Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 27283
THIRD DIVISION Docket No. CL-27241
88-3-86-3-331

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employes
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10103) that:

1. Carrier violated the rules of the current Clerks' Agreement at Los Angeles, commencing April 24, 1985, when Ms. J. D. Sellers was improperly assigned to Towerman-LAUPT Position No. 0136, and

2. Mr. J. J. Clarke shall be assigned to Towerman - LAUPT Position No. 0136 and shall be compensated for eight (8) hours' pay at the pro rata rate of Position No. 0136 for each work day of that position commencing April 24, 1985, including interest payable at the prevailing prime rate, in addition to any other compensation received and continuing so long as Mr. Clarke is wrongfully deprived of his right to work Position No. 0136."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On April 17, 1985, a vacancy on Position No. 0136, Towerman - Los Angeles Union Passenger Terminal (hereafter LAUPT) was advertised and Claimant bid. The position works under both AT&SF and Southern Pacific Rules. LAUPT requires that Towermen pass the SP Book of Rules and, further, employees who have not worked as a Towerman in a twelve month period must pass the Book of Rules again. Claimant had not passed the Southern Pacific Book of Rules within a twelve month period and the position was awarded to a junior employee on April 24, 1985. The junior employee was in turn displaced on May 8, 1985, by an employee senior to Claimant.

The following Rules are relied upon in part by the Organization:

"RULE 8--PROMOTIONS, ASSIGNMENTS, DISPLACEMENTS

Employes covered by these rules shall be in line for promotion. Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail.

NOTE: The word 'sufficient' is intended to more clearly establish the prior rights of the senior of two or more qualified employes having adequate fitness and ability for the position or vacancy sought in the exercise of seniority.

RULE 9--QUALIFYING

9-A. Employes with sufficient fitness and ability will, when bidding on bulletined positions, transferring, exercising displacement rights and/or when recalled for a new position or bulletined vacancy, be allowed 45 working days in which to qualify, and failing, shall retain all their seniority rights and may bid on any bulletined position but may not displace any other employe.

9-B. When it is decided, following informal hearing with employe involved, that the employe is not qualified for position to which assigned, he may be removed therefrom before the expiration of 45 working days. At such informal hearing the employe may be represented by his duly accredited representative or an employe of his craft. The informal hearing shall be held within three days from date employe is notified unless a longer time is agreed to. The right of appeal from Management's decision is recognized.

9-C. Cooperation will be given employes from all concerned in their efforts to qualify. If Management requires an employe to break-in on a position to which he is assigned for the purpose of familiarization or if the employe requests break-in time and it is granted by Management, the employe will receive the rate of the position. All break-in time must be for a full eight hours and during the regularly assigned hours of the position. As of the date the break-in commences, such employe will be considered as the occupant of the position.

> Management will determine the total number of break-in days required. The number of days allowed hereunder will not be counted as part of the 45 working days referred to in this Rule 9. During the break-in period, an employe will not be considered available under Rule 14-C(2) nor will he be diverted under Rule 32-N.
>
> * * *"

In its letter of August 1, 1985, advancing the claim, the Organization argued:

> "Claimant Clarke had previously written the Southern Pacific Examination on Rules and Regulations in January, 1981 . . . .
>
> Carrier cannot successfully contend Claimant Clarke lacks the sufficient fitness and ability for Position No. 0136 - LAUPT, as he clearly established this when assigned to the same position in January, 1981 and successfully performed the necessary duties until June, 1981 when released from the position."

Carrier did not deny these assertions.

The Organization argues that under Rule 8 the test is whether a bidding employee has "sufficient fitness and ability," not whether he or she is "qualified."

This case presents the Board with the issue of whether there is any tension between Rule 9 and Carrier's right to determine the question of "sufficient fitness and ability." We think there is not but we believe there is a great danger in this case of confusing terms. "Sufficient fitness and ability" and "qualification" are not synonymous. Rule 9 recognizes this by allowing employees with fitness and ability a period of time within which to qualify.

Neither do we view this case as a question of Carrier's undoubted right to require examinations. That too is a different issue from the fitness and ability question presented by the facts of this case. Here, as far as the record shows, Carrier at no time raised objection to Claimant's fitness and ability in any context other than his not having written the test within a twelve month period. It did not deny Claimant had successfully written the test beyond the twelve month period and in fact informs this Board that Claimant again passed the Book of Rules in May, 1985. Carrier does not deny Claimant had successfully performed the job while he held it from January to June of 1981.

