

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38233
Docket No. CL-38156
07-3-04-3-55

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

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

STATEMENT OF CLAIM:

**"Claim of the System Committee of the Organization (GL-13020)
that:**

Claim No. 1

This constitutes a claim/grievance on behalf of Mr. Noval Jackson headquartered in Denver, Colorado. If as a result of Amtrak's current changes in management you are no longer the person to respond to this claim/grievance, please forward this letter to the appropriate person and advise the undersigned accordingly. As a professional courtesy, I am also forwarding a copy of this claim to the Divisional Manager of Labor Relations, Ms. V. J. Giulian.

- 1) Carrier violated Rules 5, 6 and 8 and other related rules of the Agreement when they acted in a capricious, arbitrary and discriminatory manner by the process in which they furloughed Claimant. Claimant's treatment was disparate in nature compared to former management employees similarly situated who were allowed back into the craft and onto a Ticket Clerk position for which they had no prior experience. On February 27, and March 04, 2002, Claimant bid for twelve (12) Ticket Clerk positions that were open for bid in Denver, Colorado. The Carrier awarded the positions to employees junior to Claimant which subsequently forced Claimant to an unassigned status.**

- 2) Notwithstanding the above, the Carrier violated Article XI of the September 06, 1991 Mediation Agreement by their failure to hold a Ticket Clerk training class in Denver, Colorado since the inception of the Rule.
- 3) Beginning with the date of the job awards (March 01, 2002) and continuing until the Carrier places Claimant on one of the positions of his choice that his seniority would allow, they shall be required to compensate Claimant forty (40) hours per week at the Ticket Clerk rate of \$18.56 per hour including holiday pay, vacation pay and sick days. This shall be ongoing liability until this dispute is settled or this claim is honored.
- 4) The Carrier shall further be required to reimburse Claimant for any out-of-pocket medical, dental or surgical expenses to the extent that such payments would have been payable by the current insurance provided by the Carrier under the terms of the governing Agreement.

Claim No. 2

This constitutes a claim/grievance on behalf of Mr. Clifton Simms headquartered in Denver, Colorado. If as a result of Amtrak's current changes in management you are no longer the person to respond to this claim/grievance, please forward this letter to the appropriate person and advise the undersigned accordingly. As a professional courtesy, I am also forwarding a copy of this claim to the Divisional Manager of Labor Relations, Ms. V. J. Giulian.

- 1) Carrier violated Rules 5, 6 and 8 and other related rules of the Agreement when they acted in a capricious, arbitrary and discriminatory manner by the process in which they furloughed Claimant. Claimant's treatment was disparate in nature compared to former management employees similarly situated who were allowed back into the craft and onto a Ticket Clerk position for which they had no prior experience. On February 27, and March 04, 2002, Claimant bid for twelve (12) Ticket Clerk positions that were open for bid in Denver,

Colorado. The Carrier awarded the positions to employees junior to Claimant which subsequently forced Claimant to an unassigned status.

- 2) Notwithstanding the above, the Carrier violated Article XI of the September 06, 1991 Mediation Agreement by their failure to hold a Ticket Clerk training class in Denver, Colorado since the inception of the Rule.
- 3) Beginning with the date of the job awards (March 01, 2002) and continuing until the Carrier places Claimant on one of the positions of his choice that his seniority would allow, they shall be required to compensate Claimant forty (40) hours per week at the Ticket Clerk rate of \$18.56 per hour including holiday pay, vacation pay and sick days. This shall be ongoing liability until this dispute is settled or this claim is honored.
- 4) The Carrier shall further be required to reimburse Claimant for any out-of-pocket medical, dental or surgical expenses to the extent that such payments would have been payable by the current insurance provided by the Carrier under the terms of the governing Agreement.

Claim No. 3

This constitutes a claim/grievance on behalf of Mr. Frank Graham headquartered in Denver, Colorado. If as a result of Amtrak's current changes in management you are no longer the person to respond to this claim/grievance, please forward this letter to the appropriate person and advise the undersigned accordingly. As a professional courtesy, I am also forwarding a copy of this claim to the Divisional Manager of Labor Relations, Ms. V. J. Giulian.

- 1) Carrier violated Rules 5, 6 and 8 and other related rules of the Agreement when they acted in a capricious, arbitrary and discriminatory manner by the process in which they furloughed Claimant. Claimant's treatment was disparate in nature compared to former management employees similarly

situated who were allowed back into the craft and onto a Ticket Clerk position for which they had no prior experience. On February 27, and March 04, 2002, Claimant bid for twelve (12) Ticket Clerk positions that were open for bid in Denver, Colorado. The Carrier awarded the positions to employees junior to Claimant which subsequently forced Claimant to an unassigned status.

