

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 30951  
Docket No. CL-31179  
95-3-93-3-243

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

PARTIES TO DISPUTE: (Transportation Communications  
( International Union  
(  
(Western Railroad Association

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10952) that:

1. The Association violated rules 2, 8, and 9 among others of the current scheduled agreement when on February 7, 1992 the Association refused to allow Mr. Edward Chalmers' displacement on the Bindary Equipment Operator position.
2. The Association shall now be required to place Mr. Chalmers on Position No. 152 and to compensate him for the difference in rates of pay including overtime for each and every day since February 10, 1992 until such time as he reaches or exceeds a comparable level."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

This dispute involves a situation in which the Claimant, whose previous position had been abolished, attempted to displace the junior incumbent of a position known as Bindary Equipment Operator. His request to displace on the Bindary Equipment Operator position was denied by the Carrier for two reasons, namely, that he did not possess the necessary fitness and ability for the position being sought and that his past service and job performance record in the department where the Bindary Equipment Operator was assigned were unsatisfactory. Claimant thereupon displaced on a Distribution Clerk position in the same department. The subsequent claim which was presented on behalf of the Claimant alleged that Carrier's actions were in violation of Rules 2, 4, 8 and 9 of the Rules Agreement. Rules 2 and 9 are not in dispute in this case. Rules 4 and 8 are of concern in a determination of this dispute. These two Rules read as follows:

"RULE 4 - ASSIGNMENTS AND DISPLACEMENTS

(a) Promotions, assignments and displacements shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail.

(b) The word 'sufficient' is intended to more clearly establish the right of the senior employee to a new position or vacancy where two or more employees possess adequate fitness and ability."

"RULE 8 - TIME IN WHICH TO QUALIFY

(a) When an employee is entitled by bulletin to a position or displaces on a position in the exercise of his seniority, such employee will be allowed sixty (60) working days in which to demonstrate qualifications for the position, except that when it is sooner determined that such employee is not so qualified, the employee may be removed from the position before the expiration of sixty (60) working days. The employee shall be promptly notified in writing of the reasons for his disqualification.

(b) Employees disqualified after the expiration of sixty (60) working days shall be promptly notified in writing and a hearing shall be held, if requested in writing, within ten (10) days from date of the written notice of disqualification. A decision shall be rendered by the Association within ten (10) days of the hearing. An employee shall have the right to appeal the decision in accordance with Rule 28.

(c) Failing to qualify, the employee shall retain all his seniority rights and may bid on any bulletined position, (see paragraph (h), Rule 5), but may not displace a regularly assigned employee, provided, however, an employee who fails to qualify on a temporary vacancy may return immediately to his former position.

(d) Employees will be given full cooperation of department heads and others in their efforts to qualify."

In their handling of this case, the Organization contended that Rule 8 as quoted above required that an employee be allowed to displace on the position held by the junior employee and thereafter demonstrate his qualification for the position. They argued that the language of Rule 8 provided only one course of action which is to allow the employee a period of 60 working days in which to demonstrate his qualifications for the position. They further argued that Rule 8 does not allow the Carrier the right to determine whether or not an employee is qualified before permitting him to displace on the position of his choice. The Organization insisted that the ". . . Claimant has two arms and legs and he has used them without complaint in other departments." Therefore, they say he should have been allowed a qualifying period on the job he sought.

For their part, Carrier argued that the managerial prerogative of determination of fitness, ability and qualifications for a position rests solely with the Carrier and such determination is not subject to reversal unless it can be probatively proven that such determination was reached in an arbitrary or capricious manner. Carrier contended that they have never granted employees a trial period in which to qualify for a position when the employee could not demonstrate their fitness and ability for the position in the first place. Carrier further contended that in this instance the Claimant's prior work and performance history was a valid consideration in determining the Claimant's fitness and ability for the position he sought and that the Organization had not only failed to refute this position but also had failed to prove that Claimant did, in fact, possess the necessary fitness and ability to have entitled him to displace on the position in question.

Under the general rule which has been consistently followed by many Referees on this Board, Carrier is the judge of an employee's fitness, ability and qualifications. Where the judgment of the Carrier is questioned in this regard, the burden is on the complaining party to prove that Carrier was arbitrary or capricious

in making their judgment. In early Third Division Award 5966, it was ruled as follows:

"In this present instance, the Claimant appears to have a good record in the positions that he has held in the past and in the one he now holds. He also has given the Carrier many years of faithful service. For these things he is certainly to be commended. However, these things alone do not necessarily qualify him for the position in question."

The language of Rule 8 here in question does not, in the Board's opinion, place an obligation on the Carrier to permit an employee to displace on to a position for which, in Carrier's judgment, he does not possess the basic fitness and ability. In the absence of a specific on-the-job training rule confirming such a right, an employee has no demand right to be permitted to place himself on a position unless he has the basic fitness and ability to perform the duties thereof. It is firmly established that rules allowing an employee a specified period of time within which to qualify after being assigned thereto are in no way applicable where the employee is not permitted to place himself on the position in the first instance for lack of fitness and ability. The Organization's contention that the Claimant has two arms and legs, etc. is not proof of his possession of fitness and ability for the position in question.

From the record of this case, it is apparent that both the Carrier and the Organization have been down this same road on more than one occasion. Significant decisions dealing with the same parties and same basic issues as are present in this case are found in Third Division Awards 29133 and 29759. Both of these prior decisions are beneficial and instructive in our determination of the instant dispute. Award 29759 involves not only the same parties but also the same Claimant as is involved here. Carrier was within their managerial prerogative when they took into consideration Claimant's prior unsatisfactory job performance when making their determination that he lacked the basic fitness and ability for the position he sought in this instance. What was said in Award 29759 is worthy of repetition here:

"This Board has consistently held that the possession of 'fitness and ability' is a requisite which must be met before seniority rights become an issue for promotion."

There is no proof in the record of this case to show that Carrier's determinations and actions in this instance were arbitrary, capricious or in violation of any agreement rule provision. Therefore, the claim as presented here is denied.

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AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of June 1995.