



Award No. 17079
Docket No. CL-17708

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Morris L. Myers, Referee

PARTIES TO DISPUTE:

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

THE BELT RAILWAY COMPANY OF CHICAGO

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6443) that:

1. The Carrier violated the Clerks' Agreement, when it refused to permit Clerk H. Burgess to exercise his seniority rights to Utility Clerk Position No. 318, at Clearing, Illinois on December 19, 1966.

2. The Carrier shall now be required to compensate Clerk Burgess eight (8) hours' pay at the applicable Chief Clerk rate for February 15, 1967 and four (4) hours additional compensation at the rate of the position required to work, for each Saturday and Sunday, which normally under the Agreement would have been his assigned rest days, effective with the date of December 31, 1966 and continuing so long as the violation continues, or until such time as corrective measures are applied.

EMPLOYEES' STATEMENT OF FACTS: Clerk Burgess was first employed as a clerk at Clearing, Illinois on April 4, 1957. He first exercised displacement rights on Utility Clerk Position No. 318 on December 28, 1965 and occupied this position until March 7, 1966, when he was awarded another position which he worked until displaced by a senior employee on December 16, 1966.

Due to being displaced by a senior employee, Clerk Burgess on December 16, 1966 submitted notice to Agent Santoro requesting to exercise his seniority rights by displacing a junior employee on Utility Clerk Position No. 318, effective with the date of December 19, 1966, indicating thereon that he had previously worked the position. Employees' Exhibit No. 1.

Notwithstanding, that he had previously worked the position for a considerable period of time without complaint, or official reprimand his request was denied on the basis that he was not qualified. Employees' Exhibit No. 2.

NOTE: 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 or more employes have adequate fitness and ability."

it was obvious to his supervisors, by his past performance, that he could not perform the duties adequately.

OPINION OF BOARD: The Claimant in this case, Mr. H. Burgess, had been an employe of the Carrier represented by the Organization since April 4, 1957. On December 28, 1965, he exercised his displacement rights on Utility Clerk Position No. 318 and occupied that position until March 7, 1966, when he was awarded another position until displaced by a senior employe on December 16, 1966. Upon being displaced, Mr. Burgess requested on December 16, 1966 to exercise his seniority rights to bump a junior employe on Utility Clerk Position No. 318 (Mr. Burgess mistakenly wrote Position No. 218 instead of Position No. 318 in his request but wrote the name of the incumbent in Position No. 318 as the employe he desired to displace and also indicated on his request that he had previously worked the job. As stated above, he had previously worked Position No. 318, but he had never worked Position No. 218).

Mr. Burgess' request was denied by the Carrier on the basis that he was "not qualified to work Position No. 218." The Carrier's position was double-edged. On one edge of the blade, the Carrier's position was that Mr. Burgess' request was related to Position No. 218, not Position No. 318. On the other edge, the Carrier's position was that Mr. Burgess was not qualified to work Position No. 318, contending that his past performance on Position No. 318 established his lack of ability to perform the job.

A hearing was held on February 15, 1967, having been postponed from January 27, 1967 because of adverse weather conditions, to determine whether or not Mr. Burgess had the qualifications to perform Position No. 318, although the Carrier continued to adhere to its position that Mr. Burgess had applied for Position No. 218. The Carrier determined on the basis of the evidence at the hearing that Mr. Burgess did not possess the necessary qualifications to perform Position No. 318. The Claimant herein challenges that determination and claims violation by the Carrier of a number of Rules in the Agreement, Rule 8 being the one that the Board believes to be relevant to this case and which reads as follows:

"RULE 8. PROMOTION BASIS

Employes covered by these rules shall be in line for promotion. Promotion, assignment, and displacement 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 employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability.

It takes little time for the Board to dispose of the Carrier's defense that the claim should be denied because Claimant requested to bump into Position

No. 218, not Position No. 318. As stated earlier in this Opinion, not only had the Claimant in his request named the incumbent in Position No. 318 as the man that he desired to displace, and had indicated in his request that he had worked the position before, which could not have been Position No. 218 since he had never before worked Position No. 218 (but had worked Position No. 318), more importantly, at the hearing, Mr. Santoro, the Carrier's Agent who had initially denied Mr. Burgess' request finally admitted that when he received Mr. Burgess' request he was of the opinion that Mr. Burgess meant Position No. 318 although earlier in the same hearing, Mr. Santoro stated there was a question in his mind as to what position was actually involved. It is clear to the Board that the Carrier's position regarding this aspect of the case is both specious and transparent. In fact, in a case where credibility becomes a major factor in the Board's determination as to whether the claim should be sustained or denied, such a defense by the Carrier so devoid of substance tends to taint the good faith of the Carrier regarding its position in the case as a whole.

The Board now addresses itself to the issue as to whether or not Mr. Burgess had the qualifications to perform Position No. 318. In deciding this issue, the Board is both cognizant of and sympathetic to the principle that the Carrier's determination as to qualifications should not be reversed by this Board unless the Board believes that the Carrier acted capriciously or arbitrarily. With that principle firmly in mind and consistent with it, it is the Board's belief that the Carrier acted with so little justification in denying the Claimant's request as to constitute, at least constructively, arbitrary or capricious action.

The Carrier's main contention as to Mr. Burgess' lack of qualifications is that he did not understand the demurrage rules under Hinsch's tariff 4-H, ICC Service Order 979, the understanding of which was an integral part of Position No. 318. Had the Carrier proved this lack of understanding, it would have prevailed in this case. However, at the February 15, 1967 hearing, Mr. Burgess, upon questioning by the Carrier, established that he had a very adequate understanding of the demurrage rules.

The Carrier also asserted that there were complaints for overcharging from four large accounts due to Mr. Burgess' errors in computing demurrage changes. Yet upon cross-examination, it was admitted by the Carrier that there were no discrepancies found in two of those four accounts that could be attributed to Mr. Burgess, and there was no satisfactory response by the Carrier to the statement by the Organization's questioner at the hearing that the discrepancies in the two other accounts attributable to Mr. Burgess were minor.

The Carrier asserted that Mr. Burgess had a poor attitude when he previously performed Position No. 318 and that he exhibited no interest in the job. However, it is undisputed in the record that at no time was Mr. Burgess disciplined or even warned concerning his attitude or lack of interest during the period when he was an incumbent in Position No. 318. Lastly, the Carrier asserted that when the Claimant previously performed Position No. 318, his accounts became badly in arrears. However, again, at the hearing, the Carrier's evidence to substantiate its assertion was inconsistent and inadequate.

The Board thus concludes that the claim herein is meritorious. However, the Board does not believe that the remedy requested by the Claimant has

merit in its entirety. The Claimant seeks pay for February 15, 1967, the day he lost while attending his hearing. Yet it is clear in the Record that when the hearing was originally requested by the Organization, a day was suggested "so as not to cause the employee to lose time," and such a day was selected initially to accomplish that result. The bad weather conditions that required a changing of the hearing date through no fault of the Carrier should not militate against the Carrier and, thus, the Board concludes that the Carrier should not be required to pay Claimant for February 15, 1967.

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 to the extent consistent with the Board's Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of April, 1969.