

Award No. 13196
Docket No. CL-13024

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

William H. Coburn, Referee

PARTIES TO DISPUTE:

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

**MISSOURI PACIFIC RAILROAD COMPANY
(GULF DISTRICT)**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5092) that:

1. Carrier violated the Clerks' Agreement at Palestine, Texas, when on March 13, 1961, it failed to allow Mr. E. G. Boyette to exercise his seniority rights and displace junior employe Mr. Donald Chandler from position of Stock Clerk No. 891, effective March 16, 1961.

2. Mr. E. G. Boyette be assigned to the position of Stock Clerk No. 891, Mechanical and Stores Department, Palestine, and be compensated for all monetary loss sustained each day a junior employe occupies such position beginning March 16, 1961 and continuing until violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: Mr. E. G. Boyette having been displaced from position of Clerk to Superintendent Reclamation Plant by senior employe under Rule 19 (a) on March 13, 1961, and under the same rule notified Mr. A. B. Perkins, District Storekeeper, of his desire to displace Mr. Donald Chandler, occupant of Stock Clerk No. 891 effective March 16, 1961. Employees' Exhibit "A".

Mr. A. B. Perkins declined to accept Mr. Boyette's displacement notice of March 13, 1961. Employees' Exhibit "B".

Mr. Boyette replied to Mr. Perkins' letter of March 13, 1961, protesting Mr. Perkins' declination of his request to displace Mr. Chandler and filed claim for all monetary losses beginning March 16, 1961. Employees' Exhibit "C".

Mr. Perkins replied to Mr. Boyette's claim of March 13, 1961, and again stated in the first paragraph of his letter his reasons for declining Mr. Boyette the right to displace on Stock Clerk No. 891. Employees Exhibit "D".

In a long line of awards your Board has upheld the right of the Carrier to determine the fitness and ability of employes, the awards holding that the employer must be the judge of the fitness and ability of an employe. In Award 6877 it was said:

"It must be borne in mind that the decision as to Claimant's fitness and ability is made by supervisory officers of the Carrier who are responsible for placing employes with fitness and ability in important positions. It is a function of management to make all such decisions except as it may have limited itself by agreement."

This Carrier has not limited itself by any agreement in exercising its right of judging the fitness and ability of employes for any given position.

In Award 7025 your Board said:

"The responsibilities for the selection of employes and their promotion is the Carrier's; and we should not substitute our judgment based on paper for the Carrier's first hand judgment except upon a showing of abuse of discretion."

Certainly, on the basis of claimant's work record it cannot successfully be contended that Carrier's judgment in the instant case was an abuse of discretion.

The following excerpt quoted from your Board's 9622 is appropriate here:

"If Carrier felt in advance that claimant was not qualified to fulfill all of the requirements of the position during the regular incumbent's absence on vacation, it should have, as stated by Petitioner herein, so advised him at the time and denied his request for assignment to the position * * *"

The Carrier in this case knowing that claimant was not qualified to fill all the requirements of the position so notified him and denied his request for assignment to the position of stock clerk. Claimant's work record very definitely does not qualify or fit him for the position of stock clerk in the Stores Department at Palestine, Texas.

In the light of previous findings of your Board in similar cases, some of which are cited hereinabove, and which awards involved the interpretation of agreement rules similar if not identical to Rule 7 here involved, your Board should in the interest of consistency sustain the position of Carrier in the instant case. In Award 4516 it was said:

"We quite agree that awards interpreting agreements ought not to be overturned except for very sound reasons. Changes in the interpretations of identical provisions of agreements tend to confuse rather than facilitate their application * * *"

(Exhibits not reproduced).

OPINION OF BOARD: On March 13, 1961, Claimant was displaced by a senior employe from his position of Clerk to the Superintendent Reclamation Plant. He then attempted unsuccessfully to displace an employe junior to him from the position of Stock Clerk No. 891.

The Carrier's refusal to permit Claimant to bump on the job was predicated upon its belief that he was not qualified to perform the duties thereof.

Rule 7 (a) of the controlling Agreement reads:

"Employees covered by these rules shall be in line for promotion. Promotions, 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 in filling the positions named in Paragraph (c) of this rule. (In filling positions listed in Paragraph (c) of this rule preference shall be given to employees coming under the provisions of this agreement."

Rule 16, entitled "Time In Which To Qualify", says, among other things,

"(A) Employees awarded bulletined positions, or those exercising displacement rights, will be allowed thirty (30) days in which to qualify, and, failing shall retain all their seniority and may displace youngest employe in his group."

The evidence of record clearly establishes that Claimant was not accorded the consideration required of the Carrier under the foregoing rules of the Agreement. He was not even permitted to demonstrate his fitness and ability on his own time although at one stage in the progress of the claim on the property a Carrier official consented to Claimant's doing so.

Under well established and accepted principles this Board will ordinarily refuse to interfere with carrier management's exercise of discretion or judgment in determining the fitness, ability and general qualifications of an employe, absent any applicable agreement provision restricting such action, or where there is credible evidence of arbitrary or capricious carrier conduct. In this case, the Carrier's right freely to exercise such judgment is fettered by the clear and unambiguous language of Rules 7 (a) and 16 (a). Those rules were violated when Claimant was not permitted to demonstrate his fitness and ability to perform the duties of the position he sought to obtain by the exercise of his contractual seniority and displacement rights.

Accordingly, the claim will be sustained to the extent that Claimant shall now be afforded the opportunity to qualify for the position of Stock Clerk No. 891, Mechanical and Stores Department, Palestine, Texas, in accordance with the provisions of Rule 16 (a). Claimant also shall be compensated for actual wage loss, if any, sustained by him for the period March 16, 1961, to and including the date he is permitted to begin the 30-day qualification period under the aforesaid Rule 16 (a).

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 Agreement was violated.

AWARD

Claim sustained in accordance with Opinion.

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

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of December 1964.