

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36893
Docket No. CL-37481
04-3-02-3-539**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

**“Claim of the System Committee of the Organization (GL-12919)
that:**

- 1. The Carrier violated the TCU/NRPC Agreement at 30th Street Station, in Philadelphia, PA when Claimant Lawrence Acosta was denied his right to displace a junior fully covered Clerk Typist position in the Police Department at 30th St. Station, Philadelphia, PA on April 12, 2001. Claimant is senior, and possesses the necessary qualifications to bid or bump this position.**
- 2. The Carrier shall now allow aforementioned displacement, compensate Claimant for the difference in pay of the denied position and any position he might hold until claim is resolved, and allow all displacements to this position according to the rules of the TCU/NRPC Corridor Agreement.**
- 3. This claim has been presented and progressed in accordance with the provision of Rule 7-B-1 of the Agreement and should be allowed.”**

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.

The Claimant to this dispute, formerly a Passenger Movement Clerk, was attempting to exercise his seniority to a Clerk-Typist position in Carrier's Police Department at 30th Street Station, Philadelphia, Pennsylvania, when the dispute arose. He is covered under the provisions of the parties' Northeast Corridor Clerical Agreement.

After being displaced off of an Accounting Clerk position the Claimant was required to exercise a displacement right to maintain his employment with the Carrier. On April 12, 2001, he attempted to exercise his seniority to displace onto position of Clerk-Typist in the Police Department. The job description for the Clerk-Typist position (2POLCT-2) reads as follows:

"Responsible for data entry of police incident worksheets/information needing to be entered into the police computer system. Receive/review data to ensure accuracy and completeness. Must learn and be proficient with the HTE chiefs rules safety AS400 computer system. Required to assist the police department information control specialist when needed. Must comply/adhere to policies and procedures set forth by the Amtrak police department. Must maintain a high level of confidentiality and successfully pass a police background investigation. Incumbent of this position will be locked in for 6 months. - Must be qualified keystroke operator 13,000 Alpha-Numeric keystrokes per hour or 60WPM."

The Carrier denied the Claimant's displacement right to the Clerk-Typist position, asserting that he was not a fully qualified employee for the position (because he had not been trained and qualified on the AS400 computer system and had not passed a background check) and that he would be displacing a junior qualified employee. In response the Organization points to a January 3, 1996 Agreement establishing three police data entry positions where Carrier agreed to provide training on the computer system and did not require knowledge of the system. In addition, it cites Rule 2-A-5 which reads as follows:

- “(a) Employees awarded bulletined positions or exercising displacement rights will be allowed thirty (30) days in which to qualify and failing to qualify may exercise seniority under Rule 3-C-1. The thirty (30) days may be extended by agreement between the Local Chairman and the proper Corporation official.
- (b) When it is evident that an employee will not qualify for a position, after conference with the Local Chairman, he may be removed from the position before the expiration of thirty (30) days and be permitted to exercise seniority under Rule 3-C-1. The Division Chairman will be notified in writing the reason for the disqualification.
- (c) Employees will be given full cooperation of the department heads and others in their effort to qualify.”

The Organization contends that this Rule provides 30 days for an employee exercising displacement rights to qualify for that position.

The Organization filed this claim on behalf of the Claimant which was denied by the Carrier. By letter dated September 14, 2001, the General Chairman progressed the dispute to the Director, Labor Relations. The claim was denied by the Carrier on November 29, 2001. The dispute was then referred to the Board.

The Organization argues that Rule 2-A-5 provides 30 days for an employee exercising displacement rights to qualify for the position and that there is no Rule that requires an employee to be fully qualified for a position prior to an election to

displace. It contends that, at the time of displacement, the senior displacing employee only needs to possess adequate "fitness and ability" for the position, in accordance with Rule 1-B-1.

