Award No. 6352
Docket No. CL-6439

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Rules Agreement, effective May 1, 1942, particularly Rule 2-A-3, when it disqualified Elmer Smith, Jr., on a Store Attendant position at Rose Lake, Illinois, Shops, St. Louis Division.

(b) Elmer Smith, Jr., the Claimant, be compensated at the Store Attendant rate from July 12, 1949, to September 14, 1949, when the position of Store Attendant was abolished. (Docket W-689)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the class or craft of employes in which the Claimant in this case holds a position, and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes, between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Title 1, Section 5, Third (e), of the Railway Labor Act and which has also been filed with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

This dispute was progressed to the General Manager of the Western Region by means of a joint submission. The General Manager is "the chief operating officer of the Carrier designated to handle such disputes". [Railway Labor Act, Title 1, Section 3(i).] This joint submission is attached as Employes' Exhibit "A" and will be considered as a part of this Statement of Facts.

The Claimant has Group 2 seniority on the St. Louis Division as of February 26, 1942, and had held positions of different classifications in Group 2 when he was displaced from a janitor's position on July 1, 1949, by an employe senior to him in service.

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

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable 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 agreements concerning rates of pay, rules or working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregared the Agreement between the parties hereto 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 no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that no violation of the Agreement occurred by reason of the disqualification of Claimant Smith as a Store Attendant, and that he is not entitled to the compensation which he claims.

Therefore, the Carrier respectfully submits that your Honorable Board dismiss the claim of the Employes in this matter.

All data contained herein have been presented to the employe involved or to his duly authorized representative.

(Exhibits not reproduced.)

OPINION OF BOARD: Claim is here made in behalf of one Elmer Smith, Jr. that he be compenasted at the Store Attendant-rate from July 12, 1949, to September 14, 1949, account of alleged improper removal and disqualification of Claimant from position of Store Attendant, Rose Lake, Illinois, shops.

This matter comes before the Board by way of a Joint Statement of Agreed Upon Facts.

Claimant here, having been displaced from his previous position by a senior employe "posted" on the position of Store Attendant for a period of six days in accordance with the Rule permitting such action. After this act, Claimant exercised his seniority under Rule 3-C-1-(a) and was assigned to the position of Store Attendant. The record indicates that for a period of some 2 hours Claimant performed the duties of the position, at which time his ability to perform, and the speed and accuracy with which said performance was accomplished, was questioned; and that thereafter a test was given Claimant. The nature of this test was to request Claimant to select certain items requested. He was graded on the accuracy of his selection and the speed with which they were returned. It was the removal of the Claimant, on the alleged ground that he was not qualified to fill the position of Store Attendant, that forms the basis of this claim.

The Organization asserts that after the Claimant had "posted" on the position of Store Attendant for a period of 6 days in accordance with Rule 3-H-1 and had been permitted to exercise his seniority under Rule 3-C-1-(a), the Respondent was precluded from disqualifying Claimant under Rule 2-A-3-(a), at the time they did by virtue of the 30-day qualifying provision

of such Rule. It was further contended that the provisions of Rule 2-A-2-(a) and 2-A-3-(d) which reads as follows:

"2-A-2-(a) In the assignment of employes to positions subject to the application of the provisions of Rule 2-A-1 and 3-C-1, fitness and ability being sufficient, seniority shall govern."

"2-A-3-(d) Employes will be given full cooperation of the department heads and others in their effort to qualify."

were not followed in that period of 2 hours on the position without apparent assistance is not substantial compliance with Rule 2-A-3-(d) and that when the Carrier permitted Claimant to exercise his seniority under Rule 3-C-1-(a) they had then determined that he had sufficient fitness and ability and were compelled under the terms of Rule 2-A-3-(a) to give Claimant the full 30 days to qualify, and/or had waived the right to rely thereon.

The Respondent took the position that Claimant was not qualified to fill the position of Store Attendant, that his abilities in this connection had been questioned after the "posting" period of 6 days, and before he had exercised his seniority under Rule 3-C-1-(a); that his lack of qualifications had been demonstrated by the result of the test given and finally that he was properly disqualified and removed from the position of Store Attendant under Rule 2-A-3-(b).

Rules 2-A-3-(a) and 2-A-3-(b) read as follows:

"2-A-3-(a) An employe awarded a bulletined position or vacancy, or otherwise obtaining a position in the exercise of seniority, and failing to qualify within thirty days may exercise seniority under Rule 3-C-1."

"2-A-3-(b) When it is evident that an employe will not qualify for a position, he may be removed from the position before the expiration of thirty 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."

The record shows that the test given resulted in Claimant failing to locate 17 of 34 items which were requested and that in addition he made incorrect selections in 3 other instances. This showing is indicative that Claimant was not qualified for the position of Store Attendant on the day the test was given. The record further shows that after he had completed "posting" and expressed his desire and intention to exercise his seniority in accordance with Rule 3-C-1-(a) that his fitness and ability was questioned, but that nevertheless he moved over to the position of Store Attendant. There is no charge that during the period Claimant "posted" department heads failed to comply with Rule 2-A-3-(d).

At issue here is the proper interpretation to be placed upon Rules 2-A-3-(a) and 2-A-3-(b). Contrary to the assertion of the Organization nothing in Rule 2-A-3-(a) can be said to guarantee an employe 30 days in which to qualify on a bulletined position or vacancy. The rule guarantees the right of an amploye, who fails to qualify on one position within 30 days the right to re-exercise his seniority under Rule 3-C-1, for yet another position. The rule by necessary implication also guarantees (subject to some senior employe acting under Rule 3-C-1) an employe's right to stay on the position after 30 days if his fitness and ability is unquestioned.

Rule 2-A-3-(b) reserves to the Carrier (in cases where fitness and ability is found lacking) to remove the employe from a position at any time during the first 30 days of occupancy thereon. Here again an employe's right to exercise his rights under Rule 3-C-1 is guaranteed.

Rule 2-A-3-(b) is controlling here. The action of the Respondent, while an unusually strict application of the rule, caannot be properly ruled a violation of the effective Agreement.

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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 19344;

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

That the Carrier did not violate the effective Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 29th day of September, 1953.