

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25036  
Docket Number TD-25046

George S. Roukis, Referee

(American Train Dispatchers Association  
PARTIES TO DISPUTE: (  
(Chesapeake and Ohio Railway Company

STATEMENT OF CLAIM: Claim of the American Train Dispatchers Association that:

(a) The Chesapeake and Ohio Railway Company (hereinafter referred to as 'Carrier') violated the current schedule working agreement between the parties, Articles 5(d) and 6(c)1 in particular, when Claimant train dispatchers H. D. Meade and B. I. Kelly were not permitted to exercise seniority on Position No. 12 in Carrier's Columbus, Ohio train dispatching office on October 25, 1981.

(b) Because of Carrier's violation of the agreement, Carrier shall now be required to compensate Claimants Meade and Kelly the difference between the rate of pay of the position retained by each of them and the rate of pay of Position No. 12, beginning October 25, 1981, and continuing until the violation ceases.

OPINION OF BOARD: The pivotal question herein is whether Carrier violated the Controlling Agreement. particularly Articles 5(d) and 6(c)1 when it precluded them from exercising displacement rights to this position as per their separate requests, dated October 25, 1981. For ready reference these contract provisions are as follows:

"5(d) Filling Positions

In filling positions of train dispatcher, ability being sufficient, seniority as train dispatcher shall govern. "

"6(c)1 Leave of Absence Rule

A train dispatcher returning from temporary absence such as leave of absence, vacation, sickness, suspension, jury duty, etc., may return to his former position, or may upon return or within five (5) days thereafter exercise seniority rights to any position bulletined during such absence."

Under date of October 19, 1981 this position in the coordinated dispatching operation, located at Columbus, Ohio and in part responsible for the supervision of Consoles "C" and "D" covering the dispatching territories of the Baltimore and Ohio Railroad, which were part of the coordination, effectuated pursuant to an agreement dated December 28, 1979, was awarded to another applicant. The coordination involved the Chesapeake and Ohio Railroad, the Baltimore and Ohio Railroad, and the American Train Dispatchers Association. Both Claimants expressed a desire to exercise seniority to Position No. 12, but were denied displacement rights. The employee awarded the position was junior to them in seniority and the instant claim was filed on November 6, 1981.

In denying their respective requests, Carrier pointedly asserts that they were not qualified at the time to perform the duties of Position No. 12 and thus, consistent with Article 5(d), it awarded the position to the most senior employe possessing the ability to perform the functions of this position. It is Carrier's position with respect to Claimant B.I. Kelly that she was not immediately qualified for **Position** No. 12, but it recognizes that she was qualified on both B&O dispatching districts. In effect, it contends that from the time her request was denied until the time she posted on Position No. 12 from **November** 10 through November 13, 1981, which by Carrier's definition was a learning period, she was not fully qualified for this position. On November 14, 1981 she exercised her seniority to this position and was awarded it. The incumbency of this position later changed when it was awarded to a more senior employe who displaced on it on October 11, 1982. •

Correlatively, in the case of Claimant **H. D. Meade**, Carrier asserts that he lacked sufficient fitness and ability for this position and its denial was predicated upon justifiable grounds of fitness determination. It argues in particular that despite his prior service as Manager Terminal Services at Chillicothe, Ohio, Mr. Meade never worked as a B&O Train Dispatcher, had no prior experience as an Assistant Chief Dispatcher, and was unfamiliar with the two train dispatching districts involved. It notes that as a consequence of its denial, he was later called as a Guaranteed Assigned Train Dispatcher and trained on Consoles "**C**" and "**D**" for about forty (40) days and was first used as a train dispatcher on the territory transferred from Newark, Ohio on March 4, 1982. Moreover, it observes that he was provided twenty (20) days of training on both the C&O and B&O Assistant Chief dispatcher positions and first worked as a C&O Assistant Chief Dispatcher on April 6, 1982.

Carrier avers that this training and exposure to the duties of the Assistant Chief Dispatcher position qualified him for the Position, and further notes that he was considered qualified and actually used on the B&O Assistant Chief Dispatcher Position on June 12, 1982.

However, Carrier strongly argues that at the time Mr. Meade was denied displacement rights on this position, he was patently unqualified to assume its responsibilities.

