Award No. 10424
Docket No. CL-10414

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

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

CHICAGO GREAT WESTERN RAILWAY COMPANY

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

(1) That the Carrier violated the agreement between the Brotherhood and the Carrier effective August 15, 1939, reprinted May 1, 1955, when on August 20, 1956 it awarded a bulletined position to a junior employe, W. R. Graesch, to the exclusion of a senior employe, M. C. Lincoln, who made a bid on the position in accordance with the agreement; and

(2) That the Carrier shall now be required to place M. C. Lincoln on the position of Rate Clerk and compensate him the difference in rate of pay of that position, daily rate of $17.57 and that of the position of Interline Recheck Clerk, daily rate of $17.19, a difference of thirty-eight cents (38¢) per day, for Monday, August 20, 1956, and for each subsequent day on which he was withheld from the position of Rate Clerk.

EMPLOYES' STATEMENT OF FACTS: Marlin C. Lincoln is the incumbent of the position of Interline Recheck Clerk, the qualifications and duties of which are as follows: Knowledge of freight rates and governing tariffs, interline divisions and division sheets; carefully and correctly apply and revise divisions and amounts apportioned to the Carrier; percenting and revising interline freight accounts, handling statements of differences and correspondence, etc.

Under date of August 13, 1956, the position of Rate Clerk was advertised by Circular No. 36 in the office of Auditor of Revenues, the duties of which consist of revising Auditor's waybill corrections, company material waybills, coal, lumber, Iowa to Iowa waybills, etc.

Mr. Lincoln, holding Rank No. 21 on the January 1956 seniority roster of District 15, seniority date April 7, 1952, submitted his bid for the position

(Award 4011 — also, see Awards 7964, 7584, 7362, 7180, 7179, 6964, 6829, 6828, 6824, 6748, 4758, 3523, 3477, 2577, and others).

On the basis of the record, this Division should have no difficulty in discerning that the Employes have failed to prove their case and that claimant is not entitled to compensation as claimed. This Division, under the Railway Labor Act, is required to give effect to the collective agreement and adjudicate this dispute in accordance therewith. A review of the record clearly shows that claim is not supported by the contractual agreement between the parties and we suggest that this Division has no alternative but to render a denial award in this case.

Carrier affirms all data in support of its position has been presented to the other party and made a part of the particular question in dispute.

OPINION OF BOARD: It is first necessary to dispose of the Carrier's claim that this Board has no jurisdiction because the Organization did not comply with the provisions of the Railway Labor Act. Specifically, the Carrier contends that there had been no conference between the representatives of the Organization and the Carrier as required in Section 2, Second of the Act which provides as follows:

> "All disputes between the carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so as to confer respectively by the carrier or carriers and by the employees thereof interested in the dispute."

The Carrier also contends that since the Organization did ont submit the dispute to conference as required by the Railwry Labor Act, this Board may not consider the claim because the "Organization and certain Rules of Procedure" adopted by the National Railroad Adjustment Board on October 10, 1934, provides in part as follows:

> "No petition shall be considered by any division of the Board unless the subject matter has beenhandled in accordance with the provisions of the Railway Labor Act, approved June 21, 1945."

The Carrier has cited two Frist Division Awards and several Third Division Awards to support its position. In Award 14762 (Guthrie) the Board did not take jurisdiction because: "Nowhere in this submission does the petitioner ask a particular action by this Division." Further, the Board in that case said that "there is no affirmative showing of conference and appeal on the property". The Award does not disclose the facts upon which this finding was made. In Award 12787 the First Division Board rendered no opinion or analysis of the jurisdictional question but merely remanded the case "for proper conference on the property in conformance with the intent of the Railway Labor Act." None of the Third Division Awards cited by the Carrier are convincing or applicable. It is not essential to analyze and comment on each of them.

