Award No. 13302
Docket No. CL-13333

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John J. McGovern, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5157) that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 2-A-3, when it improperly disqualified Group 2 Employe P. Willis as a Store Attendant, at Rose Lake Storeroom, East St. Louis, Illinois, Southwestern Region, effective February 18, 1960.

(b) The Claimant, P. Willis, should be allowed eight hours pay a day, as a penalty, for February 19, 1960, and all subsequent dates until the violation is corrected, at the Store Attendant rate of pay. (Docket 954)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company—hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The Claimant, P. Willis, was the incumbent of a regular Group 2 position of Stores Laborer in the Stores Department at Rose Lake Car Shop, East St. Louis, Illinois, Southwestern Region, prior to February 18, 1960. He has seniority dates on the Group 1 and Group 2 seniority rosters of the Southwestern Region.

ditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Employes have not established that Claimant was qualified to perform the duties of Store Attendant at Rose Lake Car Shop or that the Carrier's action in disqualifying him for work on said position was in violation of the Clerks' Rules Agreement or in any way arbitrary, discriminatory or capricious. On the other hand, the Carrier has shown that its actions which form the basis of this claim were in conformity with the applicable provisions of the Agreement and entirely proper. Therefore, no valid basis exists upon which your Honorable Board could sustain the Employes' claim in this case and it is respectfully urged to deny the claim in its entirety.

(Exhibits not reproduced).

OPINION OF BOARD: The Claimant had worked as a Stores Laborer for approximately three years at Carrier's station, when a position of Stores Attendant became available. Inasmuch as he was the senior eligible employe, he bid for and was awarded this new position. He reported for work at 7:00 A. M., and his Supervisor, Stockman Buckles, reported for work at 8:00 A. M. At 8:30 A. M., Supervisor Buckles informed Claimants' General Chairman that he (Claimant) was not qualified for the position. Subsequent to 8:30 A. M., a written examination was administered to the Claimant. The evidence indicates that he failed. A portion of the examination is reproduced in the record by the Carrier consisting of a count of certain items. It reveals that the count was taken by the Claimant between 7:20 A. M. and 10:25 A. M., and that another count, to check Claimant's accuracy, was made by E. R. Rigney, Stores Attendant between 1:30 P. M. and 2:10 P. M. The Count taken by the Claimant is captioned "incorrect" and that taken by Rigney "correct". There are obvious discrepancies between these two counts; for example, Item H-138A Springs, is listed as blank by Claimant and 142 by Rigney; Item 938A is listed 148 by Claimant and 0 by Rigney; Item 1378 is listed as blank by Claimant and 121 by Rigney; Item 383,2298 by Claimant and 4,135 by Rigney; Item 2614,2190 by Claimant and 3,010 by Rigney; Item 2914,2400 by Claimant and 3,915 by Rigney. The last five items on the list total 8,391 by Claimant and 12,800 by Rigney.

Pertaining to the above count, the record is silent insofar as the different hours of the day that the items were counted, is concerned. It is also silent with reference to Rigney's count, that is whether or not it was checked by a third party to determine its accuracy. One might well ask in view of the obvious difference in the counts, taken at different times of the day, whether such a difference might well be attributable to the face that this was an active storehouse with items continually being requisitioned and being replaced. However that may be, the record is silent, and we are on the above two points at least, relegated to the realm of speculation.

We now direct our attention to the rules of the Collective Bargaining Agreement, which the Organization alleges the Carrier violated. They are as follows:

"Qualifying 2-A-3:

"(a) An employe awarded a bulletined position or vacancy, or otherwise obtaining a position in the exercise of seniority, and fail-

ing to qualify within thirty days may exercise seniority under Rule 3-C-1.

"(b) When it is evident that an employe will not qualify for a position, he may be removed from the position before the expiration of thirty days and be permitted to exercise seniority under Rule 3-C-1. The Division Chairman will be notified, in writing, the reason for the disqualification.

"(c) When conditions develop so that an employe cannot satisfactorily perform the assigned work, he will be permitted to exercise seniority under Rule 3-C-1, subject to agreement between the Management and the Division Chairman.

"(d) Employes will be given full cooperation of the department heads and others in their effort to qualify."

There is no question that the Claimant in this case, in the exercise of his seniority, was awarded the questioned position. It appears obvious from an analysis of the above cited rule, that the Carrier, in the exercise of its managerial pre-rogatives, may, within thirty days, disqualify an employe for lack of fitness and ability. The only limitation placed on Carrier in the exercise of these powers, is that such action does not constitute or cannot be characterized as arbitrary and capricious. The question to be resolved therefore, and the sole question is, was Carrier's action in this matter such an arbitrary and capricious abuse of its' power, that it did "de facto" engage itself in conduct which was violative of the basic contract.

Great emphasis is placed on Paragraph 2 (d) above by the Organization, which expressly obligates the Carrier to extend full cooperation to employes in their effort to qualify. The Carrier counters by stating that the Claimant, although admittedly not bound by contract (3-H-1 infra) to post on this position, failed to do so and that this failure amounts to a lack of cooperation on his part. Ideally of course, it would, it seems to us, be adviseable for an employe to post on a given job for a reasonable amount of time to familiarize himself with its duties and responsibilities. However, we are seldom confronted with ideal situations and moreover, the Claimant was not bound contractually to do so. The Carrier however, was bound to extend full cooperation to this Claimant. We find that in consideration of the facts of this case, it failed to extend such cooperation. The alarmingly swift action and precipitate decision of the Supervisor to disqualify the Claimant by 8:30 A. M., flies in the face of that degree of reasonable cooperation so apparently inherent in the language of Paragraph 2 (d). We find further that the conduct of the Carrier in this case amounted to an arbitrary and capricious abuse of its powers and as such was in violation of the spirit and intent of the Agreement.

The Claimant requests us to allow him eight hours pay a day as a penalty, for February 19, 1960 and all subsequent dates until the violation is corrected at the Store Attendants' rate of pay. A review of this Collective Bargaining Agreement fails to make provisions for such a penalty, so we therefore revert to the "make whole" concept of damages, well enunciated by many decisions of this Board too numerous to mention. Although Carrier by the terms of its contract, is not bound to utilize all thirty days for a determination of an employe's fitness and ability, it is our judgement that damages consisting of the amount of money the Claimant actually earned, and what he would have earned had he remained in the Storeman Attendant's job for a total of 29 days beginning on February 19, 1960 and continuing thereafter, are the proper damages to be awarded in this case and it is so decreed.

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 was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 12th day of February 1965.