Award No. 14288
Docket No. CL-15273

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Nicholas H. Zumas, Referee

PARTIES TO DISPUTE:

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

LOS ANGELES UNION PASSENGER TERMINAL
(Southern Pacific Company, Pacific Lines)
(The Atchison, Topeka and Santa Fe Railway Company; and the Union Pacific Railroad Company)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5658) that:

(a) The Los Angeles Union Passenger Terminal violated the agreement when on January 12, 1963, it failed and refused to allow Mr. Louis Kaplan to displace junior employe Merle Lund from Position No. 33 Yard Clerk; and,

(b) The Los Angeles Union Passenger Terminal shall now be required to allow Mr. Louis Kaplan eight (8) hours' additional compensation at the time and one-half rate of Position No. 33 January 12, 1963, and each date thereafter until he is placed on said position.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement bearing effective date January 1, 1959, (hereinafter referred to as the Agreement) between the Los Angeles Union Passenger Terminal (hereinafter referred to as the Terminal) and its employes represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes (hereinafter referred to as the Employes) which Agreement is on file with this Board and by reference thereto is hereby made a part of this dispute.

Mr. Louis Kaplan (hereinafter referred to as the Claimant) was assigned to Position No. 178, Passenger Director. His seniority date is April 7, 1949.

By letter dated January 11, 1963, Baggage Agent H. E. Pierson notified Claimant that Mr. Jerome F. Parker, a senior employe, would displace him

and Mail Handler, in lieu of displacement involved, which was approved and accepted and claimant commenced work on that assignment, Thursday, January 17, 1963.

Attached as Terminal's Exhibit "G", are copies of the displacement forms here involved, one of which indicates the displacement made by a senior employe (Parker) against the claimant effective January 12, 1963 and the other form indicates claimant's subsequent aforementioned displacement on Position No. 808, Baggage and Mail Handler. effective January 17, 1963. Terminal has no record of claimant's request for displacement on Yard Clerk Position No. 33, since that form was never returned to the Extra Board Clerk by claimant.

9. On March 11, 1963, Petitioner's Division Chairman submitted claim on behalf of claimant to the Terminal's Superintendent (Terminal's Exhibit "A") and by letter dated March 29, 1963 (Terminal's Exhibit "B") the latter denied the claim in line with a report made by the Terminal's Assistant Superintendent, which was quoted therein. By letter dated May 8, 1963 (Terminal's Exhibit "C"), Petitioner's Division Chairman gave notice that Terminal's decision cannot be accepted on the basis that ". . . Claimant is qualified and would have been better qualified had he been given cooperation by the Terminal Management and employes, this was not given."

By letter dated May 10, 1963 (Terminal's Exhibit "D"), Petitioner's General Chairman appealed the claim to the highest officer designated to handle such disputes and by letter dated March 31, 1964 (Terminal's Exhibit "E"), the latter denied the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim before us arises by reason of the fact that The Los Angeles Union Passenger Terminal (hereinafter referred to as Terminal) refused to allow Mr. Louis Kaplan to displace a junior employe from Position No. 33, Yard Clerk.

The facts, briefly summarized, are as follows: On January 11, 1963, Claimant was notified that a senior employe would displace him from his present position the following day. Claimant thereupon filed a displacement that same day against a junior employe occupying Yard Clerk Position No. 33. The Extra Board Clerk advised the Claimant that the displacement would not be allowed without approval by Assistant Superintendent Morrison. Inasmuch as Mr. Morrisson was not available for two days (January 12 and 13) account rest days, the Claimant proceeded, on his own initiative, to acquaint himself with the duties of the position he sought to assume. He spent approximately 4 hours each day during those two days with the employe whom he would have displaced. The following day, January 14, Claimant's brother called Mr. Morrison, advising him that Claimant had broken in and requesting approval to displace the junior employe. Mr. Morrison advised the brother that Claimant had failed to demonstrate to Mr. Morrison that he could do the work. Moreover, R. D. Workman, Superintendent of the Terminal, stated to the Organization's Division Chairman that "Mr. Kaplin (sic) failed to comply with instructions given him by the Extra Board Clerk and Asst. Baggage & Mail Agent, that he would have to break in on the duties of the Yard Clerk position involved and that when he felt he was qualified he was to demonstrate to Mr. Morrison that he could handle the work of the position."

Claimant in the past had worked the following positions: Assistant Foreman, Passenger Director, Information Clerk, Excess Clerk, Mail and Record Room Clerk, Receiving Clerk, Delivery Clerk, Ditto Machine Clerk, Stock Clerk, Tracing Clerk, Baggage and Mail Handler, Yard Clerk, Freight Clerk, and Receiving and Delivery Clerk. All but the last three positions were performed at the Terminal; and the last three were performed with the The Atchison, Topeka, and Santa Fe Railway.