In this case the record shows that on September 3, 1956, the Local Chairman wrote to the Auditor of Revenue as follows:

> "Friday, August 24, 1956, we discussed vacancy and assignment circulars #36 and #39, Seniority district #15. During this discussion, we failed to reach a mutual understanding and agreement of

the application of Rule 10, reading in part as follows: 'Fitness and ability being equal, seniority shall prevail' (R 9)."

Even though this conference took place before the claim was filed it is sufficient to satisfy the requirement of the Act. A conference about the merits of the claim was held on the property.

This Division has had occasion to rule directly on this jurisdictional question and has interpreted the conference requirement realistically. Such a question was raised in Docket TD-7279 which was decided in Award 7403 (Larkin). The Board in that case said:

> "Neither the Railway Labor Act nor the procedural instructions given to this Board specifically requires that the final step in handling such claims on the property be taken up in oral conference by the Manager of Personnel and the General Chairman, if they elect to waive the oral discussion, as was done in this instance. Such a conference is necessary only where requested by one of the parties."

The same conclusion was reached by this Board in Award 2786 (Mitchell) and Award 3269 (Carter). It would be a miscarriage of justice to refuse to determine the issues on the merits. This claim is properly before the Board.

The essential facts are not in dispute. The Claimant, M. C. Lincoln held Rank 21 on the January, 1956, seniority roster of District 15, and Walter R. Graesch held Rank No. 34 on the same seniority roster. The Claimant's seniority date is April 7, 1952, and Mr. Graesch's seniority date is September 18, 1952. "Both men during their first employment year performed essentially the same type of work, i.e., Mail Clerk, Waybill Sorter, etc" (R 7). Sometime before September 29, 1953, — the record does not disclose — the Claimant successfully bid and was assigned to the position of Interline Recheck Clerk which in August, 1956, carried a daily rate of $17.19. On September 29, 1953, a position of Rate Clerk in the office of Auditor of Revenue, identified as "West Desk" was advertised. The rate for that job was less than the rate of Interline Recheck Clerk. The Claimant did not apply for that position and it was awarded to Mr. Graesch. On April 22, 1955, a position of Rate Clerk, identified as "East Desk" was advertised. Mr. Graesch was the only one who bid for the job and it was assigned to him. The transfer of Mr. Graesch from the "West Desk" to the "East Desk" left a vacancy on the "West Desk" for which the Claimant did not apply.

On August 13, 1956, a position of Rate Clerk in the office of Auditor of Revenues, identified as the "Iowa Desk" was advertised. Both the Claimand and Graesch bid for the job. The Carrier assigned the position to Graesch because the Claimant lacked the "experience and training in checking rates" (R 8).

The Organization filed this claim alleging that the Carrier violated the terms of the Agreement between the parties by assigning a junior employe to the position of Rate Clerk and is requesting that the Claimant be compensated 38¢ a day for Monday, August 20, 1956, and for each subsequent day thereafter when the Claimant was deprived of the position of Rate Clerk.

Rule 10 (a) of the Agreement effective August 15, 1939, and reprinted May 1, 1955, provides:

"Employes covered by these rules shall be in line for promotion. Promotion, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that seniority shall not apply to excepted positions listed in this agreement".

"Note: The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

Rule 11 (a) of the same Agreement provides:

"The provisions of Rule 10 will be used in assigning employes to positions, and when so assigned, they will have thirty (30) days in which to qualify, and failing, shall retain their seniority rights and may bid on any bulletined position, but may not displace any regularly assigned employe."

On October 15, 1956, Carrier's Auditor of Revenues wrote to the Organization's Local Chairman as follows:

"Circular No. 36 advertised for a rate clerk. M. C. Lincoln had no experience or training in checking rates, while W. R. Graesch has been checking rates since October 22, 1953 and, therefore, has sufficient fitness and ability to handle the work currently assigned." (R 10).