The Organization argues that both Claimants possessed the presumptive ability to perform the duties of Position No. 12, since they were later deemed qualified for the position. It asserts that even assuming they were not immediately qualified to perform service on Position No. 12, they should have been given the opportunity to become qualified and then permitted to occupy it. Implicitly, it avers that there is a distinction between the words ability and qualification, which in this instance, indicate that if the Claimants were not technically qualified immediately for Position No. 12, but possessed the ability to perform its duties, the position should have been awarded to the most senior employe. It notes that while the Controlling Agreement does not contain a provision specifying an amount of time within which an employe may qualify on a position, the standard qualifying period in the railroad industry is thirty (30) days. It argues that both Claimants could have qualified in this period.

In our review of this case, we agree with Carrier that Claimant Meade was definably unqualified for Position No. 12 when he expressed a desire to displace on this position on October 25, 1981. Careful review of his background and work record does not indicate that he possessed the experience and skills needed to perform the duties of the Assistant Chief Dispatcher's position and, as such, Article 5(d) was not violated. However, the word "ability" is contextually positioned in such a way that it is obviously the intent of the contracting parties herein that an applicant should be immediately capable of performing the duties of a position. In the absence of clear contract language providing for a time in which to qualify for the period and in the further absence of identified past practices involving the same parties on a systemwide basis, de facto observing such a qualifying period, we have to conclude that ability means a qualified employee. We have no evidence that would indicate a variant construction. Of course, the question of determining whether an employee possesses sufficient ability and fitness singularly rests with the employer, subject to a challenge if an employee believes that a selection decision was biased, arbitrary or capricious. (See Third Division Awards Nos. 21328, 21676, 19123, 23050, et al.) In the instant case, we are unreservedly convinced that Mr. Meade was not qualified and lacked sufficient ability and fitness for this position when he submitted a request on October 25, 1981. It took a considerable time to qualify him for this position.

In the case of Claimant Kelly, the question of her ability to perform the duties of Position No. 12 is not as clear cut. The record shows that subsequent to Carrier's denial, Ms. Kelly worked the Second Trick Newark Dispatcher position from October 28, 1981 through November 8, 1981. She posted on the B&O Assistant Chief Dispatcher position from November 10, 1981 through November 13, 1981, and then exercised seniority to that position, effective November 14, 1981. We cannot determine her background prior to October 25, 1981 or how it was related to the qualification of Position No. 12 or unlike Carrier's detailed development of Mr. Meade's work record, which persuasively indicated a lack of sufficient ability and fitness, Carrier did not provide such a detailed work chronology for Ms. Kelly. In fact, neither Carrier nor the Organization presented any substantive data indicating one way or the other Ms. Kelly's fitness and ability. While we recognize the distinction between the words "ability" and "qualification", and the unfortunate blurring of these words, an ability to qualify is different from a ready ability to perform the tasks of a position. While the Organization's argument regarding the immediacy of Ms. Kelly's qualification suggests that she might not have been qualified for Position No. 12 on October 25, 1981, Carrier did not dispute her lack of ability with the same vigor and detail it provided to prove that Claimant Meade was unqualified. It merely answered that she did not possess the requisite ability. Under these circumstances it would be easy for this Board to conclude that she lacked the ability to perform the tasks of Position No. 12, but her manifest ability to learn the essentials of this job in a very short time explicitly indicates that a presumptive ability was present



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for this position. The Organization has argued that she was qualified for this position and the short time it took for her to qualify on Position No. 12 certainly demonstrates capability. In view of the limited time it took for her to be awarded this position, it would appear that she possessed sufficient ability and fitness for the position on October 25, 1981. We have no evidence what job skills she lacked on October 25, 1981 and how this deficiency was obviated by her posting on this position from November 10, 1981 through November 13, 1981. Since Carrier was obligated as an integral requirement of its affirmative defense to show more clearly that she was unqualified for Position No. 12, as it did to dispute Mr. **Meade's** ability and fitness, we find that she possessed the ability for this position on October 25, 1981. Accordingly, we will sustain that portion of the Organization's petition representing her claim and that she be paid the difference between the rate of pay of the position she retained during the period October 28, 1981 through November 13, 1981 and the Assistant Chief Dispatcher No. 12 position. The claim for Mr. **Meade** is denied in its entirety.

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 violated to the extent expressed herein.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
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Nancy J. Lever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of September 1984