- 2) Notwithstanding the above, the Carrier violated Article XI of the September 06, 1991 Mediation Agreement by their failure to hold a Ticket Clerk training class in Denver, Colorado since the inception of the Rule.
- 3) Beginning with the date of the job awards (March 01, 2002) and continuing until the Carrier places Claimant on one of the positions of his choice that his seniority would allow, they shall be required to compensate Claimant forty (40) hours per week at the Ticket Clerk rate of \$18.56 per hour including holiday pay, vacation pay and sick days. This shall be ongoing liability until this dispute is settled or this claim is honored.
- 4) The Carrier shall further be required to reimburse Claimant for any out-of-pocket medical, dental or surgical expenses to the extent that such payments would have been payable by the current insurance provided by the Carrier under the terms of the governing Agreement."

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 February 20, 2002, the Carrier carried out a reduction-in-force by abolishing all 29 clerical positions in Denver, Colorado. The abolished positions included the full-time baggage person positions held by the Claimants. The Carrier reorganized the work among 12 Ticket Clerk positions and bulletined them. The Claimants bid on the positions, but were denied them in favor of employees with less seniority.

The Organization launched a broad side attack. During handling on the property, it argued that the Carrier improperly combined Baggage person and Ticket Clerk jobs into a single position. The Carrier relies on Rule 1(d) which provides:

“When a reduction in force occurs, the remaining work will be covered by employees covered by this Agreement.”

We agree that the Carrier complied with Rule 1(d). The Organization has not cited any Agreement Rule that would otherwise control. Accordingly, we reject the Organization argument.

The Organization further argues that the Carrier violated Article XI of the September 6, 1991 Mediation Agreement by its failure to hold a Ticket Clerk training class in Denver, Colorado, since the inception of the Rule. Article XI of the September 6, 1991 Mediation Agreement provides, in relevant part:

“(a) Ticket Clerk Training

(1) Corporate Agreement

Prior to the awarding of a ticket clerk position to a junior unassigned employee trained after the date of this agreement, Amtrak will offer ticket clerk training to senior regular assigned employees at the location. Seniority will govern among applicants having sufficient fitness and ability.

Successful applicants for ticket clerk training will be paid the rate of their former position while engaged in training, but no more than the appropriate ticket clerk rate. Upon completion of training, employees will be considered automatic bidders for ticket clerk positions at their location and must remain on ticket clerk positions for a one year period. Rule 8 will apply from the date assigned the position. If extra boards are established for ticket clerk positions, such ticket clerk positions will be treated as regular assigned positions for the purpose of this provision.

(3) Ticket clerk classes will be offered periodically at the following locations, as indicated:

(i) semi-annually – New York, Washington, D.C. and Philadelphia;

(ii) annually – Los Angeles, Chicago and Boston.

Such classes may be canceled if there are less than five eligible trainees or if manpower needs do not warrant additional training at the time. Amtrak may offer centralized ticket clerk classes at other locations consistent with this Article; notification to employees of such classes will fulfill Amtrak's commitment to offer training to senior regularly assigned employees contained in (a)(1) and (2) above. Employees who successfully complete the training will be considered automatic bidders for ticket clerk positions at their location and will be required to remain on ticket clerk positions for 12 months. Amtrak will make a reasonable effort to release employees for training. If employees are not released due to requirements of service, they will be automatically considered for the next available training."

On its face, Article XI only requires that ticket clerk training classes be offered at New York, Washington, D.C., Philadelphia, Los Angeles, Chicago and Boston. There is no requirement that such training classes be offered at Denver. Accordingly, this portion of the Organization's attack must be rejected.

The critical question before the Board concerns the interaction of Rules 5, 6 and 8. Rule 5 provides:

"Employees 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 right of the senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

The company shall be the judge of fitness and ability, but shall not act in a capricious, arbitrary and discriminatory manner in the application of this rule. Alleged violations of this obligation may be appealed in accordance with Rule 25 (Grievances)."

Rule 6(b) provides:

"Bulletined positions will be awarded to the senior qualified bidder within ten (10) calendar days following close of the advertising period, and except when conditions beyond control of the corporation prevent, notice of award will be posted where the position was bulletined on the following Wednesday showing position, date bulletined, the name of the employee awarded the position, and the effective date of the award."