The Carrier argues that "it is the Carrier's function to pass on an employe's fitness and ability. If an employe and/or the Brotherhood disagree with the Carrier's determination then the burden of proof is on the employe, or the Brotherhood, to establish, by competent evidence, the employe's fitness and ability." In support of this position the Carrier cited numerous awards.

In Award 1147 (Sharfman) the ruling was presumably made on evidence that the claimant lacked adequate fitness and ability and for that reason he was not entitled to a trial period.

In Award 1588 (Garrison) the collective bargaining agreement covering seniority was a good deal different from the provisions in Rule 10 (a). The agreement provided the seniority will prevail "where ability and qualifications are sufficient." That is not the emphasis in Rule 10 (a). Furthermore, the Board in that case found that the Organization's committee "in handling of this dispute with the Carrier's representatives, contended that Mr. Matteson possessed sufficient ability and qualifications for the position . . ." Nevertheless, there was evidence that Mr. Matteson was careless in his work.

The Seniority clause in the agreement involved in Award 2031 (Shaw) is, likewise, distinguishable.

In Award 2142 (Thaxter) the position required "much more exacting" work than the position then held by the claimant. That is not the case here. At lease the record does not support it.

In Award 3887 (Swaim) the Organization admitted that the claimant had no experience in the job but should have been given a trial period.

The decision in Award 5292 (Wyckoff) is a little vague. The Board said:

> "There is sharp conflict in the record on the issue whether Claimant was denied the position for the sole reason that he had not had any previous training or experience as a Freight Division Clerk. Viewing the record as a whole, there is no doubt that the Carrier took that into consideration, but we are unable to conclude that it was the sole reason for the denial."

Whatever the other reasons were is not disclosed in the opinion. It is difficult to understand what they could have been since ability and fitness certainly should have controlled the Carrier's decision.

The facts of ability and fitness are fully discussed in Award 5966 (Douglass). There the position of "Assistant Head Clerk and Accountant" required "a certain amount of knowledge of the subject of accounting" which the Claimant apparently did not have.

It is desirable to examine Award 8196 (Wolff) cited by the Carrier. The Board said:

> "We find on the record that Claimant lacked the basic ability and experience necessary to fill the position in question. In this connection it is not lack of experience in the particular job that is pertinent for if that were the guiding principle, no person could ever qualify for promotion to a new position, instead it is the Claimant's lack of experience in the general field of the work involved."

We agree with the Findings of this Board in Award 96 (Samuell) that "in the first instance, the Carrier has the responsibility of determining the fitness and ability of the employees". We do not entirely agree that this Board "should be reluctant to interfere with the decision so made by the Carrier so long as it acts in good faith, is without bias or prejudice and indicates no disposition to purposely or carelessly evade or disrespect the rules as well as the spirit and intention thereof". Rule 10 (a) requires more than that. First, it does not give the Carrier the sole and absolute right to promote any one the Carrier alone decides has the fitness and ability. Second, while the Carrier has the initial responsibility and right to make the choice, the Carrier also has the responsibility to show that the senior employe who was not promoted to the job has neither "sufficient" nor "adequate" 'ability to perform the job. Third, although the burden of proof is upon the Claimant to show "sufficient" and "adequate" ability he does not need to establish that fact beyond a reasonable doubt. The evidence in the record needs only to show that the Claimant may have "sufficient" and "adequate" ability. Fourth, errors of judgment are made by the best intended Carrier representatives. Certainly, an aggrieved employe is entitled to consideration when he honestly believes that he has been passed over for a junior employe. This Board even in Award 96 recognized that the Carrier should not "carelessly evade" the spirit and intent of Rule 10 (a). How then can an aggrieved employe ever prove that the Carrier has carelessly evaded the Rule? He needs to protest and to show some evidence that he may have "sufficient" or "adequate" ability. Each case must be judged on the basis of the record.

