervisors** and managers in her department about her substandard work were more than sufficient to establish that the Carrier acted **in** good faith and in accordance **with** a reasonable judgment about the capability of the Claimant to do the work. Finding that she was not fit and able for the position, the Carrier was justified in disqualifying her from the job.

Experienced arbitrators know that in all industry one of the most difficult problems to decide under collective bargaining **agreements** is the problem of the junior **employee** being promoted over the senior employee. The great majority of agreements outside the railroad industry have a promotion clause in which the presumption that the senior employee bidding on a job shall be selected is conditioned by a phrase which leaves discretion in management to compare the fitness and ability of the candidates competing for the promotion and where, in the judgment of management, the junior employee has superior ability or fitness or education or experience, etc. such employee and not the senior employee is promoted. Understandably, the unions resist such decisions by management because they undermine the principle of seniority on which a labor organization depends so much.

In this case, however, the presumption that the senior qualified **employee** shall be promoted seems to be undiminished (see Rule 7); rather, management, under the collective bargaining agreement in Rule 8, has reserved the right, **in** a transition period of a reasonable amount of time, to determine whether or not that employee is ready to assume the required responsibilities of the job. Such approach to recognizing the critically important right of the **employee** to depend on his seniority to protect him in his job, and to be promoted, is substantially more favorable from the **employees'** standpoint than the common approach in other industries, which leaves considerable discretion with management at a

much earlier stage in the promotion process (and sometimes with respect to reduction in force) to determine who will get - or keep - the job.

Under the circumstances, it is understandable that when the employer, as in this case, is evaluating an employee during the qualifying period, it should have considerable discretion in judging whether **or** not that employee is **fit** and able to do the required work.

Under all the facts and circumstances, the Claimant had a full and fair opportunity to question the judgment of management about the basis for her disqualification; the Claimant has not met her burden to show that the Carrier was arbitrary in deciding that she was not qualified for the job; and, to the contrary, the Carrier showed that the employee, after having had a reasonable time to learn her job, failed to reach that level of fitness and ability sufficient for her to hold the job. Accordingly, the claim should 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 **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

Claimdenied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1977.