

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20361
Docket Number CL-20334

Irwin M. Lieberman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steam-
(ship Clerks, Freight Handlers, Express
(and Station Employees
(
(Harbor Belt Line Railroad

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7379) that:

(a) The Harbor Belt Line Railroad violated the current Clerks' Agreement when on May 11, 1971 it failed and refused to allow employe Patti Lucas to displace employe J. Harvey from Position No. 503, Cashier; and,

(b) The Harbor Belt Line Railroad shall now be required to allow Patti Lucas eight (8) hours' compensation at the pro rata rate of Position No. 503 each date May 12, 1971 through May 21, 1971 in addition to any other earnings compensated for service performed on such dates; and,

(c) The Harbor Belt Line Railroad shall be required to pay interest at 7% per annum compounded annually on the anniversary date of claim.

OPINION OF BOARD: Claimant, with a seniority date of May 24, 1968, was an extra clerk and was filling a temporary vacancy on Position No. 512, ATSF Correction Clerk. That vacancy terminated on May 10, 1971 and by letter dated May 11, 1971 Claimant requested to displace a junior extra clerk on Position No. 503, Cashier, effective May 13, 1971. The request was denied with the notation: "Disallowed, account not qualified." Claimant had worked two short vacation periods in 1968 and 1969 (for a total of seven days) on Position No. 503. It should be noted that subsequently, by letter dated September 1, 1971, Carrier informed Claimant that she was then qualified for position No. 503.

Petitioner relies primarily on Rule 25 and its notes which provides as follows:

"PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS

Promotion, assignments and displacements under 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 employe to bid in a new position or vacancy or make a displacement where two or more employes have adequate fitness and ability.

NOTE: This rule contemplates that the senior employe will be awarded the position unless it is obvious that he cannot qualify."

Further, Petitioner states that Rule 27 (f) provides that an employee who makes a displacement should be given a reasonable time to demonstrate fitness and ability and will be given cooperation in the effort to qualify. The Organization contends that Claimant was adequately qualified to fill the position, that she had been trained in the position and that Carrier had failed to show that it was "obvious" that she could not qualify, as required by Rule 25. Finally, Petitioner argues that Carrier had acted in an arbitrary and capricious manner when Claimant was denied the opportunity to demonstrate her capacity for the new position.

Carrier states that Claimant from May 24, 1968 to May 12, 1971 had worked only 153½ days due to medical leave. After returning from leave on December 31, 1970, she did not choose to displace either of two junior employee trainees which would have given her a better opportunity to qualify for all positions. She worked in 1968 for three days and in 1969 for four days in Position 503, both over holiday periods. Carrier states that on both of the above occasions, Claimant only "partially filled the position of Cashier....and was not qualified to work alone and perform that work fully."

Over many years this Board has held consistently that it is Carrier's prerogative to determine the fitness and ability of an employe for a position and such determination will be sustained unless it appears that Carrier was arbitrary or capricious in its actions (Awards 15494, 16360, 19129 and others). When Carrier determines that Claimant lacks fitness and ability, as in this case, Petitioner has the burden of proof to establish Carrier's error: that Carrier's action was arbitrary and capricious.

In the dispute before us the facts presented by Petitioner relate only to the two short assignments filled by Claimant in 1968 and 1969. Petitioner has failed to sustain its burden of proof and the subsequent qualification of Claimant does not lend weight to its argument.

Award Number 20361
Docket Number CL-20334

Page 3

We find therefore upon the entire record, that Carrier's decision was made in good faith, and it will not be disturbed. The determination of fitness and ability will stand.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of August 1974.

LABOR MEMBER'S DISSENT TO AWARD 20361
(Docket CL-20334)
(Referee Lieberman)

The tragedy in Award 20361 lies in the failure of the Carrier Members and Referee Lieberman to afford even the slightest weight to the second note to Rule 25 reading:

"This rule contemplates that the senior employe will be awarded the position unless it is obvious that he cannot qualify."

It was not obvious that claimant could not qualify for the position sought. In fact, she was subsequently given written notice that she was considered qualified even without ever working the position in the interim period.

The Awards cited in the Opinion of Board are not decisive to a determination in the instant case because none involved a rule containing a note similar to the second note to the rule under consideration here.

Award 20361 is in palpable error and requires dissent.


John C. Fletcher
August 27, 1974