Rule 8 provides, in relevant part:

"(a) Employees awarded bulletined positions or exercising displacement rights will be allowed thirty (30) calendar days in which to qualify and failing to qualify may exercise seniority under Rule 10. The thirty (30) calendar days may be extended by agreement between the appropriate organization representative and the proper corporation official.

- (b) When it is evident that an employee will not qualify for a position, after conference with the District Chairman, he may be removed from the position before the expiration of thirty (30) calendar days and be permitted to exercise seniority under Rule 10. The appropriate organization representative 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 efforts to qualify."

The Carrier argues that the Claimants were not qualified for the Ticket Clerk positions. It contends that the Claimants previously forewent opportunities to seek Ticket Clerk training. It further relies on Article III, Section 8 of the September 2, 1994 Mediation Agreement, which provides:

"An employee who has worked a regular assigned arrow ticket clerk position for more than 30 days will be deemed to have sufficient fitness and ability to exercise seniority to ticket clerk positions with arrow requirements. Such employees will be subject to Rule 8 (Failure to Qualify) and Rule 2-A-5 (Time in which to qualify)."

On its face, Article III, Section 8 provides a method of having sufficient fitness and ability. It appears to apply regardless of how long ago the employee worked a regular assigned Ticket Clerk position. However, it does not purport to specify the exclusive means of establishing sufficient fitness and ability.

Rule 8(a) provides that an employee awarded a bulletined position is allowed thirty days in which to qualify. Rule 5's provision that seniority governs where fitness and ability is adequate and Rule 6's provision for the award of the position to the senior qualified bidder must be read together with Rule 8's allowance of 30 days to qualify once the position is awarded.

Numerous Awards have interpreted comparable language of other Agreements to the effect that fitness and ability do not require employees to be immediately qualified to step in and perform the job, but rather that they have such training, experience and character to raise a reasonable probability that they will be able to perform all duties of the position within a reasonable time. See, e.g., Third Division Awards 22357, 7847, 5348 and 3193. Rule 8 sets that reasonable time as 30

calendar days, with further provision to disqualify an employee earlier if it is apparent that the employee will not qualify for the position.

The question whether an employee possesses sufficient fitness and ability necessitates a fact-based inquiry that can only be conducted on a case-by-case basis. In the instant case, the reasons the Carrier cited for not awarding the positions to the Claimants were their not having worked the Ticket Clerk position in the past and their not having taken advantage of prior opportunities to seek Ticket Clerk training. However, the Carrier has provided no specific reason to believe that the Claimants would be unable to perform the job within the 30-day qualifying period. The Carrier did not explain why the formal training or prior experience was necessary for these Claimants to have a reasonable probability of performing the job within 30 calendar days. Indeed, the record reflects that beginning in May 2002, the Interim Supervisor allowed the Claimants to post with existing Ticket Clerks and allowed them time off to travel to Chicago, Illinois, to take a rail reservation class, a class designed to upgrade the skills of existing Ticket Clerks to use the Carrier's new reservations system. There is no evidence of any dissatisfaction with their performance as Ticket Clerks. Apart from relying on a general view that employees lacking prior Ticket Clerk experience or not having gone through the formal Ticket Clerk training classes lacked sufficient fitness and ability, the Carrier offered no reason to believe that the Claimants could not have performed the job within the 30-day qualification period. We recognize that hindsight is always 20-20, but given that beginning in May 2002 the Claimants were allowed to perform as Ticket Clerks and apparently performed satisfactorily, calls for the Carrier to provide specific reasons why it believed the Claimants did not have a reasonable probability of performing the job within 30 days. Accordingly, we find that the Carrier violated Rule 5 in awarding the positions to junior bidders. We emphasize that our finding is confined to the particular record presented to us.

This case also raises questions of remedy. First, the claim seeks reimbursement for out of pocket medical expenses. During handling on the property and before the Board, the Carrier contended that the Agreement does not provide for such a remedy. The Organization never responded to this contention and failed to cite any authority for such a remedy. Accordingly, this aspect of the claim will be denied.

Second, as noted above, beginning in May 2002, the Claimants began working as Ticket Clerks. Accordingly, any backpay awarded to the Claimants must be offset by their actual earnings once they began working as Ticket Clerks.

AWARD

Claim sustained in accordance with the Findings.

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 18th day of July 2007.