Award No. 1093
Docket No. CL-1153

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE NEW YORK CENTRAL RAILROAD COMPANY (BUFFALO AND EAST)

STATEMENT OF CLAIM: "Claim of System Board of the Brotherhood on the New York Central Railroad Co., Buffalo and East:

"I. That Miss Marion O. Brainard be reimbursed at the rate of $105.20 per month for the period May 16, 1938 to June 2, 1938, inclusive, during which she was denied assignment to position of Comptometer Operator in violation of the provisions of rules agreement.

"II. That Miss Mary F. Hanrahan be assigned to position of Comptometer Operator rate $105.20 per month, effective June 8, 1938 and that she be reimbursed in full for all wage loss suffered due to having been denied assignment to this position in violation of the provisions of rules agreement."

EMPLOYES' STATEMENT OF FACTS: "Miss Marion O. Brainard and Miss Mary F. Hanrahan, Clerks in the Car Service office, Buffalo, N. Y., were notified April 14, 1938 that their positions were to be abolished as of the close of business April 15, 1938.

"Both these Clerks immediately made known to Management their desire to exercise seniority rights in displacement to Comptometer Operator positions, rates $105.20 per month, held by junior employes in the same office and on the same seniority roster.

"Miss Brainard whose seniority date is April 16, 1929 asked to displace Mrs. A. E. Rich, seniority date May 9, 1929; Miss Hanrahan whose seniority date is April 16, 1929, to displace Miss L. N. Kleinhans, seniority date November 6, 1929.

"The following which is quoted from memorandum furnished the General Chairman as a record of what transpired in conference attended by these employes April 19, 1938, upon instructions of Mr. M. R. Clinton, Assistant Superintendent Car Service and in his office, sets forth in Mr. Clinton's own language the conditions under which they were required to proceed in using their displacement rights to Comptometer Operator positions.

> 'We explained to you that you would be given a period of thirty (30) working days, at your own time and expense, six (6) days of which would be considered the qualifying period,' and during that period of six (6) days, you understand, you are to perform at least

Last 2 paragraphs, Page 3
First 2 paragraphs, Page 4
3rd, 4th, 5th and 6th paragraphs, Page 6
Last complete paragraph, Page 7
Last 4 paragraphs, Page 8, and para. ending on Page 9.

"The management merely wishes to reiterate that its action was only to the end of treating all employes in a fair and impartial manner on the basis of the requirements of the rules.

"In conclusion, Management desires to emphasize its fairness in giving these individuals twenty-four days in which to prepare to qualify, if necessary, and six additional days in which to demonstrate their qualifications. Assistance and help was given them voluntarily on the part of the Management during this period. As previously stated, comptometer work requires special training and is not ordinary clerical work; individuals who have occupied clerical positions for many years would not be able to perform that work without special training in the operation of comptometer machines. The employes contend that so-called speed tests were not contemplated by the rule, but the fact is that there is nothing in the agreement which prescribes what method shall be adopted in determining the ability and efficiency of applicants for displacement. Management contends that this is not a 'speed test' as other factors, such as accuracy, knowledge of the details of tonnage work, etc., are pertinent in such a determination. While the final question of qualifications must rest with the officials in charge, it is noteworthy that the basis adopted for judging the qualifications of these two individuals was closely similar to that agreed to between the Management and the former General Chairman under date of June 15, 1932. It will be obvious to your Board, therefore, that the Management gave these individuals more consideration than the agreement calls for. Of course, the circumstances in unusual cases of this kind must be recognized as not covered by the rules, but the management believes your Board will recognize that it acted equitably in the handling of these cases.

Management's Comments on 'Employes' Comments on Carrier's Position':

"Management simply desires to reiterate its statements and contentions as hereinbefore set forth."

There is in evidence an agreement between the parties bearing effective date of September 1, 1922.

OPINION OF BOARD: The facts and the contentions of the parties are sufficiently set forth in their respective submissions.

The dispute here before us involves the interpretation or application of Rules 4, 7 and 19. As the positions formerly occupied by the employes in question were abolished effective April 16, 1938, and they were seeking to exercise displacement rights over their juniors in service under the provisions of Rule 19, it then becomes our first duty to determine if that rule was correctly applied by the carrier.

Rule 19 first provides that employes displaced, or whose positions are abolished, may exercise displacement rights within ten days thereafter. The second provision is that, "Such employes will be given opportunity to qualify at their own expense."

Rule 19 does not specify any particular period of time in which employes must qualify. It merely says that they will **qualify at their own expense.** The longer it takes employes to qualify, the greater burden of expense it places on them. On the other hand, the more quickly they qualify, the earlier they will be assigned to positions and start drawing compensation. There is every inducement in the rule to cause employes to master their duties and qualify with promptness.

Nor does Rule 19 provide any such condition precedent to qualifying as was here imposed, arbitrarily, by the carrier, viz., that the employe exercising displacement rights shall be able to

> "perform at least ninety (90) percent of the work currently that is being done by the clerk holding the position into which you are attempting to displace."

