

Award No. 10225
Docket No. CL-10201

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Albert L. McDermott, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

WABASH RAILROAD COMPANY

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

(1) Carrier violated the Schedule for Clerks when on or about November 2, 1957, Clerk Harold Munton who had been displaced as a result of force reduction, from position of Overcharge Claim Investigator in office of the Auditor of Revenues, was not permitted to displace Miss E. Decker, a junior clerical employe holding position of Claim Clerk in the Freight Claim Department.

(2) Clerk Harold Munton shall be assigned to position applied for and compensated for monetary loss sustained by reason of Carrier's action in denying his request to displace Miss E. Decker effective on or about November 2, 1957. Claim to continue in force and effect until the violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: Bulletin notices were issued by the Auditor of Revenues on October 25, 1957 abolishing ten (10) clerical assignments in his office effective with the close of Business October 31, 1957.

Clerk Harold Munton, with clerical service date of June 25, 1942 in the Accounting Department and regularly assigned to position designated by the Carrier as Overcharge Claim Investigator, basic daily rate of \$18.98 as of November 1, 1957, was displaced on November 1, 1957 by a senior clerk in the Auditor of Revenues office by reason of the force reduction.

In written request dated November 1, 1957 addressed to Mr. B. J. Smiehausen, Freight Claim Agent, Clerk Munton requested that he be permitted to displace Miss E. Decker, clerical service date July 13, 1943, assigned to position of Claim Clerk in the Freight Claim Department, with basic daily rate of \$19.82. **EMPLOYEES' EXHIBIT NO. 1**

more important positions in the office without having first fitted himself in any way to handle that position.

As of November 1, 1957, the date Mr. Munton sought to place himself on the position of Claim Clerk, individuals who had first established their seniority in the Accounting Department in offices other than the office of the Freight Claim Agent, and who had first acquired seniority in the office of the Freight Claim Agent when the Accounting Department seniority rosters were consolidated on October 24, 1955, were regularly assigned on eleven (11) of the thirty (30) clerical positions (other than dictaphone operator positions) in the office of the Freight Claim Agent.

The fact that more than one-third of the clerical positions in the office of the Freight Claim Agent are occupied by individuals who held no seniority in that office prior to October 24, 1955, effectively refutes any allegations of unjust discrimination against employes from other offices.

The claim is not supported by the rules of the Schedule for Clerks and should be denied.

The Carrier affirmatively states that the substance of all matters referred to herein has been the subject of correspondence or discussion in conference between the representatives of the parties and made a part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant was displaced as a result of a force reduction from the position of Overcharge Claim Investigator. He sought to displace a junior clerical employe holding the position of Claim Clerk in the Freight Claim Department. His request was denied.

Carrier states that "after questioning claimant concerning his past experience it was found that he lacked the necessary fitness and ability to handle this position as he had no experience in this general field of adjusting freight loss and damage claims."

The Seniority and Promotion Rule (Rule 15) provides inter alia that fitness and ability being sufficient, seniority shall prevail.

The seniority rosters of all clerical employes in the various offices of the Accounting Department in the Carrier's General Office had been consolidated into one seniority roster. The Claimant was in the office of the Auditor of Revenues. The seniority roster in that office and in the office of the Freight Claim agent were among those included in the consolidation of rosters.

Claimant had qualified and performed service with the Carrier as a Relief Claim Clerk, Overcharge Claim Bureau Clerk, Overcharge Claim Investigator, Local Tracing Clerk, Interline Switching Clerk, Per cent and C/A Clerk. Also, General Clerk, Interline Bureau, Balance Clerk, Statistical Bureau, Grain Door and Switching Claim Clerk, Correction Clerk, Overhead Tracing Clerk, Code Clerk, Correspondence Clerk, Agent Account's Clerk, Agent Account's Bureau and Agents Account's Clerk, Passenger Section.

Carrier in concluding that claimant did not have the fitness and ability to handle the job of Claim Clerk in the Freight Claim Department repeatedly

stated in the Record that claimant had no experience in the handling of loss and damage claims.

Fitness and ability does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance or assistance. It means that the applicant must have such training, experience, and character as to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time. Award 5348.

Carrier states that "employees . . . ordinarily fit themselves for this work by placing themselves on some of the lower rated positions in the office where they can become familiar with the procedures, principles, and rules with which they must work and the factors involved in handling open and unadjusted claims." This, of course, would serve as a measure of fitness and ability but we do not find it to be the controlling factor in determining the fitness and ability of an applicant for a position.

