Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31712
Docket No. CL-32417
96-3-95-3-297

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(Transportation Communications International Union
PARTIES TO DISPUTE: (
(National Railroad Passenger Corporation (AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11145) on behalf of A. W. Bombard that:

The following claim is presented for payment due to Amtrak's violation of Agreement (clerks) with TCU. On February 12, 1993, I was not allowed to displace Ticket Clerk Job TC226, paying $14.05 per hour, by J. Fugate by way of Kevin Regan, by way of Labor Relations Department.

Since my previous job, spare block operator, Meriden Connecticut, Board has been abolished, Rule 3-C-1, paragraph C (right to displace) allowed me the bump. Refusal was based on the fact that I was not Arrow qualified. This requirement is not part of TCU Agreement, and being a unilateral requirement imposed by Amtrak, it doesn't supersede the Agreement and also violated Rule 2-A-5, Paragraphs A & C (Time to Qualify and Amtrak's cooperation). Since previous block operators G. Ross and H. Benson were allowed to become Arrow qualified when their jobs were abolished and which Arrow qualification requirement was in effect, I should be allowed same.

Also latest provisions added to TCU Agreement provided for Arrow training in Boston, Massachusetts. Such training was not offered to operators and notification of classes was withheld from us. The new positions also provide that training be offered before regular position is awarded to outside employees. Position EB202 is presently vacant, and a newly hired employee is being trained to fill it, a clear violation.

These actions by Amtrak clearly show bias against block operators moving into ticket positions as I have been told by my supervisors that I may bid a ticket position and be trained for it, and there were no restrictions on my displacing into clerical spare board which would require Arrow training.

If I can exercise my seniority rights in the foregoing examples, there should be no reason to refuse the exercise of all my rights. To hire a new employee and train him, while not offering the same options to an employee of nine years with more experience and knowledge of Amtrak is on the face of it ludicrous and a waste of taxpayer money.

Since I was forced to displace position BG225 with pay rate of $12.87 per hour, claim is made for the difference in hourly rate, plus overtime paid to job TC226 which I was entitled to plus overtime on relief days of TC226 which I worked on Job BG225. This claim is a continuing claim from February 12, 1993, when original violation occurred."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant contests Amtrak's denial of his February 23, 1993 attempt to bump into a Ticket Clerk's position at Springfield, Massachusetts after his job as Spare Block Operator at Meriden, Connecticut, was abolished on February 12 of that year. The issue presented is a narrow one. This case requires us to determine whether Carrier violated any provision of the Clerks' Agreement by preventing the Claimant from displacing an incumbent Ticket Clerk on the grounds that he lacked the specific computer training required by the Carrier for such positions. For the reasons discussed below, we sustain the Carrier's position and deny the Claim.

The Claimant was hired as a Block Operator on October 10, 1984. Anticipating the elimination of Operator positions as a result of introducing a new "Centralized Electrification and Traffic Control" system, the Carrier issued a division-wide bulletin dated on January 1, 1993, offering training on its computer ticketing system (ARROW) to all interested employees. Although Claimant took and passed the aptitude test for such training, he never availed himself of such training.

Following the elimination of his position, he attempted to bump a junior incumbent on the Springfield ticket counter. When the Carrier rejected his efforts to displace for lack of ARROW training, the Claimant ultimately bumped into a baggage position for which he was qualified and filed this claim.

The Organization asserts that the Agreement does not distinguish between an employee's rights in a bid or a bump situation; in either context, it argues, the employee attempting to exercise his seniority is entitled to an opportunity to succeed or fail in the work of the desired position during a thirty day qualification period. In support of that position, it relies on the following terms of the Agreement:

"RULE 3-C-1 - REDUCING - INCREASING FORCES

(c) An employe whose position is abolished or who is displaced from his permanent position shall exercise seniority to positions not requiring a change in residence as defined in Section 501 (9) of the Act, within ten (10) calendar days or forfeit all seniority, except as provided in Rule 2-A-7 or in case of personal illness, vacation or unavoidable causes, the ten (10) calendar day period will be extended proportionately to the extent of such absence. An employe entitled to exercise seniority in accordance with the foregoing but who is unable to do so due to the fact that no position is available. will be considered furloughed."

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"RULE 2-A-5 - TIME IN WHICH TO QUALIFY

(a) Employes awarded bulletined positions or exercising displacement rights will be allowed thirty (30) days in which to qualify and failing to qualify may exercise seniority under Rule 3-C-1. The thirty (30) days may be extended by agreement between the Local Chairman and the proper Corporation official.

(b) When it is evident that an employe will not qualify for a position, after conference with the Local Chairman, he may be removed from the position before the expiration of thirty (30) days and be permitted to exercise seniority under Rule 3-C-1. The Division Chairman will be notified in writing the reason for the disqualification.