Further, this rule does not call for a competitive speed test through a period of 48 working hours, the result of which is the basis for declaring whether the employe using seniority rights to displace, or whether the one already assigned, is to have the position involved.

Rule 19 which applies in the instant case does not provide either by specification or implication any restriction whatsoever as to any period of time during which it is necessary that an employe exercising seniority rights qualify when displacing a junior employe. While Rule 7 **does** provide that employes when promoted under Rule 4 will be allowed a reasonable time in which to qualify (not less than 10 days), the fact that Rule 7 refers to time for qualifying, and the fact that Rule 19 does not, both agreed upon at the same time by the same parties, is the best evidence that it was not intended that the latter rule should carry a time limit or any other restriction.

Rule 4, which applies in cases where employes are seeking promotion in the exercise of their seniority rights, and which does not specifically apply in cases where employes are exercising displacement rights under Rule 19, provides only that where ability and fitness of an employe are **sufficient,** seniority shall prevail. The requirement in Rule 19 under which an employe is actually being demoted, unless there is a specific provision therein, should at least be no greater than the requirement under Rule 4 dealing with promotions.

Under Rule 19, speed tests are not sanctioned or, in fact, permitted; nor is it necessary that the senior employe in service, displacing the junior one, have his work compared on a quantity percentage basis with the employe he is displacing in the exercise of seniority rights.

To illustrate, it is just possible that the junior employe in the office about to be displaced is the speediest worker in the entire office. Say, that in such case, and it is entirely possible, this junior employe can perform 25 to 50 percent more work than the average in the office; then it would be necessary for the senior displacing employe, under the plan here arbitrarily instituted by the carrier, to perform 90 percent of 125 to 150 percent of the office average before that employe could qualify. Certainly, no such requirement was intended in the exercise of seniority rights, when the only requirement, even by inference, that could possibly apply is the **sufficient** ability and fitness requirement contained in Rule 4.

While it is true that at one time, effiective June 15, 1932 the parties to the agreement did reach an understanding as to the requirements an employe would have to meet in exercising displacement rights under Rule 19, it is also shown that those requirements were cancelled by the petitioner effective November 9, 1933.

Carrier argues that the former General Chairman, in conference with the carrier officers, January 28, 1931, stated what he believed would be a fair requirement under Rule 19, but we think the record shows that any such statement then made by the General Chairman was superseded by the agreement between the parties effective June 15, 1932, and which agreement was cancelled effective November 9, 1933. Further, such memorandum is too indefinite to be considered binding upon either party.

In any event, the memorandum referred to by the carrier was dealing with a situation where an employe had no training whatsoever as a stenographer or comptometer operator. The interpretation placed on that mem-

orandum by the carrier, as shown by the Chief Personnel Officer's letter of June 14, 1932, indicated that he felt when an employe desired to displace a comptometer operator under Rule 19, the employe should be sufficiently experienced to turn out a reasonable amount of work in an accurate and satisfactory manner, and if the employe could do this, the officer in charge should not deny the senior employe the right of displacement.

It is shown in the record and not disproven by the carrier that both of the employes involved in this dispute, viz., Misses Brainard and Hanrahan, had some previous experience in operating comptometer machines. It is also shown that both of these employes had previously used comptometer machines to a certain extent in performing their clerical work, and that prior to their positions being abolished, realizing that such was about to happen, they both attended night school, where they received instructions and practice in the operation of comptometer machines.

The petitioner shows, and carrier substantially admits, that under the established practice of long standing on this railroad, when an employe has sought to make a displacement under Rule 19, he has been given opportunity to become familiar with the duties of the position sought, and when he has done so and makes proper request, he is then placed on the position under pay. If question is then raised that the employe can not satisfactorily perform the work on the newly acquired position, such question is determined from the record of actual performance on the job.

The record indicates that the carrier has attempted arbitrarily to modify or change the provisions of Rule 19, and also to change the accepted use of seniority rights under these rules of many years standing.

As to the qualifications of Miss Brainard, it is shown that during the so-called test period, she performed 85% of the work of the junior employe she was later permitted to displace on June 3, 1938, following her request of May 12 that she be placed on the position May 16. Her claim, therefore, only involves reparation for the period May 16 to June 3, 1938, and it should be sustained. We feel that if she had **sufficient** qualifications to be placed on the position June 3, with her experience, she was so qualified May 16.

Miss Hanrahan is shown, during the so-called test period, to have performed 71.2% of the work of the junior employe she sought to displace. While, as we have previously stated, we do not construe the rules of the agreement as calling for the requirements here arbitrarily imposed by the carrier, we do feel that such a showing on the part of Miss Hanrahan indicates that she had **sufficient** qualifications to have been placed on the position under compensation when she was denied it by her superior on June 9, 1938.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the requirements arbitrarily imposed by the carrier on employes in exercising their seniority rights under Rule 19 are contrary to the pro-

visions thereof, and that the two employes involved shall be compensated as shown in the Opinion.

AWARD

Claims (1) and (2) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 23rd day of May, 1940.