The Organization further argues that Third Division Award 34067, cited by the Carrier, is not applicable to the instant case, since it involved a situation not at issue (in that case, the Claimant admitted he had no knowledge of the computer system and software programs). In addition, the Organization contends that the Majority, in Award 34067, "went too far" when it, in essence, nullified a Rule similar to Rule 2-A-5, and rendered employees subject to the "whim and fancy" of the Carrier. It argues that Award 34067 completely ignores employees' rights when exercising their displacement rights and does not comport with the applicable Rules of the Agreement and other Third Division Awards.

Finally, the Organization argues that the Claimant was never asked by the Carrier to prove his "fitness and ability" for the Clerk-Typist position. It contends that paragraph (c) of Rule 2-A-5, which requires that employees "be given full cooperation of the department heads and others in their effort to qualify," gives an employee having "fitness and ability" for a position assistance to qualify for an assignment. Further, it contends that paragraph (d) of Rule 3-C-1 permits the Carrier to allow a displacing employee to assume the position and retain the junior incumbent on the position to assist in qualifying the senior employee. It argues that the Carrier's failure to grant the Claimant his displacement right is because there may be a slight disruption in the department's operations. The Organization urges that the claim be sustained.

The Carrier argues that it has the managerial right to determine whether or not an employee is qualified for a particular position. Citing precedent it contends that the Claimant lacked the requisite fitness and ability to fulfill the functions of the position he sought. In addition, the Carrier argues that the Agreement does not require it to allow a senior employee to displace a junior qualified employee and then train the senior employee for the desired position.

The Carrier further argues that Rule 2-A-5 provides an employee 30 days in which to qualify once the employee has been awarded a bulletined position or permitted an exercise of seniority to a particular position, but does not provide an employee with 30 days to be trained. Citing precedent it contends the 30 days to

qualify has no application unless or until an employee is awarded or permitted to displace on a position.

The Carrier further argues that the Organization failed to meet its burden of proof in establishing a violation and that "mere assertions" are not proof. Citing authority, the Carrier contends that, because the Organization has not submitted any proof that violation occurred with respect to the claim, it must be denied.

Finally, the Carrier argues that the Organization has not shown that the Claimant suffered any loss in earnings because he was not allowed to exercise seniority to the involved position. It notes that, in fact, the Claimant exercised his seniority to another position and is making more money than he would be making working the Clerk-Typist position that is the subject of this dispute. The Carrier urges that the claim be denied.

The Board is persuaded that the claim on behalf of the Claimant must be sustained. The evidence establishes that the Claimant was prevented from exercising his displacement right to the Clerk-Typist position. The Carrier's view was clearly stated in its letter of November 29, 2001, denying the claim:

"During discussion of this dispute it was the Organization's position that claimant had the requisite fitness and ability to work the above position.

We disagreed. Our investigation of this matter reveals that claimant was not proficient in the HTE/CHIEFS Public Safety AS400 Computer System. Additionally, the claimant had not passed a police background check. Moreover, the Organization has failed to submit evidence that claimant possesses the necessary fitness and ability to displace on the involved position. . . ."

In short, the Carrier contends that the Claimant lacked the requisite fitness and ability because he was not fully qualified for the position. However, the literal language of Rule 2-A-5 of the Agreement does not read the way the Carrier wishes. It is clear that employees need not be fully qualified before they may exercise their displacement rights: "Employees . . . exercising displacement rights will be allowed thirty (30) days in which to qualify. . . ." During the 30-day period, in accordance with paragraph (c) of Rule 2-A-5, the employer must, at a minimum, demonstrate

the equipment, provide training manuals, and answer questions from the displacing employee while he attempts to qualify for the position.

The Board recognizes that, having eventually exercised his displacement rights to what may actually be a higher rated position (in which case he may not be entitled to additional money), the Claimant may no longer wish to pursue the Police Data Entry position. In addition, the Board recognizes that, as suggested by the December 26, 1995 Agreement establishing these data entry positions, this particular Clerk-Typist function may be complicated. The Claimant may fail to qualify within 30 days. However, the parties did not modify their Agreement, nor did they create a special exemption in order to account for the complicated nature of this position. Rule 2-A-5 of the Agreement requires the Board, if the Claimant still desires, to give him an opportunity to exercise his displacement rights.

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 25th day of February 2004.