The mere fact that the Claimant did not bid for the "West Desk" and "East Desk" jobs does not automatically or conclusively establish the fact

that he does not have "sufficient" or "adequate ability to perform the work of the "Iowa Desk" job. It is neither logical nor good contract interpretation to argue "that those closest to an employe ordinarily know his fitness and ability best, and those would be his immediate supervisors and other close associates."

There is no evidence in the record by "his immediate supervisor and other close associates" that the Claimant did not have "sufficient" or "adequate" ability. Graesch may have been better qualified, but that is not the contract obligation. The Agreement does not say that seniority shall be applied only when skill and ability are equal.

The record shows that on October 15, 1956, S. B. Wilk, Auditor of Revenues wrote to C. D. Foster, Local Chairman of the Organization, in part, as follows:

> "Circular No. 36 advertised for a rate clerk. M. C. Lincoln had no experience or training in checking rates, while W. R. Graesch has been checking rates since October 22, 1953 and, therefore, has sufficient fitness and ability to handle the work currently assigned.
>
> "I do not subscribe to your apparent contention that Rule 10 contemplates that seniority will govern in this case, that is, on positions for which they are not qualified; hence, I can see no valid basis for the claims presented and same is respectfully declined."

Nowhere in that letter does the Carrier's representative say that the Claimant did not have "sufficient" or "adequate" ability. They say only that W. R. Graesch "has sufficient fitness and ability". The second paragraph in that letter is presumptuous. Mr. Foster in his letter to Mr. Wilk under date of September 3, 1956, made no such "apparent contention" about Rule 10.

The record also shows that the Organization in the Ex Parte Submission stated:

> "It is the contention and position of the Employes, further, that Martin C. Lincoln's position of Interline Recheck Clerk requires of him the performance of duties which are likewise necessary on the position of Rate Clerk from which position he was withheld; that at the time of his application for that position he was capable and fit to perform the Rate Clerk's duties, in that both positions of Interline Recheck Clerk of which he is the incumbent, and the Rate Clerk position for which he made application, requires a knowledge of tariffs, rates, divisions and other concomitant duties; . . ."

The Carrier in its Ex Parte Submission said:

> "The rate clerk position advertised under date of August 13, 1956, which is the subject of this dispute, was a much more advanced position than the two previous positions, and required an employe who was experienced in the handling of freight rates and tariffs. Lincoln was still on an interline recheck position and had no experience or training whatsoever in checking rates. On the other hand, Graesch had put in almost three years checking rates and possessed sufficient fitness an dability to handle the position."

Again, the Carrier nowhere denies the direct statement of the Organization with respect to job content. They emphasize only that the Claimant "had no experience or training whatsoever in checking rates" and that Graesch "possessed sufficient fitness and ability to handle the position. There is sufficient evidence in the record to show that the Claimant may have had "sufficient" and "adequate" fitness and ability to perform the work.

We do not agree with the Carrier that the Organization ever admitted that the Claimant di dnot have sufficient fitness and ability, as provided in Rule 10 (a) to perform the work required.

Applying the principle enunciated by this Board in Award 8196, to the evidence in the record, we conclude that the Claimant did have sufficient "experience in the general field of the work involved" and that the Carrier improperly assigned a junior employe to the job.

Many other awards cited by both the Carrier and Organization were thoroughly examined. It will serve no useful purpose to analyze and distinguish each and every one of them.

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 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 Carrier violated the Agreement as stated in the Opinion.

AWARD

Claim is sustained in accordance with the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 15th day of March 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10424, DOCKET CL-10414

The majority has committed serious error on both major issues involved in this dispute — jurisdiction and the merits.

JURISDICTION

On the jurisdictional issue, the majority stated:

> "* * * It would be a miscarriage of justice to refuse to determine the issues on the merits. This claim is properly before the Board."

The claim was not properly before the Board, under which circumstance it was not for us to properly question or lament the "justice" or "injustice" which the petitioner had self-inflicted. Both the Railway Labor Act and the Rules of this Board were violated when the majority decided to assume jurisdiction of this case, which had not been handled in accordance with the Act or our rules.

