Award No. 2427
Docket No. CL-2432

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

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

WABASH RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) Clerk Frank J. McGee be assigned to clerical position in the local freight office, Kansas City, designated on clerical roster as General Utility Clerk, with an established rate of $6.93 per day.

(b) Clerk Frank J. McGee be compensated for monetary loss sustained retroactive to and including January 7, 1943, effective date on which Clerk McGee signified that he wished to displace Clerk A. J. Pinter.

EMPLOYES' STATEMENT OF FACTS: Following abolishment of a clerical position at Corn Products Plant, North Kansas City, on or about December 31, 1942, Clerk A. A. Ward, occupant of said position, exercised his seniority by displacing Clerk Frank J. McGee on position of Machine Bill and Yard Clerk at North Kansas City, rate $6.64 per day.

Under date of January 6, 1943, Clerk Frank J. McGee advised Mr. R. W. Berrey, Superintendent, to the effect that he wished to exercise his seniority by displacing Clerk A. J. Pinter, assigned to position of General Utility Clerk, or Switching desk as the position is referred to in the office, effective January 7, 1943.

Request of Clerk Frank J. McGee was declined by Mr. Berrey in conference with Local Chairman on January 7, 1943. Refusal of Superintendent Berrey to permit Clerk McGee to displace Clerk A. J. Pinter on position designated as General Utility Clerk was later confirmed by Mr. Berrey in letter to Local Chairman dated February 17, 1943. A true copy of this letter is submitted as Employes' Exhibit "A."

Following refusal of Superintendent to permit Clerk McGee to displace Clerk Pinter, Clerk McGee wrote Mr. Berrey on January 9, to the effect that he would exercise his seniority as second choice on a position designated as Utility Clerk, effective 9:00 A. M., Monday, January 11, 1943, and fill that position pending final disposition of his claim to position of General Utility Clerk.

Seniority date held by Clerk Frank J. McGee on the Kansas City Terminal Division is November 30, 1923. Seniority date held by Clerk A. J. Pinter is January 23, 1924.

Attention of the Board is invited to Docket No. CL-54, Award No. 52, of the National Railroad Adjustment Board, Third Division, and in support of the position of the Carrier in the alleged dispute referred to herein attention is directed to the Carrier's original submission and exhibits thereto submitted to the Board in Docket CL-54.

The foregoing shows that the alleged claim set up in the Committee's ex parte Statement of Claim is without foundation under the rules of the Schedule for Clerks, and, therefore, the contention of the Committee should be dismissed and the claim denied.

OPINION OF BOARD: McGee's request for the position in question was denied by the Division Superintendent by letter as follows:

> "Due to the fact that the duties on this position require a thorough knowledge of switching rates of all lines in greater Kansas City and of the further fact that you have had no experience and are not qualified to assume the duties of this position, and of the still further fact that you admitted to Chief Clerk Wooldridge and myself that you knew nothing of the work on this desk but expected other employes in the office to get you by until you could learn the work, I cannot accept your request to be permitted to exercise your seniority on and displace Clerk Pinter on the General Utility Clerk position in the Local Office."

In other words, the reason for the denial was that McGee, whose seniority and clerical work dated back to 1923, was not "qualified to assume the duties of this position" because they required a "thorough knowledge of switching rates" in which he had "no experience." There was no suggestion that McGee had not the "fitness and ability" to learn and perform the duties of the position.

The agreed interpretation of Rule 11, paragraph (r), fifth section, is that seniority shall govern displacement rights, "fitness and ability being sufficient, * * * the immediate supervising officer to be the judge."

In brief the question is whether the applicant has "fitness and ability" for the position and not whether he is immediately "qualified to assume the duties of the position." If the seniority rule is not to be largely nullified the distinction is essential, since obviously no employe can have experience in a particular position so as to be immediately qualified to assume the duties unless he has already held that position or one closely similar to it.

That the parties had the distinction in mind in making the rules is shown by the interpretation of June 24, 1930, that "employes displacing junior employes shall be allowed a reasonable time to **qualify**" for the particular position.

The Carrier contends that the latter interpretation applies only to "employes **displacing** junior employes" and not to those denied the right by their immediate supervising officers. But it is not necessary to determine the question, as it is apparent that here the denial was based, not upon applicant's lack of "fitness and ability," but upon his lack of qualification by experience in the position, for which, according to the interpretation, the employe who has the necessary fitness and ability is entitled to "a reasonable time to qualify."

While, under Rule 11, paragraph (r), the immediate supervising officer is to be the judge of fitness and ability, he must use his judgment with reasonable discretion and not in a manner which fails to give effect to the rule, whether because of arbitrary action or because of a misconception of the meaning of the rules.

The record shows that McGee offered to take his twelve-day vacation and devote the time to learning the work but was not permitted to do so. McGee was denied the assignment and the "reasonable time to qualify," not on the ground that he had not the requisite "fitness and ability," but on the mistaken

ground that he was not yet qualified because of a lack of actual experience in the work of the position. It is our conclusion that the rule has been violated and that the claim must be sustained.

