

Award No. 13574
Docket No. CL-14065

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, 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-5314) 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 Employee Cato Davis as a Store Attendant, at Rose Lake Car Shop, East St. Louis, Illinois, Southwestern Region, effective February 8, 1961.

(b) The Claimant, Cato Davis, should be allowed eight hours' pay a day, as a penalty, for February 9, 1961, and all subsequent dates until the violation is corrected, at the Store Attendant rate of pay. [Docket 1147]

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as the representative of the class or craft of employees 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 Employees 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, Cato Davis, was the incumbent of a regular Group 2 position of Stores Attendant at the Fuel Oil Storage Facility, East St. Louis, Illinois, Southwestern Region, prior to February 6, 1961. He has seniority dates on the Group 1 and Group 2 seniority rosters of the Southwestern Region.

For the foregoing reasons, it is respectfully submitted that your Honorable Board may not properly enter such an award in this case.

III. Under The Railway Labor Act, The National Railroad Adjustment Board, Third Division, Is Required To Give Effect To The Said Agreement And To Decide The Present Dispute In Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required to give effect to the said Agreement and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules and working conditions." The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employees in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions 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 Employees 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 Employees' claim in this case, particularly in view of the procedural defect mentioned above, and it is respectfully urged to deny the claim in its entirety.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to the events giving rise to this dispute Claimant Davis worked as Store Attendant at Carrier's Bulk Oil Storage Facility, East St. Louis, Illinois. The primary duties of this position were "Loading and unloading diesel fuel oil at Rose Lake Shops and Lower Yard, East St. Louis, Illinois." Effective February 6, 1961 Claimant was displaced from this position by a senior employe. Claimant then displaced a junior employe from a Store Attendant position at the Rose Lake Car Shop Stores Department, with tour of duty 7:00 A. M. to 3:30 P. M. daily except Saturday and Sunday. The primary duties of this position were:

"Storing, counting, ordering and disbursing material and handling forms and records in connection with freight car material and supplies used at that point; unloading diesel fuel."

Claimant Davis began service on this position, which was an outside job, on February 7, 1961, and the following morning the Stockman in charge, R. M. Buckles, gave him a test. Later the same day Stockman Buckles notified the Claimant by letter, copy to the Local Chairman, that due to Claimant's inability to perform the primary duties of the position it was necessary to disqualify him effective as of 3:30 P. M. that date, and that Claim-

ant could exercise his seniority under Rule 3-C-1. Thereafter, a claim was filed to protest Claimant's disqualification, and the matter was duly progressed to this Board.

The Organization contends that the disqualification of the Claimant was in violation of his rights under the Agreement, and that said violation was motivated by Stockman Buckles' opposition to Negro employees holding Store Attendant positions at the involved location. It is charged that more exacting standards are required of Negro than of white employees seeking to obtain such positions. Claimant Davis is a Negro.

The Carrier denies any violative or otherwise discriminatory action against the Claimant. Management contends that during Claimant's first tour of duty on February 7, 1961, it became obvious he was unable to perform properly the duties required of him, that the test, therefore, was given to determine how much he knew about the subject Store Attendant position, and that as a result of Stockman Buckles' observations and Claimant's test results, the Stockman properly determined Claimant did not possess the necessary qualifications.

The Agreement provision applicable to this case is Rule 2-A-3, which reads:

"(a) An employee awarded a bulletined position or vacancy, or otherwise obtaining a position in the exercise of seniority, and failing to qualify within thirty days may exercise seniority under Rule 3-C-1.

(b) When it is evident that an employee 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 employee 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) Employees will be given full cooperation of the department heads and others in their effort to qualify."

This rule indicates that an employee obtaining a position in the exercise of his seniority, as did Claimant Davis, may be required to qualify within 30 days, but may be removed from the position in less than 30 days "when it is evident" he "will not qualify" for the position. The rule further declares that "employees will be given full cooperation of the department heads and others in their effort to qualify."

Claimant Davis states he was not given cooperation in an effort to qualify and the record compels us to agree with his statement. Moreover, the test was administered under adverse conditions (items Claimant was requested to locate and count were covered with snow) and some of the questions could only be answered by an employee who had actual experience on the job. Finally, there is reason to doubt that the "correct" answers, offered by the Carrier in support of the low score given to the Claimant's test results, were in fact the correct answers in all instances.

Rule 2-A-3 does not automatically grant the affected employee a full 30 days within which to qualify for the position he has obtained by exercise of

seniority. This is the maximum qualifying period to which the employe is contractually entitled, but he may be removed from the position in less than 30 days when it becomes evident he will not qualify within the 30 day period, even though given the full cooperation specified in paragraph (d) of the rule. However, it was by no means evident as of the second day Claimant Davis occupied the subject Stores Attendant position that he would fail to qualify for the position in 30 days, provided he received the contractually required "full cooperation" in his "effort to qualify."

The Carrier may utilize a test to determine an employe's qualifications. But the record compels us to conclude that the test administered to the Claimant in this instance was designed as a trap, rather than as an objective means of evaluating his qualifications after "full cooperation" had been given him. It is manifest that the ablest employe can fail a test if he is placed in the hands of a capricious or biased examiner.

Whether the arbitrary conduct exhibited by the examiner in the subject case was based on the invidious and irrelevant criterion of race or on other grounds is unnecessary for us to determine here. Employes covered by this Agreement are entitled to the full fruits thereof, free of prejudicial or arbitrary treatment for any reason. Nevertheless, we are mindful that this is the third case arising at the same location within a brief period of time, involving similar facts and the same Stockman-Examiner, in which we have concluded that a Negro employe was wrongly disqualified under Rule 2-A-3 due to an abuse of managerial discretion. In the two other cases, as here, it was evident that the Stockman failed to extend the full cooperation mandated by Rule 2-A-3. Awards 13302, 13470 (both McGovern, Referee).

This brings us to the question of remedy. We think the proper remedial action is that Claimant Davis be made whole for earnings lost for the period beginning February 9, 1961 until the violation is corrected by Claimant being given an opportunity to qualify for the subject position within the meaning of Rule 2-A-3 of the Agreement.

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.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of April 1965.