Award No. 11780
Docket No. CL-11567

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Levi M. Hall, Referee

PARTIES TO DISPUTE:

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

LOS ANGELES UNION PASSENGER TERMINAL

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

1. The Los Angeles Union Passenger Terminal violated the Clerks' Agreement on March 8, 1957, when it failed to assign Pejsach Kupersztych to Position No. 530, Gateman-Baggageman; and,

2. The Los Angeles Union Passenger Terminal shall now be required to compensate Mr. Pejsach Kupersztych at rate of Position No. 530, Gateman-Baggageman, March 8, 1957, and each date thereafter that he is denied the right to perform service thereon; and,

3. The Los Angeles Union Passenger Terminal shall now be required to compensate Mr. Pejsach Kupersztych $1.00 per day, March 22, 1957, and each date thereafter until he is placed on Position No. 530, Gateman-Baggageman.

EMPLOYES' STATEMENT OF FACTS: The Los Angeles Union Passenger Terminal (hereinafter referred to as the Terminal) is located in the City of Los Angeles, California, and its operation consists of handling passenger trains of the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier), the Atchison, Topeka and Santa Fe Railway Company, and the Union Pacific Railroad Company.

An Agreement dated February 14, 1939, by and between the parties named immediately above and their employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Evpress and Station Employes, provides for apportionment of work among employes of each of the three railroads, as well as the employment relationship, seniority status and rights of employes working within the Terminal and that, pending negotiation of an agreement covering rules and working conditions applicable

In the circumstances set forth above, Terminal submits the claim is entirely lacking in merit and should be denied.

CONCLUSION

All data herein submitted have been presented to the duly authorized representatives of the petitioner and are made a part of the particular question in dispute.

The Terminal reserves the right, if and when it is furnished with the submission which may have been or will be filed ex parte by the petitioner in this case, to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the Terminal at this time and have not been answered in this, the Terminal's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: The Los Angeles Union Passenger Terminal, (hereinafter referred to as the Terminal), is located in Los Angeles, California, and it's operation consists of handling passenger trains of the Southern Pacific Company (Pacific Lines), (hereinafter referred to as the Carrier), the Atchison, Topeka and Santa Fe Railway Company and the Union Pacific Railroad Company. On March 1, 1957, Gateman-Baggageman Position 530 was bulletined by the Carrier for seniority choice of employes assigned in the Terminal. Pejsach Kupersztych, seniority date August 3, 1946 bid for the position as did another whose seniority date was junior to Claimant's. The Carrier assigned the position to Claimant's junior whereupon claim was filed against the Carrier, it being contended that the Agreement between the parties had been violated. The pertinent positions of the Agreement with which we are here concerned are, as follows:

"Promotion Basis

"Rule 27. — Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to the excepted positions, listed in supplement to this agreement.

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

"Assignments and Displacements

"Rule 28. — 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 this provision shall not apply to the excepted positions, listed in supplement to this agreement.

"NOTE: In exercising seniority rights Rules 27 and 28 contemplate that, subject to the exceptions contained therein, the senior employe will be

awarded the position unless it is obvious that he cannot qualify.

"Employes shall be given cooperation in their efforts to qualify."

* * * * *

"Failure to Qualify

"Rule 36. — An employe who is assigned to a permanent position or makes displacement, and fails, within a reasonable time, to demonstrate fitness and ability, shall vacate position on which disqualified . . ."

It is the contention of the Claimant that under the provisions of Rules 27 and 28 of the Agreement, Claimant, as the senior bidder, was entitled to an opportunity to demonstrate his fitness and ability to perform the work of Position No. 530 with full co-operation from department heads and others subject to Carrier's direction.

Carrier concedes that Claimant would have been entitled to an award of Position No. 530 if it had not been obvious that he was not qualified, and, in its failure to appoint Claimant to the position relies on the Note to Rule 28 which states that "senior employe will be awarded the position unless it is obvious that he cannot qualify"; and urges that all that is involved in this dispute is Claimant's lack of fitness and ability to properly fill or perform Gateman-Baggageman Position No. 530.

The parties to this dispute are in agreement that the duties of the position for at least two hours of each tour of duty entailed direct dealings with Carrier's patrons, the public.

Carrier contends that one year prior to the time in question Claimant worked the position of Delivery Clerk at the Terminal; that he had contact with patrons of the Carrier, that he spoke rapidly and they had difficulty understanding him; that he had a language barrier as well which had been repeatedly accompanied by misunderstandings and emotional outbursts, all of which was detrimental to the Carrier. That he was excitable and had a language barrier which made it difficult for people to understand him was supported by evidence from clerks who had worked with him of actual occurrences and by instructors who had taught him at an Adult School, none of which is denied in the Record.

There is, then, a single, clear issue determinative of this case, namely: — Did the Carrier abuse its discretion in concluding that Claimant could not qualify for Position No. 530 on March 8, 1957?

Fitness and ability, within the intent of this agreement, means that the applicant must have such training, experience and qualification as **to raise a reasonable probability that he would be able to perform all the duties of the position for which he has applied.** Award 5348 — Robertson.

It has been recognized and established by a long series of awards that management has the right to determine the fitness and ability of an applicant for a position and its judgment in this regard will not be lightly set aside; it can only be so done if it is clearly established that the action of manage-

ment in so doing was arbitrary or capricious. Award 3273 — Carter; Award 9324 — Rose; Award 10345 — LaBelle; Award 11121 — Dolnick; Award 11572 — Hall.

The evidence in this Record clearly demonstrates that the action of the Carrier in determining that Claimant was obviously not qualified was neither arbitrary, capricious nor unfair. We cannot find that the Agreement has been violated.

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 Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of October 1963.