Award No. 3730
Docket No. DC-3722

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL OF DINING CAR EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local 370, on the property of the Pennsylvania Railroad, for and in behalf of Everett Smith, Waiter to be allowed to exercise his seniority on Train No. 28, and be compensated to the extent suffered as a result of Carrier's action in not allowing him to exercise his seniority on October 17, 1946.

EMPLOYES' STATEMENT OF FACTS: Claimant Everett Smith was employed as waiter in the Dining Car Department of the Carrier herein involved on September 27, 1944—a position he has filled continuously on numerous trains operating out of the Chicago District since that date.

On October 17, 1946, in accordance with Rule 3 (3-E-1)* of the current agreement Claimant Smith was displaced from his regular assignment by a senior employe. Management refused his request under the alleged authority of Rule 2 (2-A-1).** In the usual manner the questions of arising from the denial of Claimant's request to displace on Train No. 28 were progressed up to and including the Chief Officer of the Carrier designated to handle such matters. No adjustment has been reached.

POSITION OF EMPLOYES: Rule 2 (2-A-1) does not give Carrier a free hand in denying an employe's application for assignment to a given position. The rule does however place upon the Carrier the burden of proving, beyond a moral certainty, that an applicant desiring a position, does not possess either the "ability or fitness" to be assigned thereto.

The term "ability and fitness" as used in the rule can mean only that the employe possesses the necessary skill to perform the required duties and is physically able to execute them.

The Claimant herein involved is a skilled waiter—he does not frequently absent himself from duty; his work on trains to which he has been assigned has been efficient and satisfactory, and has not occasioned complaints of a serious nature from either supervisory personnel or passengers. Claimant

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*(3-E-1) "An employe displaced from his regular position by a senior employe in the exercise of seniority, may, within ten (10) days, exercise seniority to any position held by a junior employe, subject to the provisions of Rule 2-A-1."

**(2-A-1) "Ability, fitness and seniority are essential in the consideration of employes' application for assignment to preferred positions. The proper Officer shall decide whether the applicant is qualified therefore."

class, possessed more fitness and ability than the former Head Waiters and award the runs or positions to the more capable employes."

In his statement quoted above the General Chairman suggests that the Carrier assign the more capable employes to certain positions. Thus the position of the Employes at that time was not the same as it is today. They now apparently contend that so long as an employe holds seniority as a waiter he must be assigned to any position for which he bids without regard to fitness and ability. The evidence contained in the General Chairman's letter and the minutes of the discussion at meeting of July 11 and 12, 1938, clearly shows that the present contention of the Employes is contrary to the practice which has always been understood and followed.

A copy of the General Chairman's letter of May 29, 1939, is attached hereto and made a part hereof as Exhibit "B".

The Organization is fully aware of the Claimant's short-comings as a waiter but they argue that, because the Carrier employed him as a waiter, it is obliged to permit him to work on any train to which his seniority entitles him. With this the Carrier disagrees, and as shown above, many awards of your Honorable Board have been to the effect that the Carrier has a limited discretion in such matters, particularly in situations in which the rules clearly give it the right to decide whether an applicant is qualified. If the meaning of the Agreement is as stated by the Employes, then there could be no situation in which the Carrier would have the right to refuse a position to an employe because of his lack of ability or fitness.

The Carrier, therefore, respectfully submits that in the instant case the decision that the Claimant was not qualified for service as a waiter on the "Broadway Limited" was taken only after carefully considering his lack of ability and fitness for such position and that this action was taken in good faith and without bias or prejudice, and for the good of the service, and its action should be sustained.

III. **Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Agreement between the Parties and to Decide the Present Dispute in Accordance Therewith.**

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreement covering rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreements between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has not no jurisdiction or authority to take such action.

CONCLUSION

It is respestfully submitted that the Claimant did not possess the necessary fitness and ability for the position he sought and the requests hould be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is made in this case that Waiter, Everett Smith, be allowed to exercise his seniority on Train No. 28 and be compensated to the extent suffered because of his not being permitted to so exercise his seniority on October 17, 1946.