If this Board should ever be burdened with the task of adjudicating claims which have not been the subject of serious discussion on the respective properties between the respective parties, nothing less than utter chaos and confusion would reign. This one never was so handled. The majority's finding that a "conference" on this claim was held prior to the existence of the claim is fantastic and absurd. To imply that the parties may waive the requirements of law and the Board's Rules of Procedure is no less absurd.

The majority's decision on jurisdiction makes the entire award a nullity.

THE MERITS

If we should attempt to discuss each error made by the majority on the merits of this dispute, this dissent would be of greater length than the rest of the record combined. The temptation to write such a dissent, however, bows to the certain knowledge that anyone reasonably well-versed in the field of Labor-Management Relations will readily recognize the entire decision as nothing less than gross error, and the further knowledge that no one else need consider its content.

While these may not even be the worst mistakes made by the majority, we cannot leave this matter without pointing out the following:

The Majority Opinion states, in part:

> "Again, the Carrier nowhere denies the direct statement of the Organization with respect to job content."

Bearing in mind that the pertinent "job content" item was freight rates, the majority imputes weirdness to the own "logic" when they follow their last above quotation with Carrier's point-blank statement that claimant "had no experience or training whatsoever in checking rates."

The Majority Opinion continues with this classic:

> "There is evidence in the record to show that the Claimant **may have had** 'sufficient' and 'adequate' fitness and ability to perform the work."

Aside from the fact that **no** evidence of claimant's fitness and ability was submitted in his behalf, the majority's resort to such conjecture as "may have had", is repugnant to the principle here involved, and is indicative of the abject poverty of reasoning underlying the entire decision.

There is only one short paragraph separating the majority's finding of "may have had", and the following:

> "Applying the principle enunciated by this Board in Award 8196, to the evidence in the record, we conclude that the Claimant **did have** sufficient 'experience in the general field of work involved'

and that the Carrier improperly assigned a junior employe to the job." (emphasis added)

During whatever time that expired between the writing of those two short paragraphs the majority changed from the feeling that claimant "may have had" to the feeling that he "did have sufficient 'experience in the general field of the work involved' ". He was either a competent freight rate man, or he wasn't; and that is what he would have had to be to qualify for the position in dispute. He had the burden of proving his fitness and ability by competent evidence, not one iota of which was submitted in his behalf. The majority's implication that figuring division of revenue between participating Carriers is in "the general field of the work involved" is absurd to say the least.

In spite of the Local Chairman's letter of December 3, 1956, the majority states:

> "We do not agree with the Carrier that the Organization ever admitted that the Claimant did not have sufficient fitness and ability, as provided in Rule 10 (a) to perform the work required."

The Local Chairman appraised Claimant's qualifications as follows: (R., p.10)

> "In the instant case, Mr. Lincoln is as qualified as Mr. Graesch was when he started checking rates in 1953, and under the seniority Rule should be extended the same opportunity afforded Mr. Graesch in 1953."

When Mr. Graesch started checking rates in 1953, it was on the bottom rate job in the office. Claimant, in 1956, bid on a top-flight rate job requiring far more knowledge and general fitness and ability than the bottom or beginner job. In fact, Petitioner stated (R., p.19) that the job on which claimant bid "is commonly known on the property as the Assistant Bureau Head position". It is clearly evident, then, that the most the Local Chairman could say for the claimant was that he probably could have filled a beginner rate position. Such was not the position on which he bid. It is no wonder, under the circumstances, that the Petitioner did not wish to face the Management in conference discussion of this case. Rather, they simply submitted the case to the Board, hoping for gross error on the part of the majority. Ironically, and unfortunately, their hopes have been realized.

The decision of the majority is in serious error, and should be treated as a nullity.

O. B. Sayers

R. E. Black

R. A. DeRossett

W. F. Euker

G. L. Naylor