

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32261
Docket No. CL-32004
97-3-94-3-362

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

**(Transportation Communications International Union
PARTIES TO DISPUTE: (
(CSX/Sealand Terminals, Inc.**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Union (GL-11054) that:

- 1. The Intermodal Company violated the Agreement on January 15, 1993, when Clerk Thomas L. McElroy, who had been displaced from his Guaranteed Extra Board position in Transportation, attempted to exercise his seniority as contemplated under the February 1, 1992 CSX/SEA-Land Terminals, Inc. Agreement to position No. 10, occupied by Clerk D. Williams, but was denied the displacement.**
- 2. As a result of Intermodal's action, it shall permit Clerk McElroy to displace on Position No. 10 and, in addition, it shall compensate him his guaranteed daily rate of \$110.28 beginning February 15, 1993, to be continuous until he is placed on the position."**

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 were given due notice of hearing thereon.

On January 14, 1993, Claimant was displaced from his position on the Guaranteed Extra Board in the Transportation Department of CSX Transportation at Nashville, Tennessee. Pursuant to the February 1, 1992 Terminal Company Agreement, Claimant attempted to exercise his seniority to Position No. 10 at the Nashville Intermodal Facility, displacing Clerk D. Williams. Claimant was informed by the Carrier that he was disqualified from all positions on the Carrier at Nashville.

In response, the Organization requested an Unjust Treatment Hearing on Claimant's behalf. This request was initially denied, but was subsequently granted and the Hearing was conducted on May 7, 1993. Following this Hearing, the Carrier reconfirmed its decision that Claimant was disqualified.

While the Carrier acknowledges Claimant had sufficient seniority to displace to this position, and that such a displacement would otherwise be permissible under the Terminal Company Agreement, it avers it properly determined him to be unqualified based upon his previous performance on an intermodal position in December 1991 and January 1992. According to Carrier, Claimant had made a number of serious errors in the handling of customer business, resulting in complaints from the customers and expense to the Carrier. These incidents, says the Carrier, first came to light after Claimant had returned to the Transportation Company. Consequently, the Carrier asserts it chose to take no disciplinary action, but informed the Organization that Claimant would be considered disqualified should he ever attempt to return to an intermodal position.

The Organization relies upon Rule 11 - Time Allowed in Which to Qualify, which reads as follows:

"(a) Employees awarded bulletined positions will be allowed 30 working days in which to qualify, except when it is plainly seen within less than 30 working days that they cannot qualify, they will be disqualified. An employee disqualified shall, within seven (7) calendar days from date disqualified:

1. Return to former position, provided it has not been abolished in his absence and provided he has not in his absence been displaced by a senior employee; or

2. Exercise seniority rights to any position bulletined during the qualification period.

3. If upon return the employee disqualified finds his former position abolished or that he has been displaced by a senior employee, he will exercise seniority rights as provided in Rules 8 & 13. Other employees affected may exercise their seniority in the same manner.

(b) Employees exercising seniority rights will be allowed 30 working days in which to qualify, except when it is plainly seen within less than 30 working days that they cannot qualify, they will be disqualified. Such employees disqualified will exercise seniority rights as provided in Rule 13. In the event an employee is disqualified on a position onto which he displaces, the prior incumbent shall return to it and all other employees affected shall return to their prior position except where position is abolished or occupied by a senior employee who secured it as the result of a separate transaction that employee will exercise seniority rights as provided in Rule 13.

(c) Employees failing to exercise seniority rights as provided in sections (a) and (b) of this Rule 11 within the time limit specified herein forfeit all seniority rights unless prevented on account of personal illness or other unavoidable cause.

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

(e) As to the intent of the parties, see Addendum 9."

Addendum No. 9 of the Agreement provides, in pertinent part:

"As agreed, in the application of Rule 11, time allowed in which to qualify, it is understood and agreed that employees bidding for positions

or exercising displacement rights will be allowed reasonable and necessary time to qualify with pay at the rate of the position not to exceed thirty (30) working days subject to the provisions of Rule 10 and 11.

NOTE: An employee who has been disqualified on a position will not be again assigned to or allowed to displace on this position or a similar position unless he can demonstrate to Carrier representatives he has improved his skills to do such type of work."

It is clear from reading Rule 11 and Addendum 9 that Carrier must take some affirmative action if it is to determine an employee is not qualified to hold a particular position. Failure to do so during the 30 working day qualifying period establishes the presumption that the employee is qualified, thereby giving the employee certain rights to the position. This does not mean the employee may not be disqualified at a later date, but to do so the Carrier must afford the employee some basic due process rights, the least of which is formal notice. In this case, Carrier never took any action to rescind Claimant's status as a qualified employee. While Carrier arguably may have had a basis to disqualify Claimant, it sat on its right to do so, thereby forfeiting it.

When an employee vacates a job, after having completed the qualifying period for that job, he continues to be deemed qualified for it and is entitled to displace a junior employee from it. This is the corollary to the NOTE to Addendum No. 9. Even if the job changes, the Carrier must give the employee an opportunity to demonstrate the ability to perform the changed duties. Because Claimant was attempting to return to a position he had previously held without being formally disqualified, he should have been permitted to displace the junior employee. The Agreement, therefore, was violated.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 7th day of October 1997.