Smith was employed as a waiter in the Dining Car Department of the Carrier in 1944. On October 17, 1946, a senior employe displaced him from his regular "swing" assignment and he then made a request to displace a

junior waiter assigned to trains No. 28 and No. 29, the "Broadway Limited," which request was denied. Subsequently he was placed on another assignment and is still employed by the Carrier as a waiter.

Employes contend that the Carrier violated Rule 3-E-1 of the Agreement by so refusing Smith's request to displace a junior waiter on the Broadway Limited, while the Carrier contends that in such refusal they were justified by the provisions of Rule 2-A-1.

The rules in question are as follows:

"(3-E-1) An employe displaced from his regular position by a senior employe in the exercise of seniority, may, within ten (10) days, exercise seniority to any position held by a junior employe, subject to the provisions of Rule 2-A-1."

"(2-A-1) Ability, fitness and seniority are essential in the consideration of employes' application for assignment to preferred positions. The proper officer shall decide whether the applicant is qualified therefor."

Rule 2-A-1 applies only to "preferred positions." The Employes insist that the job of waiter on the Broadway Limited is not a preferred position because there is no favorable differential in the rate of pay for service on that train. Only suggestion by Employes as to what would constitute a "preferred position" was service on a lounge car on which there is a higher rate of pay. This Rule 2-A-1 was included in the Agreement, however, long before lounge cars were being used.

The Carrier, on the other hand, explained that the Broadway Limited is a train which the Company strives to use as an advertising medium; that every endeavor is made to achieve perfection in its operation; that special features are included in the serving of meals on this train; and that to this end it has been the practice of the Carrier to have the dining car crews on the Broadway Limited composed of the most efficient and personable men obtainable. It is clear that for this train the Carrier has set up more exacting standards for its dining car crews, both as to service rendered and general appearance and deportment, than on any other train operated by Carrier.

It would seem reasonable to suppose that tips received by waiters on such a train would amount to considerably more than on an ordinary train.

The Carrier has shown that in a conference with the Local Chairman for the Employes, the Local Chairman stated that he understood that "preferred positions" in Rule 2-A-1 referred to positions on the Broadway Limited and certain other special trains. While the expression of a local chairman of his understanding of the correct interpretation may not be binding on his Organization, it does furnish some indication of the interpretation by the parties.

We are of the opinion that a position on the Broadway Limited is a "preferred position" within the meaning of Rule 2-A-1.

Rule 2-A-1 states that three essentials are to be considered in connection with the consideration of an employe's application for assignment to a preferred position, ability, fitness and seniority. The Rule does not say whether any one of the three essentials is to be given more weight than the others, but seniority is named last.

Some such rules provide that "fitness and ability being sufficient, seniority shall prevail." We find no such provision in this Rule.

This Rule also expressly provides that, "The proper Officer shall decide whether the applicant is qualified therefor."

The Employes contended that if Smith was qualified to be a waiter on any of the Carrier's trains he should have been given the position on this train; that "The term 'ability and fitness,' as used in the rule can mean only that the employe possesses the necessary skill to perform the required

duties and is physically able to execute them." If this were the full meaning of the words in question it would qualify any waiter in the service, would leave only seniority to be considered and, therefore, leave only one possible decision to the "proper Officer."

The letter of General Chairman Brown, filed as an Exhibit to Carrier's Submission, indicated that he thought that this Rule gives the Carrier the right to choose the employe who has "more fitness and ability" even though he had less seniority than another applicant.

We are of the opinion that this Rule requires the Carrier to give a preferred position to the senior of two applicants only when the senior applicant possesses ability and fitness at least approximately equal to the ability and fitness of the junior applicant.

We find no evidence of abuse of discretion or arbitrary action by the Carrier in making its decision in this case under Rule 2-A-1.

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 Agreement was not violated.

AWARD

The claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 9th day of December, 1947.