

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-4849) that:

(a) Carrier violated Rules of the Current Clerks' Agreement when it improperly and in a discriminatory manner "disqualified" and removed employe A. J. Bufano from Job No. 12 — Shop Clerk — Watts, California, and

(b) That employe A. J. Bufano, be compensated for all wage losses sustained as a result of this violation, from April 9, 1959 until violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: Mr. A. J. Bufano is an employe of the Pacific Electric Railway Company, with seniority date of June 25, 1941. Prior to March 31, 1959, employe Bufano received notice that the regular position to which he was assigned, Job 21 — Claim Clerk, was abolished effective March 31, 1959. Mr. Bufano effected displacement on Job 12 — Shop Clerk at Watts, California, effective April 1, 1959 (Employees' Exhibit No. 1).

Mr. Bufano was the incumbent of Job 12 — Shop Clerk from April 1, 1959 to April 8, 1959, with the exception of one day absence account sickness, and was notified verbally on April 8, 1959 that he was "disqualified" from Job 12 without written explanation.

Claim was presented to Mr. D. W. Yeager, Superintendent on behalf of Employe Bufano, on May 28, 1959 (Employees' Exhibit No. 2). Letter of reply was received from Mr. L. R. McIntire, Manager of Personnel, dated June 25, 1959 (Employees' Exhibit No. 3). The Organization replied to Mr. McIntire, copy to Mr. Yeager, on July 17, 1959, insisting on a conference with the Superintendent in accordance with established procedure (Employees' Exhibit No. 4). Letter of reply from Mr. D. W. Yeager, dated July 27, 1959, setting date for conference on July 29, 1959 but denying claim prior to conference date because of time limits (Employees' Exhibit No. 5). Note: Employees' Exhibit No. 5 was not received in the office of the Brotherhood until July 30, 1959, subsequent to conference held in the office of Mr. Yeager on July 29, 1959. Also

"sick". The facts show that he was paid the full rate of the position for the entire six days. Under such circumstances, how can it reasonably be said that this claimant was not given cooperation in his effort to qualify? It will be noted that Rule 32 requires an employe to vacate a position if he fails "within a reasonable time" to demonstrate fitness and ability. During the two and one-half days that this claimant was on Job No. 12 he not only failed to demonstrate fitness and ability but did nothing more than worry about his future status. This was no doubt brought on by the neurosis being suffered by the claimant at that time. This claimant had every intention of disqualifying himself from the position and would have done so except for advice given him by his representatives that such action may jeopardize his protection under the so-called Washington Agreement. All of this was within the knowledge of the carrier. After the claimant had absented himself from April 3 until April 8 upon the pretext of being "sick", and in order to get the matter straightened out once and for all, claimant was notified at the close of business April 8 that he was disqualified. As stated above, this was solely for the purpose of permitting the claimant to obtain a different position commensurate with his total seniority. Had he technically disqualified himself he would have been required to displace the junior assigned employe under Rule 32.

Even after this considerate action on the part of the carrier, the claimant, after having elected to go on the extra board, failed to respond to call and continued his absence from duty from April 10 until September 1, 1959.

The carrier cannot feel that this Board will lend any degree of credence to a sympathy portrayal which the carrier anticipates.

In summary, it is the carrier's position:

1. That the claimant gave up the position in question after two and one-half days on the job and thus for technical purposes disqualified himself.
2. That the carrier's notification to the claimant April 8, 1959 was technical only to permit the claimant to place himself in other work consistent with his seniority and ability.
3. That there has been absolutely no loss of compensation to the claimant in that he was compensated for all days between April 1, 1959 to a current date, except those days from April 10, 1959 through September 1, 1959, during which period he laid off of his own accord upon the pretext of being sick and during said period collected benefits under the provisions of federal law through the facilities of the Railroad Retirement Board.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant had a seniority date of June 25, 1941. The position of Job 21 — Claim Clerk to which he was assigned was abolished effective March 31, 1959. In exercising his seniority rights Claimant displaced a junior employe, J. L. Stiltz, in the position of Job 12 — Shop Clerk, Watts, California, herein called Job 12, effective April 1, 1959. Carrier, in its Submission, states the Job 12 — Shop Clerk position:

"... was the only position of its kind in existence on the carrier. The position, while clerical in nature, required knowledge for the purpose of preparation of various and sundry technical reports, details of which could be mastered only through experience and training."
(Emphasis ours.)

Job 12 was in an isolated location without any clerical supervision or other clerical employees at the site.

Claimant worked Job 12 for 2½ days on April 1, 2 and 3, 1959. April 4 and 5 were rest days. He was off sick on April 6, 7 and 8. At the close of business on April 8 Carrier, without giving any reason for its action, disqualified Claimant.

Carrier permitted Stiltz to advance his vacation so that he was in that status during the time that Claimant worked Job 12. Consequently, Claimant was denied the benefit of being indoctrinated in the peculiar and unique duties of the job by his predecessor. Further, Carrier failed to have anyone instruct or train Claimant in the duties of the job.

Petitioner contends that the Agreement was violated in that Carrier did not give Claimant: (1) a reasonable time to demonstrate fitness and ability; and (2) cooperation in his efforts to qualify. It cites Rule 32 of the Agreement which reads in pertinent part:

"An employee who . . . makes displacement, and fails, within a reasonable time, to demonstrate fitness and ability, shall vacate position on which disqualified . . . Employees shall be given cooperation in their efforts to qualify." (Emphasis ours.)

Carrier argues that it is management's prerogative to decide whether an employee is qualified. We do not disagree that the ultimate decision, if not arbitrary or capricious, is vested in the Carrier. But, where as here, the Carrier has contractually bound itself to fulfill specified conditions precedent to the exercise of its judgment, the conditions must be satisfied before Carrier is free to make the ultimate decision.

We find that Carrier gave Claimant no cooperation in his efforts to qualify and, under the circumstances, we hold that 2½ days was not a reasonable time within which Claimant could demonstrate his fitness and ability. We will sustain the claim.

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 the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1964.

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Interpretation No. 1 to Award No. 12245

Docket No. CL-12133

Name of Organization:

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

Name of Carrier:

PACIFIC ELECTRIC RAILWAY COMPANY

Upon application of the representative of the employe involved in the above Award that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m) of the Railway Labor Act, as approved June 21, 1934, the following interpretation is made:

1. The remedial order is designed to make whole employe A. J. Bufano for any loss of wages he suffered because of the violation; and, to place him, as of the time of compliance, in the status to which he is then contractually entitled and would have been in absent the violation;
2. Loss of wages is that amount the employe would have earned absent the violation, less what he actually earned, in the period from the date of the violation to the date of compliance with the order;
3. The Board, in interpreting an award, may not consider facts which are not in the record.

Referee John H. Dorsey, who sat with the Division, as a neutral member, when Award No. 12245 was adopted, also participated with the Division in making this interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 25th day of February 1965.