We recognize that it is a prerogative of the Carrier to determine the fitness and ability of its employees. We must accept the carrier's decision unless we find that the Carrier was arbitrary or capricious in reaching its decision. At the same time, we must guard against the element of seniority in promotions or displacements from being rendered a nullity.

On the basis of the record, we find that the claimant had the general fitness and sufficient ability to fulfill the duties of Claim Clerk in the Freight Claim Department. On the basis of the record and agreement before us we find that the Carrier's action herein was in arbitrary disregard of the applicable agreement. The claim is sustained subject to Section 17(f) of the agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 6th day of December 1961.

CARRIER MEMBERS' DISSENT TO AWARD 10225, DOCKET CL-10201

The result reached in Award 10225 is wrong in every sense of the word. In reaching their erroneous result, the Majority either completely ignored or disregarded some of the most basic and fundamental principles which this Board is committed to follow.

Under the Agreement before us in this case, as in most Agreements of its type, promotion, bidding and displacement rights are subject to three prerequisites: Seniority, fitness and ability. The claimant had sufficient seniority for the displacement he sought to make. Had seniority been the only requirement, the case would not have been here. But, for obvious reasons, the parties have included in their Agreement the other two requirements — fitness and ability.

Since claimant's seniority was not an issue, there remained the matter of his fitness and ability. The Majority was pointedly reminded that **the burden of proof of claimant's fitness and ability rested squarely upon the Petitioner, citing**, among others, such precedents as:

Award 6829 (Messmore):

"As stated in Award 5417: 'Repeated decisions of this Division of the Board have established the rule that once fitness and ability of an employe have been found by the Carrier to be lacking, the burden rests upon the claimant to overcome that decision by substantial and competent proof'. Citing Awards 1147, 2031, 3272, 3469, 5147 and 4040 of this Division in support thereof.

"The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance'. Award 4011. See, also, Awards 4758, 3523, 3477, 2577."

and Award 9947 (Rose):

"This Division has repeatedly held that the burden of proving that he has sufficient fitness and ability is upon Claimant, after Carrier's determination to the contrary. Claimant failed to meet that burden here."

That the Majority completely ignored the rules of evidence is attested to by the fact that not one iota of evidence of claimant's fitness and ability appears in the record. Yet, not only does the Majority ignore this indisputable fact, but they take the "privilege" of making the completely unfounded statement that "the Carrier's action herein was in arbitrary disregard of the applicable agreement." The record shows very clearly that such statement is not factual. Indeed, the record even shows that claimant was asked about his fitness and ability for the position at issue, and his own answer was negative. Thus, the Majority not only made the grave error of ignoring the rules of evidence and substituting their judgment for Management's, but in addition were so presumptuous as to make a determination opposite claimant's own evaluation of his fitness and ability.

Having once decided to render the wrong decision in this case, it is apparent that the Majority ignored the overwhelming preponderance of logic and precedent in the many awards cited for the Carrier, and sought justification from a single award (5348 cited by Petitioner) which involved the ques-

tion of whether or not a certain maintenance of way man should have been allowed to work as a welder. It would have been hard to find a more inappropriate "guide".

For the Carrier, the following Awards of this Division were cited.

| Award | Referee |
|------------------|-----------------------|
| 9927 | Lloyd H. Bailer |
| 2692, 3151, 5802 | Edward F. Carter |
| 7171 | H. Raymond Cluster |
| 8430 | Carroll R. Daugherty |
| 5966 | David R. Douglass |
| 8214 | Paul N. Guthrie |
| 7070 | John Day Larkin |
| 6829 | Fred W. Messmore |
| 2791 | Richard F. Mitchell |
| 9818 | Donald F. McMahon |
| 4040 | Jay S. Parker |
| 7015 | Le Roy A. Rader |
| 4358, 4466 | Francis J. Robertson |
| 9947 | Martin I. Rose |
| 4687 | Mortimer Stone |
| 3887 | H. Nathan Swaim |
| 2142 | Sidney St. F. Thaxter |
| 10000, 10072 | Charles W. Webster |
| 8196 | Sidney A. Wolff |
| 9190, 9966 | Harold M. Weston |
| 5292, 5637 | Hubert W. Wyckoff |
| 2573 | Without Referee |

Rather than honor those precedents, the facts, the requirements of fitness and ability, the Carrier's considered judgment, claimant's own negative appraisal, and the rules of evidence, the Majority obviously and improperly cast all those things aside. The end result thereof, Award 10225, is an absurdity and a nullity. It should forever be so treated.

O. B. Sayers
R. E. Black
F. J. Goebel (Per REB)
G. L. Naylor
R. A. DeRossett