Rule 9 contemplates a judgment regarding fitness and ability and then allows time to "qualify." We believe that Rule is frustrated by a mechanical approach in which an employee who had passed the qualifying test and successfully performed the job for many months can be said to lack sufficient fitness and ability solely because he had not rewritten an examination.

We are aware of, and in no way should be taken as disagreeing with, the numerous cases holding it is the Carrier's prerogative to determine fitness and ability. Carrier has, and must have, that right. Simply put we do not believe Carrier made any judgment regarding fitness and ability here. Rather it took the position Claimant was "not considered as having the fitness and ability . . . until he has . . . passed" the examination.

Awards of this Board have held that Claimant:

> "has the burden of coming forward with evidence of probative value to support its contention as to fitness and ability." Third Division Award 19129.

It is undenied that Claimant had written the test in the past and satisfactorily performed the precise work in question for a substantial period. We believe this meets the required burden.

As noted above, an employee senior to the Claimant displaced the junior employee on May 8, 1985. Accordingly, Claimant should be compensated at the Agreement rate for the period he would have held Position No. 0136 had the Agreement not been violated, that is, until May 8, 1985. We will not require payment of interest as, contrary to the Organization, we find no Agreement basis for such payment.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 12th day of August 1988.

CARRIER MEMBERS' DISSENT
TO
AWARD 27283, DOCKET CL-27241
(Referee Cloney)

The Majority focuses its concern on the "great danger" of confusing the terms "fitness and ability" and "qualification." Unfortunately, in the process of struggling to avoid the "great danger," it completely lost sight of the primary issue in the dispute, namely, whether a carrier can violate its Agreement with its labor organizations when it enforces the Operating Rules of another carrier.

The undisputed facts show that the position sought by the Claimant was not on the Carrier Respondent, the ATSF, but was, instead, on the LAUPT, a separate carrier entity. The testing requirement involved here was not a Rule requirement of the ATSF but a requirement of the Operating Rules of the LAUPT, for whom the Claimant would be working if his bid had been accepted. Indeed, the test was not of the operating Rules of the ATSF but of the Southern Pacific Railroad Company.

The central issue, accordingly, was whether the ATSF violated its Agreement with the Organization when it informed the Claimant that it could not accept the Claimant's bid for employment on the LAUPT until the Claimant satisfied the LAUPT's testing requirement. Such issue, obviously, cannot be determined on the basis of whether the ATSF notified the Claimant that his failure to comply with LAUPT's Rules resulted in his not being "fit and able" or his not being "qualified."

Fortunately for the Carrier, the LAUPT position in dispute was subsequently awarded to an employee senior to the Claimant, thus ending the Claimant's asserted right to it. If such were not the case, the Carrier would be confronted with an Award requiring it to compensate the Claimant on a continuing basis until the ATSF awarded the position to the Claimant, an award which the ATSF does not have the power to accomplish.

We also do not agree with the Majority's holding that the Claimant's refusal to take the test did not impact his "fitness and ability." The Majority's reasoning on this issue is far from clear. The facts of record show that the Claimant last took the test in January, 1981, and that Claimant had last held the position in June, 1981. The test involved the operating Rules of the Southern Pacific Railroad Company and Claimant apparently had not worked under such Rules for approximately four years. The ATSF contended that after a period of four years, it was appropriate to ensure that the Claimant knew the Rules of the Southern Pacific. Clearly, such test was a determinative factor of the Claimant's "fitness and ability."

The Majority cites the fact that the Claimant finally did agree to take the test in May, 1985, and passed it at that time. Apparently, the Majority considers such fact as proof that Claimant was "fit and able" in April, 1985, before he took the test. To such extent, the Majority clearly misapprehends the Carrier's position. The Carrier has never argued that Claimant could not establish his fitness and ability, it simply required the Claimant to do so before it assigned him the position by

passing the test. Indeed, the Majority agrees with the ATSF that it had the "undoubted right to require examinations." Surely the Majority cannot be suggesting that while it has the "undoubted" right to require an examination, the employee has the equal right to refuse to take the test so long as he can subsequently show that he would have passed the test if he had deigned to take it.

For all the foregoing reasons, the Majority was in error and we Dissent.

M. W. FINGERHUT

R. L. HICKS

M. C. LESNIK

P. V. VARGA

J. E. YOST