

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21640
Docket Number CL-21539

Robert W. Smedley, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight **Handlers**,
(Express and Station **Employees**
PARTIES TO DISPUTE: (
(Southern Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood,
GL-8035, that:

(a) Carrier violated the Clerks' Agreement at Memphis, Tennessee, when it refused to assign Mr. **Agee** Green to the position of Chief Clerk to the Agent Terminal Control instead of junior clerk Mr. **J. W. Dunavant**.

(b) Carrier shall be required to compensate Mr. Green for the difference between his rate as Claim Clerk and that of Chief Clerk beginning August 12, 1974, and continuing until he is assigned to the position of Chief Clerk.

OPINION OF BOARD: The chief clerk position to the agent terminal control at Memphis, Tennessee, was advertised by vacancy bulletin dated July 29, 1974. Claimant **Agee** Green bid for the job but it went to J. W. **Dunavant** effective August 12, 1974. Green's seniority date was December 13, 1965, and **Dunavant's was May 3, 1967**, about 17 months junior.

Both parties agree that controlling is:

"RULE B-7 -- FILLING VACANCIES UNDER SENIORITY RULES

(a) Except as otherwise provided in this agreement, vacancies covered by this agreement will be filled in accordance with principles defined in Rule B-6 **in** the following wanner, except that merit, capacity and qualifications being sufficient, seniority shall govern:

* * *

NOTE No. 1: The word 'sufficient' as used above is intended to establish the right of the senior qualified employees to be assigned to new positions or vacancies covered by Section **(a)** of this rule **over** junior qualified employees."

Also specifically applicable is:

"RULE C-2 -- GRIEVANCES

An employee who considers himself unjustly treated, otherwise than covered by these rules, shall have the same right of investigation, hearing, appeal and representation as provided in Rule C-1 if written request which sets forth the employee's complaint is made to his immediate superior officer and/or designated officer with whom claims are filed, within thirty (30) days of cause of complaint.

NOTE: This rule should be used particularly in instances where an employee is adjudged not to have relatively equal or sufficient qualifications, **merit** and capacity for a position on which he has submitted an application or bid and a junior employee has been assigned **or awarded** the position. The employee must then present evidence at the hearing that he did have relatively equal or sufficient qualifications, merit and capacity and the burden of proof rests with such employee. In the event the employee had previously filled the position for thirty (30) days or more work days during a vacancy or during a vacation period and had not previously been disqualified therefrom, the burden of proof would then shift to the carrier to **prove** such employee did not have relatively equal or sufficient qualifications, merit and capacity.

This rule is not limited solely to cases of the type cited **above**, but may be used in any case where an employee feels he has been unjustly treated in some manner not covered by any specific rule(s) of this agreement."

A distinction is drawn between the language of Rule B-7, **i.e., "merit, capacity, and qualifications being sufficient, seniority shall govern"** and the language of:

"RULE B-6 -- PROMOTION, VACANCIES OR NEW POSITIONS NOT FILLED BY SENIORITY

Promotions, vacancies or new positions **which** are not filled by seniority shall be filled as follows:

"Qualification, merit and capacity being relatively equal, preference shall be given employees in the service, who have made application, in order of their service age."

This distinction has merit. In the B-7 situation the senior applicant need only show he has "sufficient" qualifications and in the B-6 case he must show that he is "relatively equal" to his junior. **Management** has these mixed in its thinking throughout, insisting that "claimant did not present evidence that he did have relatively equal or sufficient qualification, merit and capacity for the chief clerk position, compared to those of Dunavant." A more contractually correct recitation would strike the words we have underlined in this above quote.

But this erroneous view of claimant's burden does not necessarily vitiate the decision. Instead, it requires us to examine the proof offered by claimant to see if he met the mere sufficiency burden. At the hearing, claimant testified and was accompanied by three **union** men. Here was the opportunity to show the sufficiency of claimant's merit, capacity and qualifications. Something should have been said besides "he should have been given a chance." No one - not even claimant - attested by example, opinion or otherwise that claimant was sufficiently qualified for the job. Claimant was a yard clerk and the job was agency clerk. Claimant said "I worked **claim** job" in the agency, but the bulletined job description contains many heavier duties than that. Thus, we must conclude that claimant did **not** meet his burden of proof. The evidence heavily preponderates the other way. Rule B-10 is cited by the **Employees:**

"RULE B-10 -- FAILURE TO QUALIFY

Employees awarded bulletined positions will be allowed a reasonable time in which to qualify and, failing, shall retain all their seniority rights, may bid on any bulletined position, but will not displace any regularly assigned employee."

This, however, does not override the Note in Rule C-2, casting the burden of proof **on** claimant.

Much is made of the fact that these are revised rules which substantially changed management's previous unfettered discretion in **such** matters. Still it boils **down** to proof, and no cited case persuades us **to** uphold the claim under these facts.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and **upon** the whole record and all the evidence, finds and holds:

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

The Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 29th day of July 1977.

