

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20878  
Docket Number CL-20874

Joseph A. Sickles, Referee

PARTIES TO DISPUTE: ( (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-7663) that:

1. The Carrier violated, and continues to violate, the rules of the Clerks' Agreement when it denied Leonard L. Zeck the position of Revisor No. 215 in the Freight Claim Department, Chicago, Illinois.

2. The Carrier shall now be required to place Mr. Zeck on position of Revisor No. 215 and reimburse him for any loss of compensation at \$0.98 per day, commencing July 2, 1973, and continuing until placed on position of Revisor No. 215.

OPINION OF BOARD: Claimant was employed by Carrier on July 26, 1928. Thereafter, he received a number of promotions; the last of which being to Interline Division Clerk on June 6, 1966.

On May 21, 1973, Claimant was advised that his position was abolished effective June 29, 1973, and that he was free to exercise his seniority. On May 29, 1973, Claimant advised Carrier that he desired to exercise his seniority rights to position as "Revisor #215." On the next day, he was notified that: "Under provisions of Rule 7 your application for displacement is rejected." On the same date, Claimant requested a hearing under Rule 58 (unjust treatment) - which was conducted on July 9, 1973. On July 26, 1973, after review of the transcript of investigation, Carrier advised Claimant that he did not have the fitness and ability necessary to enable him to be assigned to the position of Revisor #215; which advice prompted this claim.

The Carrier has raised certain procedural objections concerning the Organization's method of prosecuting the claim, and the parties have debated that question at length. However, our disposition of this dispute on its merits makes it unnecessary to rule on the procedural question.

In urging that the claim be sustained, the employees have cited, among others, Rule 7:

"Rule 7. PROMOTION

Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to excepted positions.

"NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability."

and they argue that this Claimant had satisfied the requirements contained therein.

It should be noted that, in addition to Claimant herein, other employees sought similar promotions which were denied. See Awards 20879, 20880 and 20881.

Quite frequently, disputes of this nature produce highly controversial factual disagreements and seldom lend themselves to simple determinations. Such is the case here. Initially, we note that Rule 7 is not a strict seniority rule. Rather, it is modified by the application of fitness and ability.

No useful purpose is served by a lengthy recitation of the various and complex duties of the Revisor position. Suffice it to say that a review of the record convinces us that the position does require a significant degree of skill and ability in order to properly perform the job. This dispute is, of course, magnified when one considers Claimant's years of service and demonstrated ability to properly perform his prior assignments. We do note however, that Claimant's prior job performance did not expose him to all of the many and varied requirements of the position he sought.

We freely concede that reasonable minds could differ concerning a review of Claimant's qualifications when considered in the perspective of an initial determination, and in that regard, we have noted certain indications that Carrier officials may well consider that the position should be treated as "exempted" - when, in fact, it is not, and we wonder how significant was the consideration that Claimant and three others attempted to displace four experienced Revisors at the same time; which indeed, could have led to some rather disquieting results.

But, it is not our role to make the initial determination of qualification. We have noted that certain Awards have stressed that it is not necessary that the applicant be immediately qualified to assume the duties of the position without assistance and guidance. (See, for example, Award 14762). But, there must be a potential to be able to perform all of the duties of the position within a reasonable time. This Board's role, in assessing the concepts noted above, is quite limited. Our attention has been invited to a number of Awards which have held that, when considering a rule such as here in issue, the Carrier has the initial right to determine the necessary qualifications, and this Board is not free to substitute its judgment for that of the Carrier, absent a demonstration that Carrier's determination was "biased", "arbitrary",

"capricious", "grossly abusive", etc. While those words and terms are frequently overused and misapplied, the words themselves, when properly utilized, require a rather strong showing of improper action. In our review of the cited Awards, we have noted that numerous Referees who have served this Board for long periods of time with distinguished records, have freely chosen to incorporate those terms into their Awards. Those individuals are fully conversant with the proper use of the English language and we must presume that they intended their words to convey their true meanings.

Regardless of what view we might express were we concerned with a prospective view of "qualifications", we are unable to find a showing that Carrier's action was such that it may be set aside under our very limited review authority.

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. Paulose  
Executive Secretary

Dated at Chicago, Illinois, this 26th day of November 1975.

LABOR MEMBER'S DISSENT TO  
AWARD 20878 (Docket CL-20874)  
AWARD 20879 (Docket CL-20875)  
AWARD 20880 (Docket CL-20877)  
AWARD 20881 (Docket CL-20878)  
REFEREE SICKLES

In reviewing what is set out in Award 20878 together with the other awards dealing with the same subject matter, that is, Awards 20879, 20880, and 20881, one is at a loss as to how the majority of the Board can conclude, based on all the facts and circumstances which were presented, that carrier's action was such whereby it could not be set aside and the claims should not be sustained.

While one must recognize, that if all four claimants were permitted to displace experienced revisors at the same time, it could have led to some rather disquieting results, it is nevertheless evident that based on all the facts and circumstances which permitted the claimants to exercise the rights to which they were entitled under the agreement, together with the fact that all the claimants had numerable years of service and demonstrated their ability to properly perform in their prior assignments, based on the provisions of the agreement governing carrier's action was biased, arbitrary, capricious, and grossly abusive. This is especially due to the fact that the positions in question were not "exempted" as the carrier officials desired they be treated and it is evident that in this particular instance all the claimants did not have the potential to be able to perform the duties of the positions within a reasonable time and by no stretch of the imagination was carrier's action such that it could not be set aside.

Award 20878, along with 20879, 20880, and 20881 are palpably in error and all require dissent.

*Gerald Toppen*  
Gerald Toppen  
Labor Member

12-23-75