The Terminal contends that the position in dispute is important in that its primary purpose is to obtain information "to determine the number and type of cars handled at the Terminal by each Carrier to develop the actual usage of the Terminal facilities by each Carrier on a percentage basis." Terminal further contends that the position requires exacting and accurate work, and therefore "requires an employe to have a certain amount of clerical aptitude which would include visual acuity and dexterity to qualify. It is for this purpose a new, inexperienced employe must 'break-in' by practicing and working with an experienced employe who can protect and correct any errors which a new employe must learn to minimize and eliminate entirely for complete accuracy."

With respect to the time spent by Claimant "breaking-in", Terminal asserts: "During this time, claimant made only one attempt to record the information required when a train was passing by."

Rule 27 provides:

"Assignments and Displacements

"Rule 27. Assignment and displacement under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient seniority shall prevail.

Note: In exercising seniority rights Rules 26 and 27 contemplate that the senior employe will be awarded the position unless it is obvious that he cannot qualify. Employes shall be given cooperation in their efforts to qualify."

Claimant contends that if the record does not indicate that it is obvious in the first instance that he cannot qualify, Terminal is required under the Agreement to approve the displacement. If it is determined that he cannot or does not demonstrate his fitness and ability to handle the position within a reasonable time, then Terminal has the right to disqualify him under the provisions of Rule 32.

Terminal contends that Rule 27 requires that a showing of sufficient fitness and ability are **conditions precedent** to the awarding of a position. Further, that the Terminal has the right to make that determination, and absent any evidence of arbitrary or capricious action, such determination must be upheld.

This Board has considered fitness and ability claims on numerous occasions. Set forth are the principles applicable to this claim emanating from prior Awards:

Award 11780 (Hall):

"It has been recognized and established by a long series of awards that management has a right to determine the fitness and ability of an applicant for a position and its judgment in this regard will not be lightly set aside; it can only be done so if it is clearly established that the action of management in so doing was arbitrary or capricious. Award 3273 — Carter; Award 9324 — Rose; Award 10345 — LaBelle; Award 11121 — Dolnick; Award 11572 — Hall."

Fitness and ability for promotion to a position of greater responsibility must be commensurate with the requirements of the position to be filled. (Award 2990 — O'Malley).

If the Carrier determines that the applicant lacks sufficient fitness and ability, the burden is on the applicant to establish that he possessed reasonable sufficient fitness and ability to occupy the position. (Award 3273 — Carter; Award 1147 — Sharfman).

Fitness and ability means that the employe must have such "training, experience, and character as to raise a **reasonable probability** that he would be able to perform all of the duties of the position within a reasonable time." (Award 5348 — Robertson). (Emphasis added).

Rule 27, consonant with the principles set forth above, entitled Terminal, as a preliminary matter, to satisfy itself that Claimant possessed the requisite basic requirements sufficient to satisfactorily perform all the duties of the new position if it were assigned. In making this determination, Terminal was entitled to consider Claimant's prior experience, training, breaking-in performance, and the requirements of the position. If it determined, after a reasonable and unarbitrary evaluation, that the Claimant was not yet ready to assume the responsibilities or it was uncertain whether Claimant could perform the work, Terminal was entitled to further proof of "reasonable probability" of subsequent performance.

We reject the contention of Claimant that Rule 27 must be construed to place an immediate burden on the Terminal to assign a senior employe unless it is obvious at the outset that he cannot qualify. To impose such a restriction would virtually nullify Terminal's right to determine fitness and ability in any instance.

We further find that Terminal's action was not arbitrary, capricious, or unreasonable.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1966.

LABOR MEMBER'S DISSENT TO AWARD 14288, DOCKET CL-15273

Award 14288, Docket CL-15273, simply is not a proper interpretation of Rule 27 which reads:

> "Rule 27. Assignment and displacement under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient seniority shall prevail.
>
> Note: In exercising seniority rights Rules 26 and 27 contemplate that the senior employe will be awarded the position unless it is obvious that he cannot qualify. Employes shall be given cooperation in their efforts to qualify."

The principles set out in the Award simply do not apply here because the parties have added the "Note". That Note was completely ignored, not only by the Carrier but by the Referee, in this case. The reasonableness thereof or ones on personal predilections as to what should have been agreed to are matters entirely foreign to interpretation of a rule.