(c) Employes will be given full cooperation of the department heads and others in their effort to qualify."

The Organization makes several additional arguments in support of its position. First, it contends that Operators Ross and Benson were allowed to bump into Ticket Clerk positions when their positions were eliminated even though both lacked ARROW training. These accommodations by the Carrier, it asserts, were proper and constitute controlling precedent with respect to the correct interpretation of the Agreement in Claimant's situation. Second, the Organization characterizes as "ludicrous" the fact that after denying the Claimant an opportunity to demonstrate his qualifications on the counter position, it "reaches into the open employment market; selects a totally untrained person (one wholly new to the industry); and teaches that individual the ARROW procedures." Lastly, the Organization cites several prior Awards it maintains have addressed the underlying issue here. We review the Awards on which the Claimant chiefly relies, and each of the Organization's other contentions below.

At the outset, we note that the Parties clearly do not dispute that Claimant lacked the qualifications necessary to have immediately functioned as a Ticket Clerk. Rather, the core issue between them is the extent to which the Carrier may insist upon an employee's ability to "hit the ground running" in a displacement situation. That question, the Organization says, "has been contentious for years," and the volume of precedent submitted by the Parties on both sides of that issue tends to confirm that assessment.

Turning initially to the language of the Agreement as best manifesting the Parties' intent, we conclude, as the Organization correctly suggests, that Rule 1-B-1, "Qualifications for bulletined Positions or Vacancies," and Rule 2-1-1, "Bulletining and Awarding of Positions" are relevant and must be harmonized with the rules governing reduction in forces and time to qualify, quoted above, upon which it relies. Rules 1 and 2 provide generally that "seniority, fitness and ability" shall govern in cases of promotions, assignments and displacements; if fitness and ability of applicants are sufficient, in the judgment of the company, "seniority shall prevail."

In part, however, because none of those provisions specifically defines the terms "to qualify," "qualified," or "qualifications", we reach a different conclusion than the Organization in harmonizing these rules. We believe our outcome is consistent with the preponderance of authority in those prior Third Division Awards that have wrestled with this issue.

Rule 3-C-1 employs language that, standing alone, might be reasonably read to suggest that an employee intending to displace a junior employee is entitled to an unqualified opportunity to do so, provided only that he or she possess superior seniority. That construction would seem to be reinforced by the terms of Rule 2-A-1 which on its face gives the bumping employee 30 days in which to qualify on the new job, and further obligates the company to cooperate with his or her efforts in doing so. This, however, cannot be the end of the analysis because it is impossible to reconcile the language of Rules 1 and 2 with such a result. Had the Parties intended to invest a bumping employee with an unqualified right to displace a junior employee, contingent solely upon an automatic 30 day period to learn the new job, the language of Rules 1 and 2 which speak in terms of the company being the judge of "fitness and ability" would be mere surplusage. But our obligation is to construe the Parties Agreement, if possible, so as to give meaning to all of its provisions if they can be reconciled by a reasonable construction.

While not entirely uniform, the numerous Awards submitted by the Parties provide, on balance, a good aid in analyzing the probable objectives of the Parties, and warrant strong deference. Third Division Award 13850, upon which the Organization relies, is distinguishable to the extent that it addressed a *bid* by a senior employee rejected by the Carrier on the basis that the bidder lacked *previous experience* in the position sought. The Carrier's judgment was subverted in that 1965 case on the basis that it applied the single standard of experience, which the Neutral held was a factor for which the Rules made no provision. Nonetheless, the Referee in that case observed as follows:

> "There is no dispute in this case about the recognized right of Carrier, under Rule 9, to make the initial determination of the sufficiency of the fitness and ability of applicants...."

In our reading, Award 13850 stands for the proposition that, under the rules then applicable, the Carrier could not reasonably require evidence of prior performance of the same duties as the sole criterion in determining "fitness and ability" in a bid context.

Third Division Award 21802 cited by the Claimant is also distinguishable on its facts but in accord with our analysis. There the Carrier rejected the Claimant's notice to displace a junior employee on the basis that he was not qualified to perform keypunch work, a function that would be required one day per week while relieving a Keypunch Clerk. Apparently based in large part upon the Claimant's having successfully qualified as a keypuncher in a subsequent five day period, the Referee found the Carrier's judgment in this instance "arbitrary and capricious and without substantive evidence." Again, however, the holding in this Award is entirely consistent with ours:

> "The harmonious reading of these rules does not mean that fitness and ability be such that an employee need fully and completely perform the work immediately upon assuming the position, but that it be such that he could do so within the period of time permitted in the qualification rule. Nor does such reading mean that an employe obviously lacking fitness and ability be given the qualifying time when it is apparent that he could not qualify within that period."

