

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21685  
Docket Number CL-21653

James F. Searce, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees  
(  
(Norfolk and Western Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,  
GL-8116, that:

1. Carrier violated the Agreement between the parties when Clerk J. Druckemiller was arbitrarily disqualified on November 4, 1974, and not permitted to exercise seniority to the Extra Board.

2. Carrier further violated the Agreement between the parties when Clerk Druckemiller was not assigned to Relief Position No. 6 on November 25, 1974.

3. Carrier shall now be required to compensate Clerk Druckemiller for all time lost as a result of the above violations, until the violations are corrected.

OPINION OF BOARD: This case involves an allegedly improper disqualification of Claimant on November 4, 1974, when Carrier denied her the right to displace, as well as Carrier's failure to assign her to a relief position on November 25, 1974, which failure or refusal is alleged to be a violation of Claimant's rights.

The main rules involved are:

"Rule 5 - Promotion, Assignments and Displacements

Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements, under the rules of this Agreement, 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.

"Rule 10 - Qualifying

(a) An employee awarded a bulletined position or who exercises displacement rights thereon shall be allowed forty (40) working days with pay in which to qualify except when it is evident he will not qualify for the position he may be removed from the position at any time before the expiration of the qualifying period of forty working days.

(b) An employee failing to qualify shall retain all seniority rights and must return to his former position. In event such employee's former position has been abolished or senior employee has exercised displacement rights thereon, the displaced employee will be governed by the provisions of Rule 18(b). However, after two consecutive disqualifications he shall not be allowed to displace any regularly assigned employee but may bid on any bulletined position, except the positions from which disqualified. Employees displaced by his return will be governed by the provisions of Rule 18.

(c) The Local Chairman shall be notified, in writing, the reason for any disqualification.

(d) Employees will receive cooperation of the department heads and others in their effort to qualify.

"Rule 12

(b) If there is no applicant for a new position or vacancy which is bulletined in a seniority district and there are furloughed employees from that seniority district the senior of such furloughed employees will, subject to Rule 5, be assigned. Should a situation arise in a seniority district where employees senior to those in service have been furloughed and applications for new positions or vacancies are received only from junior employees remaining in the service, the senior employee who is furloughed will, subject to Rule 5, be assigned.

Application from furloughed employees for bulletined positions are not required."

On March 27, 1974, Claimant was awarded position of Extra Board Clerk No. 2 on Extra Board No. 1, Bison Yard.

On May 2, 1974, Claimant was again awarded position as Extra Board Clerk No. 2 on Extra Board No. 1, Bison Yard.

On July 11, 1974, Claimant was awarded position of Extra Board Clerk No. 4 on Extra Board No. 1, Bison Yard.

On September 12, 1974, Claimant was awarded position of Billing Clerk No. 36 in Agent's office.

Prior to November 4, 1974, Claimant was notified that she was being displaced by a senior employee from Billing Clerk Position No. 36 effective November 4, 1974.

Claimant elected to displace a junior employee on position of Extra Board Clerk No. 5 on Extra Board No. 1, Bison Yard, but was not permitted to displace thereon and, effective November 4, 1974, became furloughed.

There is nothing in the record to indicate that, prior to the letter of December 5, 1974, Carrier was in any manner dissatisfied with Claimant's work on similar extra board clerk positions which Carrier assigned to her commencing March 1974. The December 5, 1974, letter was a belated attempt by Carrier to comply with Rule 10(c). Claimant was the senior furloughed employee on November 25, 1974, and, in accord with Rule 12(b), was entitled to be assigned to Relief Position No. 6, on which no bids from senior employees had been received.

From at least March 27, until November 4, 1974, when Claimant was advised by telephone that her displacement on Extra Board Clerk Position No. 5 would not be honored, Carrier failed to raise any issue as to her work. When claim was filed in her behalf, Carrier advised the local chairman that she had "trained" from three to twenty-five days on five of the twenty-three positions covered by Extra Board No. 1 and "failed to qualify." In answer to claim in her behalf account not assigned to Relief Position No. 6, Carrier stated "Claimant was disqualified from extra board #1, Bison Yard which covers position of Relief #6."

The record reveals that, contrary to the provisions of Rule 10, Claimant was neither allowed forty working days with pay in which to qualify on any of the twenty-three positions covered by Extra Board No. 1, Bison Yard, nor was she informed that it was evident she would not qualify for any of the extra board positions, and that Carrier invoked its belated and contested disqualification of her from Extra Board Clerk Position No. 5 on Extra Board No. 1 at Bison Yard as disqualifying her from all twenty-three positions covered by said extra board.

Carrier did not act timely, in accord with Rule 10(c), nor did it properly comply with Rule 12(b). Not only Claimant, but Claimant's representative as well, has a right to know if Carrier determines "it is evident he will not qualify" so that either might take timely action. Claimant was belatedly alleged to have failed to qualify on five of the twenty-three positions. On no one position had she been given forty working days in which to qualify nor had she ever been told her efforts were to no avail, until she attempted to displace on a position similar to others awarded her previously, based on Carrier's determination that her seniority, fitness and ability were deemed sufficient. In such instances the burden shifts to Carrier to prove her lack of sufficient fitness and ability. (Awards 6892, 10424, 12141, 12245, 16547 and awards cited therein.) In addition, when one has not been advised that his work performance on a previously assigned position was not acceptable, there is created a presumption in favor of the employee which Carrier should be prepared to overcome. (Awards 402 (without referee), 2638, 2673, 2864, 4725, 11279, 13352 and awards cited therein.) The record does not support Carrier's action.

In view of all the facts of record, rules cited and relied on, and prior decisions involving such matters, the Board concludes that the agreement was violated.

Claimant asks that she be paid all time lost until the violations are corrected. We will order that Claimant be treated as though her displacement on Extra Board Clerk Position No. 5 on November 4, 1974, had been allowed and require Carrier to pay her what she would have earned on that position from November 4, 1974, until she actually acquires, or did acquire, another position, less any amount she earned during that period.

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

The agreement was violated.

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Page 5

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Claim sustained in accordance with opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: *A. W. Paulson*  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1977.