Award 11780, cited as authority in this case, involved a dispute over a rule reading essentially the same as was here involved. In that case the same Carrier as here involved quite obviously recognized the thrust of the "Note" for it argued that:

> "Terminal submits the foregoing, and particularly Exhibits 'C' through 'G' clearly establish that **it was obvious claimant could not qualify** for Position No. 530, and **in those circumstances, under the specific provisions of the note following Rule 28,** Terminal's action in not assigning him to the position was entirely proper. Not only was claimant's performance in work involving direct contact with the public entirely unsatisfactory, resulting in disgruntled patrons, but it was frequently necessary for other employes working in close proximity to take time from their own duties to intercede on Terminal's behalf to straighten out misunderstandings and assist in getting patron's baggage to them or in getting it properly checked." (Emphasis supplied)

Moreover there, while the Referee gradually strayed away from the "Note", he certainly did not completely ignore it for he wrote:

> "There is, then, a single, clear issue determinative of this case, namely: — Did the Carrier abuse its discretion in concluding that Claimant could not qualify for Position No. 530 on March 8, 1957?"

Here, however, it seems obvious that the Referee simply could not believe what the parties had agreed to.

Awards 1147, 2990, 3273, 5348, 9324, 10345, 11121 and 11572 referred to in the awards and citations involved what can be termed general or usual rules under which the principles set out in the present case have come to be more or less generally recognized. In the majority of those cases, if there was a note to clarify and give additional meaning to rules such as 27 here, the "Note" simply stated:

> "The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two (2) or more employes have adequate fitness and ability."

In others cited the rules plainly stated that promotion depended on faithful performance and a showing of fitness for increased responsibility, which must be sufficient in the judgment of the officers, before seniority prevailed. But to apply those general principles here, when the parties have agreed to a more stringent rule, simply constitutes palpable error.

As for the requirement that the Yard Clerk have "visual acuity and dexterity." I wish to make it quite clear that the Organization was not asserting a claim for either a blind man or a cripple. Claimant could read and write. There was no hint that he was in any way afflicted and most certainly Claimant could read car numbers and write them down.

The claim should have been sustained, in view of the clear wording and intent of the rules, based on the facts of record. I therefore most vigorously dissent to this erroneous and improper Award.

D. E. Watkins
D. E. Watkins, Labor Member
4-29-66

CARRIER MEMBER'S ANSWER TO LABOR MEMBER'S DISSENT,

AWARD 14288, DOCKET CL-15273

(Referee Zumas)

The theme of the dissent is the same as that argued by the Employes in the record and by the Labor Member before the Referee. The issue framed by the Employes is whether sufficient fitness and sufficient ability to meet the requirements of a position are prerequisites to exercising seniority on that position, or are to be acquired after appointment to the position. The Employes argue that an employe cannot be required to demonstrate fitness and ability prior to being placed on a position but "must be awarded the position and be given cooperation in his efforts to qualify **after being placed thereon.**"*

The crux of the Employes' argument is clearly stated in their rebuttal as follows:

> "These rules, read and considered together, clearly mean that an employe, with cooperation, has the right to demonstrate fitness and ability after he is placed on the position. **Nowhere** in the Agreement can even one line be found to support Terminal's contention

that an employe must demonstrate fitness and ability **prior** to being placed on a position." (Emphasis herein by Employes)

* Emphasis herein by us unless otherwise indicated.

The rules here referred to by the Employes are 27 and 32 which reads:

"Assignments and Displacements

"**Rule 27.** Assignments and displacements under these rules shall be based on seniority, fitness and ability; **fitness and ability being sufficient** seniority shall prevail.

"**Note:** In exercising seniority rights Rules 26 and 27 contemplate that the senior employe will be awarded the position unless it is obvious that he cannot qualify. Employes shall be given cooperation in their efforts to qualify."

"Failure to Qualify

"**Rule 32.** An employe who is assigned to a permanent position or makes displacement, and fails, within a reasonable time to demonstrate fitness and ability, shall vacate position on which disqualified, and may displace the junior assigned employe. The privileges under this rule must be exercised within five (5) calendar days from date of being notified of disqualification.

"An employe disqualified on a temporary position may return to his permanent assignment."

Carrier agrees, of course, that Rule 27 is controlling. Rule 27 itself could hardly be more explicit in stating that Carrier can consider fitness and ability before seniority becomes effective. **The express wording is that fitness and ability must be sufficient in order for seniority to prevail.** This Board has been called upon to interpret such language in Clerks' Agreements on many prior occasions, and has consistently ruled that by this language, fitness and ability are conditions precedent to a right to exercise seniority. In one of the very early cases on the point the Board ruled this way on the matter:

Award 2142 (Thaxter — Clerks v. NYC&StL):

". . . The Committee claims that the rules relating to seniority have been violated and particularly Rules 8 and 9 (a) which read as follows:

" 'Rule 8.

