Award No. 13968
Docket No. MW-14711

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it failed and refused to compensate Relief Bridge Operator Robert E. Fuller for time consumed in the Carrier's service at Bridge 210.21, Lorain, Ohio on May 28, 29, 30, June 1, 2 and 4, 1962.

(2) The Carrier further violated the Agreement when it refused to reimburse Claimant Fuller for the expenses incurred and travel time consumed in traveling from his assignment on Bridge 184.50 at Cleveland, Ohio to Bridge 210.21 at Lorain, Ohio on the six aforementioned dates.

(3) Claimant Fuller be allowed pay for 42½ hours for the time consumed in traveling to and performing service at Bridge No. 210.21 on the dates set forth in Part (1) of this claim.

(4) Claimant Fuller be reimbursed for the expense incurred in traveling a total of 360 miles to perform the aforementioned service. (Carrier's file 30-20-87).

EMPLOYES' STATEMENT OF FACTS: The claimant is an experienced drawbridge operator and was regularly assigned as relief drawbridge operator at Bridge No. 184.50, Cleveland, Ohio, on the dates involved in this claim. He has established and holds seniority rights as a drawbridge operator on the Buffalo-Cleveland Division as of December 10, 1956.

On May 15, 1962, the Carrier advertised a temporary relief drawbridge operator's position at Bridge No. 210.21, Lorain, Ohio. The claimant applied

The rule which expressly covers the situation is Rule 10, which reads as follows:

"Employes accepting positions, in the exercise of their seniority, will do so without causing extra expense to the railroad."

It should be noted that Rule 10 by its clear and unambiguous language contemplates that employes who accept positions in the exercise of their seniority must do so without causing extra expense to the Carrier. There can be no question as to the intent of this rule and it has always been applied as written. In other words, employes have always qualified themselves on their own time for positions which they wish to acquire through exercise of their seniority.

A similar situation obtained in the case involved in Award 6477 of this Division. In denying that claim, this Board held that unless the actions of the Carrier, in insisting as it did there that the claimants qualify themselves for the positions they sought to acquire in the exercise of their seniority, showed an abuse of discretion or lack of good faith, such a requirement did not entitle the claimants to additional compensation. No such showing was made here. In the instant case, the Carrier simply informed the claimant that if he wished to be assigned to the relief position at the Lorain drawbridge, it would be necessary for him to learn its operation on his own time. In so doing, the claimant simply qualified himself voluntarily to operate the drawbridge so that he could exercise his seniority, by bid, to the relief position at that point. No rule of the effective agreement supports his claim for compensation in the circumstances. The Carrier's position, on the other hand, is clearly supported by Rule 10. The claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant held seniority as a relief drawbridge engineer and was performing that position at Bridge No. 184.50, located at Cleveland, Ohio. On May 15, 1962, Carrier bulletined a position as relief drawbridge engineer at Bridge No. 210.21, located at Lorain, Ohio. Claimant was the senior bidder for the position but was not awarded it because Carrier did not consider him as qualified. He was told that if he wished the assignment he would have to learn the job on his own time.

Claimant went to Lorain on six occasions after he completed his regular assignment and learned the operation of that bridge. On June 4, 1962, Carrier determined that he had qualified and he was awarded the assignment that day.

The claim is for compensation for the time and the travel expense in learning to operate the bridge in order to qualify.

The Organization supports the claim on a number of theories which require examination. It says first that Claimant, having attained seniority as a drawbridge engineer, was qualified, by virtue of having attained that seniority rating, to operate any drawbridge and hence Bridge No. 210.21. It points to the fact that the Agreement does not make any distinction between drawbridges and that the parties made no such distinction on the property. The last assertion is not borne out by the record which discloses that one was a swing bridge and the other a vertical lift. The parties discussed qualifications on the property and could not have done so without reference to the distinction between the bridges.

The argument that Claimant must be deemed to have been qualified is not the theory upon which the claim was advanced. The Claimant did not protest that he should have been appointed on May 28 when he began to post the job. As will be seen below, the theory was that he had been appointed to the job.

But assuming, arguendo, that the claim was that he should have been appointed because he was qualified by the mere fact that he had seniority rating as a drawbridge operator, we would have had to deny the claim on the basis of Rule 12(b) which reads:

> "(b) Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail. Assistant Foremen will be given preference in filling vacancies or new positions as Foremen."

The rule asserts that seniority is not the only criterion. An employe must also be qualified by ability to do the job. It does not matter that this was a transfer to a job at the same level and not a promotion because Rule 21 makes the provisions of Rule 12(b) apply to transfers.

The Organization then argued that Claimant was in fact awarded the job, in that he was instructed by Carrier officer to travel during his off duty hours for the purpose of qualifying and that in doing so he performed services for which he should be paid because no employe should be required to work without being paid. It pointed to the fact that Carrier alluded to Rule 10 in refusing to pay for the travel expense. It reads,

> "Employes accepting positions, in the exercise of their seniority, will do so without causing extra expense to the railroad."

The rule applies to a case where the employe has "accepted" a position. It argued that Carrier must, therefore, be conceding that he had accepted the position and, if so, it must have been awarded to him.

This is a play on words. The facts are just the opposite. Claimant was told that he would not be awarded the position because he was not qualified, that if he wanted to he could qualify on his own time.

The Organization then contended that the agreement requires that a man qualify by training on the job. However, there is no contractural basis for this argument. Rule 16, on which the Organization relies, does not so provide. It says:

> "Employes accepting promotion and failing to qualify within 30 days may return to their former positions."

The Rule applies only to employes who are awarded positions and fail to make good. It does not apply where the position is not awarded and it says nothing about requiring that employes be given the opportunity to qualify on the job. To justify such an interpretation we would have to ignore Rule 12(b) which makes qualification a prerequisite to appointment.

Finally, it is argued that Claimant was assigned and performed work for which he should be compensated. The facts, again, contradict this assertion. He was not assigned. He was permitted, if he wished, to post the job.

The choice was his and he was under no compulsion. He was given an opportunity to learn and thereby qualify, an opportunity Carrier was not obliged to give him, and he ultimately was awarded the position. Under no semantic distortion can he be said to have been "assigned".

Nor did he perform work. He did not replace the incumbent. He did not protest a vacancy. He did not fill a vacuum. The Carrier was not unjustly enriched at his expense. Only he benefited. He learned enough about the job to persuade Carrier to award it to him.

The Organization has failed to support the claim on any contractural provision. Carrier acted within the proper limits of its prerogatives and discretion when instead of either declining to appoint to an employe who may have been qualified or appointing an employe who had not proved he was qualified, it took the practical step of saying to the employe, "Learn the job and prove you can do it and it will be yours."

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 did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of November 1965.