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 Employe involved in this dispute are respectively carrier and employe 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 Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 17th day of December, 1943.

DISSENT TO AWARD NO. 2427, DOCKET CL-2432.

Under the interpretation cited, and recognized by the Opinion (3rd and 6th par.), an employe seeking to displace a junior employe must possess the necessary fitness and ability. The error of the Award is found in the assertion that the Carrier advised the employe he was not "qualified to assume the duties of this position" instead of advising him he lacked " 'fitness and ability' to learn and perform the duties of the position." There follows then an attempted distinction between the term "qualified" and "fitness and ability," in support of the claim. There is no logical support whatever for such distinction under the practical application of the rules involved. The term "fitness and ability" as referred to in all the rules and the interpretation here involved, and the term "qualified" as it may be used as a substitute for "fitness and ability," both presuppose the existence of reasonable qualifications for the work to be performed on a particular position before the obligation would attach to the Carrier to afford an opportunity to the applicant to qualify for the particular position which had been awarded to the employe either in response to his bid therefor or his request to displace thereon. In making distinction otherwise the Award is clearly in error.

/s/ A. H. Jones
/s/ C. P. Dugan
/s/ R. F. Ray
/s/ R. H. Allison
/s/ C. C. Cook

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 2427
DOCKET CL 2432

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Wabash Railroad Company

Upon application of the representatives of the Employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as providde for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

This Division's award sustained the claim that Frank J. McGee should be assigned to the position of General Utility Clerk and that he should be compensated for any monetary loss sustained by reason of the Carrier's refusal so to assign him.

The position of General Utility Clerk is a six day position under the Rules, and A. J. Pinter, who filled the position during the period, received total earnings of $2166.12, of which $67.60 was for overtime and $2098.52 constituted his regular earnings at $6.93 per day. McGee, however, filled the position of Utility Clerk, which was a regular seven day position under the Rules, and received total earnings of $2858.74, of which $375.81 was for overtime and $2428.93 constituted his regular earnings at $6.06 per day. Thus, without regard to overtime, McGee's regular earnings during the period exceeded Pinter's by $384.41; and, including overtime, by $692.62.

Having thus on either the regular, or regular and overtime basis, received more money than Pinter it is clear that McGee sustained no monetary loss; on the contrary, he actually received $692.62 more than he would have received if he had been assigned to the desired position. But it is contended (1) that the overtime should be left out of consideration, and (2) that in computing the difference in pay, only the six days which comprised the ordinary week's work in the position of General Utility Clerk should be taken into account; in other words, that all the extra earnings both because of overtime work and because the regular work week was seven days instead of six, should be ignored. The result would be to ignore the actual earnings and to hold that McGee lost 87¢ per day, six days per week during the period.

Interpretation No. 1 to Award No. 2144 is relied upon as a precedent barring overtime as an element in computing monetary losses in this class of claims. However, in that claim the award was expressly stated as "for time lost **at the scheduled rate of pay** of the position" less other wages received; and in the Interpretation this Division said:

> "This means the regular rate of pay without regard to overtime. Not only is this the correct interpretation of the language taken by itself, but it is the only construction which leads to a practical solution of the problem. Without clear and specific direction in the award, we should not base one man's wage loss on the amount of overtime and extra work which another man might perform in the same position."

While the second sentence quoted above from the Interpretation indicates the opinion that overtime should ordinarily not be considered, it does not constitute a precedent to that effect, since the Award in that case specifically limited the monetary reimbursement to "time lost at the scheduled rate of pay."

Whether the Division believes that overtime should be excluded is immaterial in this instance, and therefore unnecessary to consider; for in the event of its exclusion it is impossible to find that the employe has sustained monetary damage, since his regular earnings in the position held exceeded the regular earnings he would have received in the position bid for. The contention that the seventh day must be considered in the nature of overtime cannot be sustained, in view of the Rules' establishment of the position as a regular seven day one. Nor can the extra day's pay on the seven day job be considered as within the reason for the exclusion of overtime pay suggested in the Interpretation to Award No. 2144, which was: "Without clear and specific direction in the award, we should not base one man's wage loss on the amount of **overtime and extra work** which another man might perform in the same position." Since the position was a regular seven day one, any one who filled it would have worked the seven days, just as McGee did, and the extra day's pay was regular and not in the nature of "overtime and extra work."

Whatever method of computation is used in this Award will establish a precedent for future awards, and we must consider its effect if the situation were reversed. If McGee had been entitled to a seven day position and had been denied it and had been given only a six day position, he would obviously not be satisfied with compensation only on a six day basis; while he would have had to work an extra day each week to earn the money, his **monetary loss** because he was not assigned to the position would nevertheless include the entire regular pay which he was denied the opportunity to earn. The rule must obviously work both ways.

Neither precedent nor logical reason is presented for excluding any part of the regular salaries in the two positions, in computing the monetary loss sustained by the employe. As the record shows that the employe has sustained no monetary loss, he is entitled to no monetary compensation.

Referee Howard A. Johnson participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 26th day of April, 1944.