" 'Promotions or the awarding of other bulletined positions coming within the scope of these rules, shall be based on seniority, fitness and ability; **fitness and ability being sufficient,** seniority shall prevail.

" 'NOTE: The word "sufficient" is intended to more clearly establish the right of the senior clerk or employe

to bid in a new position or vacancy where two or more employes have adequate fitness and ability.'

" 'Rule 9.

" '(a) Employes accepting promotion or awarded bulletined positions **will be allowed thirty (30) working days in which to qualify, except where it is plainly seen within a period of ten (10) working days that the employe cannot qualify,** he may be removed from the position by mutual agreement between the management and clerks' committee. Disqualified employes shall return to former position, if available.'

"Similar rules to 8 have been interpreted in a number of awards. 96, 396, 1147, 1441, 1588, 2031.

"The Committee suggests that Rule 9 (a) requires the Carrier to award the position to the senior bidder who, subject to the provisions of the rule, will be given thirty days in which to qualify. We do not so construe the rule. The Carrier is obligated under Rule 8 to award the position to the applicant having the highest seniority **provided that employe has the requisite fitness and ability.** Rule 9 (a) recognizes that a favorable decision with respect to qualifications may turn out to be erroneous and that the designated employe under the actual stress of work may fail to fulfill expectations. The rule merely provides a method for correcting the mistake . . ."

One of our most recent awards involving such language in a railway labor agreement puts it this way:

Award 13968 (Wolf — MW v. NY,C&StL):

"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 contended that the agreement requires that a man qualified by training on the job. However, there is no contractual 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 employees 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."**

In **Award 5802** where the Agreement provided: ". . . Ability and merit being sufficient, seniority shall prevail in the appointment.", the Board with Judge Carter sitting as Referee ruled:

" The burden is upon the Claimant to show that he had sufficient ability and merit . . .

"The Agreement permits the Carrier to consider ability and merit before seniority becomes effective. The determination of the Carrier will not be disturbed unless it has acted arbitrarily and unreasonably. We do not think the record made by the Organization affirmatively shows that the Carrier failed to properly apply the agreement."

To the same effect, see **Awards 13351** (Bailer), **12338** (Englestein), **11006** (Boyd), **10689** (Mitchell), **9966** (Weston), **8430** (Dougherty), among others.

Thus, in addition to the clear language of Rule 27 itself, we have a long line of well-reasoned awards consistently holding that under this language sufficient fitness and ability to fill the position are express prerequisites to the right to exercise seniority on that position.

Consistent with the rule itself and with the awards on other properties, this Board has recently rendered an award on this same property involving these same rules and has upheld Carrier's position that fitness and ability constitute conditions precedent to the right to exercise seniority on a position. That award is now final and binding, and is determinative of the only substantial issue presented in this docket.

Award 12801 — Engelstein (CL v. LAUPT — Claimant refused displacement):

"Claimant has failed to show that he had sufficient fitness and ability for the position and that Carrier was arbitrary and prejudiced in its denial of his bid for the position. Since the record leads us to conclude that Carrier acted fairly and reasonably in exercising its managerial prerogative in determining the fitness and ability of Claimant for the position, we cannot hold that the Agreement was violated."

The Employes in this case appear to be placing undue emphasis on the Note to Rule 27. In the first place, we should not lose sight of the fact that the Note is simply a note, it does not have the dignity of part of the rule itself, and certainly was not intended to swallow up the rule and transform it into something different than what is expressed by its plain terms. As we said in **Award 12949** (Wolf):

". . . The resort to a note can only mean that the parties regarded its text as of secondary importance, a making more explicit of something already said or implied."

The Note simply states that the senior employe will be awarded the position unless it is obvious that he cannot qualify. **Carrier recognizes that under this Note, the employe is entitled to have doubts as to his fitness and abliity resolved in his favor where they otherwise might not be. This does not change the fact that the fitness and ability must be there and present, not something which is hoped for in the future after a period of education on a job that the employe cannot presently fill. The Note simply means what it says, Carrier must be convinced of a lack of qualification to the point it is obvious to Carrier that the employe does not possess sufficient fitness and ability to fill the position at the time he is attempting to exercise his seniority. The prerequisite element is not lost and there is nothing whatever in the Note to suggest that it is.**

/s/ G. L. Naylor

/s/ R. A. DeRossett

/s/ C. H. Manoogian

/s/ W. M. Roberts

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