

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21685

Docket Number CL-21653

James F. Searce, Referee

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

(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood,
CL-8116, that:

1. Carrier violated the Agreement between the parties when Clerk **J. Druckemiller** was arbitrarily disqualified on November **4, 1974**, and not permitted to exercise seniority to the **Extra** Board.

2. Carrier further violated the Agreement between the parties when Clerk **Druckemiller** was not assigned to Relief Position No. 6 on November **25, 1974**.

3. Carriers shall now be required to compensate Clerk **Druckemiller** for **all** time lost as a result of the above violations, **until** the violations are corrected.

OPINION OF BOARD: This case involves an allegedly improper disqualification of Claimant on **November 4, 1974**, when Carrier denied her the right to displace, as well as Carrier's failure to assign her to a relief position on November **25, 1974**, which failure or **refusal** is alleged to be a violation of Claimant's rights.

The main rules involved are:

"Rule 5 - Promotion, Assignments and Displacements

Employees covered by these rules shall be in line for promotion. Promotion, **assignments and displacements**, under the rules of this Agreement, 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 **employee** to bid in a new position or vacancy where two or more **employees** have adequate fitness and ability.

"Rule 10 - Qualifying

(a) An employe awarded a bulletined position or who exercises displacement rights thereon shall be **allowed** forty (40) working days with pay in which to qualify except when it is evident he will not qualify for the position he may be removed from the position at any time before the expiration of the qualifying period of forty working days.

(b) An employe failing to qualify shall retain all seniority rights and **must** return to his former position. In event such **employe's** former position has been abolished or senior employe has exercised displacement rights thereon, the displaced employe will be governed by the provisions of **Rule 18(b)**. However, after two consecutive disqualifications he shall not be **allowed** to displace any regularly assigned employe but may bid on any bulletined position, except the positions from which disqualified. **Employes** displaced by his return **will** be governed by the provisions of **Rule 18**.

(c) The Local Chairman shall be notified, in writing, the reason for any disqualification.

(d) **Employes will** receive cooperation of the department heads and others in their effort to qualify.

"Rule 12

(b) If there is no applicant for a new position or vacancy which is bulletined in a seniority district and there are furloughed employes from that seniority district the senior of such furloughed employes will, subject to **Rule 5**, be assigned. Should a situation arise in a seniority district where **employes** senior to those in service have been **furloughed** and applications for new positions or vacancies are received only from junior employes remaining in the service, the senior employe who is **furloughed** will, subject to **Rule 5**, be assigned.

Application from furloughed employes for bulletined positions are not required."

On March 27, 1974, Claimant was awarded position of Extra Board Clerk No. 2 on Extra Board No. 1, Bison Yard.

On May 2, 1974, Claimant was again awarded position as Extra Board Clerk No. 2 on Extra Board No. 1, Bison Yard.

On July 11, 1974, Claimant was awarded position of Extra Board Clerk No. 4 on Extra Board No. 1, Bison Yard.

On September 12, 1974, Claimant was awarded position of Billing Clerk No. 36 in Agent's office.

Prior to November 4, 1974, Claimant was notified that she was being displaced by a senior employe from Billing Clerk Position No. 36 effective November 4, 1974.

Claimant elected to displace a junior employe on position of Extra Board Clerk No. 5 on Extra Board No. 1, Bison Yard, but was not permitted to displace thereon and, effective November 4, 1974, became furloughed.

There is nothing in the record to indicate that, prior to the letter of December 5, 1974, Carrier was in any manner dissatisfied with Claimant's work on similar extra board clerk positions which Carrier assigned to her commencing March 1974. The December 5, 1974, letter was a belated attempt by Carrier to comply with Rule 10(c). Claimant was the senior furloughed employe on November 25, 1974, and, in accord with Rule 12(b), was entitled to be assigned to Relief Position No. 6, on which no bids from senior employes had been received.

From at least March 27, until November 4, 1974, when Claimant was advised by telephone that her displacement on Extra Board Clerk Position No. 5 would not be honored, Carrier failed to raise any issue as to her work. When claim was filed in her behalf, Carrier advised the local chairman that she had "trained" from three to twenty-five days on five of the twenty-three positions covered by Extra Board No. 1 and "failed to qualify." In answer to claim in her behalf account not assigned to Relief Position No. 6, Carrier stated "Claimant was disqualified from extra board #1, Bison Yard which covers position of Relief #6."

The record reveals that, contrary to the provisions of Rule 10, Claimant was neither allowed forty working days with pay in which to qualify on any of the twenty-three positions covered by Extra Board No. 1, Bison Yard, nor was she informed that it was evident she would not qualify for any of the extra board positions, and that Carrier invoked its belated and contested disqualification of her from Extra Board Clerk Position No. 5 on Extra Board No. 1 at Bison Yard as disqualifying her from all twenty-three positions covered by said extra board.

Carrier did not act timely, in accord with Rule 10(c), nor did it properly comply with Rule 12(b). Not only Claimant, but Claimant's representative as well, has a right to know if Carrier determines "it is evident he **will** not qualify" so that-either might take timely action. Claimant was belatedly alleged to have failed to qualify on five of the **twenty-three** positions. On no one position had she been given forty working days in which to qualify nor had she ever been told her efforts were to no avail, until she attempted to displace on a position similar to others awarded her previously, based on Carrier's determination that her seniority, fitness and ability were deemed sufficient. In such instances the burden shifts to Carrier to prove her lack of sufficient fitness and ability. (**Awards 6892, 10424, 12141, 12245, 16547** and awards cited therein.) In addition, when one has not been advised that his work performance on a previously assigned position **was** not acceptable, there is created a presumption in favor of the **employee** which Carrier should be prepared to overcome. (**Awards 402 (without referee), 2638, 2673, 2864, 4725, 11279, 13352** and awards cited therein.) The record does not support Carrier's action.

In view of **all** the facts of record, rules cited and relied on, and prior decisions involving such matters, the Board concludes that the agreement **was** violated.

Claimant asks that she be paid all time lost until the violations are corrected. We **will** order that Claimant be treated as though her displacement on Extra Board Clerk Position No. 5 on November 4, 1974, had been allowed and require Carrier to pay her what she would have earned on that position from November 4, 1974, until she actually acquires, or did acquire, another position, less any amount she earned during that period.

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

The agreement was violated.

Award Number 21685
Docket Number CL-21653

Page 5

A W A R D

Claim sustained in accordance with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: *A. W. Paulos*
Executive Secretary

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