

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22882
Docket Number CL-22266

Dana E. Eischen, Referee

(Brotherhood of Railway, Airline and
(Steamship Clerks, Freight Handlers,
(Express and Station Employees
PARTIES TO DISPUTE: (
(St. Louis-San Francisco Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-8485)
that:

1. Carrier violated the Agreement between the parties when it failed and refused to allow clerical employee, D. C. Claxton, to displace a junior employee from position No. 4 in line with his seniority.

2. Carrier shall now be required to compensate clerical employee, D. C. Claxton, an additional \$3.02 for each date of March 24, 25, 26, 29, 30 and 31, 1976; \$3.11 for each date of April 1, 2, 5, 6 and 7, 1976; and \$2.51 for each date of April 8, 9, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29 and 30, 1976. Total amount claimed is \$76.34.

OPINION OF BOARD: Claimant, D. C. Claxton received notification on March 23, 1976, that effective 7:30 a.m., March 24, 1976, he would be displaced from his regular assignment by a senior employee exercising displacement rights under and in accordance with the current Agreement. Later that same morning (March 23), Claxton presented a displacement notice to the proper officer of the Carrier notifying that he would displace on Position No. 4, then occupied by a junior employee, B. F. King. Claimant's displacement notice was returned with the following comment: "Declined. Do not meet fitness and ability qualifications for Position No. 4.
s/ D. R. Vierrether."

Subsequent to receipt of this notice Claimant resubmitted a displacement notice advising that he would displace on Balance Clerk Position No. 433. That displacement was allowed and Claimant performed service on that position on March 24, 1976. Claimant then submitted a request for an unjust treatment hearing as provided for in Rule 32 of the Agreement. Hearing was held on April 6 and 7, 1976. On April 12 Claimant was notified that there was no evidence presented to cause a change in the initial determination that he lacked fitness and ability for assignment to Position No. 4. Thereafter, the matter was appealed without resolution on the property and came to the board for disposition

The rule of primary importance in this case is Rule 7 of the Agreement which states:

"Rule 7. PROMOTION BASIS

Employees covered by these rules shall be in line for promotion. Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, seniority shall not apply to positions listed in Rule 1, Exceptions (a), (b), (c) and (e)."

Impinging upon the instant case is Referee Criswell's Award No. 221 of Public Law Board No. 405 in which Mr. Criswell restored Mr. O. R. Whitehead, an employee senior to both Claimant and employee King, to ownership of Position No. 4 as of March 25, 1975:

" BEFORE
PUBLIC LAW BOARD NO. 405

Carrier's File: D-8734
Organization's File: R-7-10

AWARD NO. 221
(Case No. 347)

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

and

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees on the St. Louis-San Francisco Railway Company, that:

- " 1. Carrier violated the terms of the prevailing Agreement between the parties when by notice dated March 25, 1975, it assigned a junior employee to Position #4, Senior Services Clerk-Records, at Springfield, Missouri.
2. Carrier shall now compensate clerical employee, O. R. Whitehead, an additional \$2.61 per day beginning March 25, 1975, and continuing for each and every day thereafter that employee Whitehead is not allowed to occupy Position #4. Claimed amount is subject to future wage increases.
3. Carrier shall now be required to allow Mr. O. R. Whitehead to be assigned to Position #4, Senior Services Clerk - Records.

JURISDICTION OF BOARD:

The jurisdiction of this Board is stated in its Award No. 1. That statement is incorporated herein by reference thereto.

OPINION OF BOARD:

March 21, 1975, Position No. 4, here in question, was advertised by bulletin. On March 25, Carrier advised by notice that clerical employee Grigsby was assigned. Grigsby's seniority date is July 22, 1968.

Claimant inquired of the Carrier by letter why he, with a seniority date of March 3, 1966 and an applicant for the advertised position, was not so assigned.

After an exchange of correspondence, on April 4, 1975, Claimant formally asked that an unjust treatment hearing be conducted under the provisions of Rule 32 of the Agreement:

"An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided above if written request is made to his immediate superior within fifteen days of the cause for complaint."

The hearing was conducted on April 22, 1975. Reading the transcript of the proceeding raises serious doubts as to its fairness. The presumption is that information will be gathered at such a hearing, from which a determination will be made. Rather, it appears from certain argumentative conduct that the hearing was merely to justify a conclusion already reached.

On the basis of that violation, we will allow the claim as requested to and including the date of decision on appeal.

It is the position of the Carrier that Claimant did not meet the test of Rule 7 of the Agreement:

'Employees covered by these rules shall be in line for promotion. Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, seniority shall not apply to positions listed in Rule 1, Exceptions (a), (b), (c) and (e).

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

"We are assured that employee Grigsby was 'more qualified' than Claimant, that he had worked certain positions which Claimant had not. We are told that because the occupant of Position No. 4 must report to certain officials directly it is a more sensitive position and requires some special preparation. The chain of command is unimportant to us.

We are concerned with whether Claimant and Grigsby were of 'sufficient' ability and fitness to perform the duties as described in the advertisement. And we find nothing in the record which convinces us the abilities and fitness of both is not 'sufficient.'

So finding, we next consider Rule 16 of the Agreement:

'Employee awarded bulletined position or those displacing junior employee shall be allowed thirty days in which to qualify, and failing, shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employee.

'It is understood supervisors will cooperate with employees who are making an effort to qualify.

'UNDERSTANDING: This applies after employee is put on position and employee must have sufficient fitness and ability before being placed on position. Days means calendar days.

'When it is definitely determined, through hearing if desired, that the employee cannot qualify, he may be removed before expiration of thirty days.'

We direct that the provisions of Rule 16 be invoked, that Claimant be assigned, owning senior standing and being found of sufficient ability and fitness, thereunder.

Rule 7 is not a rule which allows selection or the determination of 'most fit and able.' We will retain jurisdiction of the matter pending the qualifying period under Rule 16 with the intent, if necessary, to hear presentations if he is found unfit.

" FINDINGS:

Public Law Board No. 405, upon the whole record and all the evidence, finds and holds:

1. That Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;
2. That this Board has jurisdiction over the dispute involved herein; and
3. That the Agreement was violated.

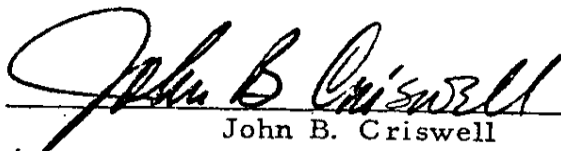
AWARD

Claim sustained as outlined in Opinion of Board.

ORDER

Carrier is hereby ordered to make effective Award No. 221, made by Public Law Board No. 405, on or before.

May 23 1976


John B. Criswell

Chairman and Neutral Member


J. A. Thompson, Carrier Member


R. O. Norton, Employee Member

Dated at Springfield, Missouri, this 23rd day of April, 1976. "

For reasons not shown on this record, Mr. Whitehead apparently received compensation only for the period to October 14, 1975. Nevertheless, through his Award, Referee Criswell restored Whitehead to Position No. 4 from the time of his displacement denial (March 25, 1975) through his actual reinstatement in the position on May 3, 1976. Since Position No. 4 is thereby considered held by Whitehead at the time of Claimant's application; and since Whitehead is senior to Claimant, the latter's claim of entitlement to the position must yield. Accordingly, the Claim is denied.

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:


Executive Secretary

Dated at Chicago, Illinois, this 18th day of June 1980.