Third Division Awards 29172, and Cases 3 and 4 of Public Law Board No. 3148, are not entirely on point. In Award 29172, the Board sustained a series of claims challenging the unilateral implementation of an aptitude test to be used in determining qualifications for certain positions. In doing so, he faulted a number of prior cases that had addressed, (and in the Carrier's view settled), its right to employ such measures and found that the earlier decisions had failed to comprehend "the distinction between fitness and ability, on the one hand, and qualifications, on the other...." There is scant evidence of such subtle distinctions in the language the Parties negotiated in our case. In any event, we are not presented in this case with the task of deciding the propriety of testing as a means of determining fitness, ability or qualifications, or of deciding whether those are the same or different powers or states of being, or whether the Carrier could contractually measure fitness and ability, but not, as Award 29172 concluded, qualifications. Accordingly, we need not charge onto that metaphysical battlefield, particularly since the core holding of Award 29172, coincides with ours, that:

> "There is no dispute here that the Carrier has the right to determine fitness and ability as Rule 5 explicitly and unambiguously states."

The Awards in Cases No. 3 and 4, Public Law Board No. 3148, are neither wholly on point nor highly persuasive in our view. Case No. 3 addressed a Laborer's bid for a Keypunch Operator position. The position was awarded to the junior employee based upon the Laborer's unsatisfactory test scores. Case No. 4 involved a displaced Clerk whose attempt to bump into a position requiring keypunch qualifications was rejected, again based upon test scores. Both cases addressed the same rules, the same arguments, the same test, and the same judgment by the Carrier based upon the same reasons. In apparent accord with the rationale of Award 29172 sanctioning tests to gauge fitness or ability, the Referee here held that a keypunch test used to ascertain whether or how fast an employee can operate a keypunch machine does no violence to the Rules. The Neutral held, however, that the Carrier's reliance *solely* on such test results constitutes an "arbitrary standard" and sustained the claims accordingly.

The Awards relied upon by the Carrier appear to more nearly parallel the facts in dispute. In Public Law Board No. 2296, Award 34, Amtrak's decision to reject Claimant's displacement of a Statistical Clerk was sustained on the basis of his prior failure to pass a required typing test. In Award 16 of Public Law Board No. 2296, a Baggageman's effort to bump a Ticket Clerk was denied on the basis that "Rule 5 gives the Carrier the right to judge fitness and ability so long as it is not capricious, arbitrary and discriminatory'." In Case 4, Public Law Board No. 4208, the Referee rejected the Organization's argument that the Claimant was entitled to prove he could become qualified within 30 days on the job when a six week training course was required for a Ticket Clerk position. No useful purpose is served in detailing the additional authority cited by the Carrier except to observe that the cases are numerous and consistent. (*See, e.g.*, Third Division Award 29759 ("This Board has consistently held that the possession of `fitness and ability' is a requisite which must be met before seniority rights become an issue for promotion.") Case 5, Public Law Board No. 4418 ("The Organization has not referred the Board to precedent in which those rules have been construed to compel a carrier to oust a competent but junior incumbent in order to accommodate a senior applicant who is presently unable to perform any meaningful aspect of the job but who could perhaps learn it in 30 days.")

In sum, we conclude there is both support in the text of the rules and ample arbitral authority to find that the Carrier may, as here, make necessary determinations with respect to the fitness and ability of employees attempting to displace junior employees. Because reality is untidy, the context in which those judgments are apt to be made necessarily may continue to be *ad hoc* and contentious, with patently arbitrary and clearly reasonable determinations clustered at the extreme ends of the continuum and other "closer calls" undoubtedly falling at various points along the line.

Looked at from that perspective, the Agreement and the cases suggest an exercise of seniority may neither require that the bumping employee "hit the ground running," nor unreasonably compel the Carrier to accept what promises to be an unsatisfactory period of "running in place." A judgment that declines to staff a ticket counter position -- in contrast, for example, with some less stressful function that involves no public contact -- with an employee who must learn a complex computerized ticketing system on the job, while at the same time serving harried and demanding travelers, hardly represents an arbitrary judgment in the opinion of this Board.

We turn next to the Organization's contentions that the Carrier is, in a sense, estopped from denying the Claimant's notice to displace in the face of having earlier permitted the displacements of ticket clerks by two Operators, both of whom also lacked ARROW training. The Carrier simply denies those allegations.

While inconsistency or the lack of uniformity in applying the Rules may and often is relevant, it is the burden of the party so complaining to fully develop such a defense. There is simply no record evidence of disparate treatment to support Claimant's allegation on this point, and we find no basis therefore to credit it.

Lastly, the Organization argues that it was "ludicrous" for the Carrier to have hired and trained a new employee on the ARROW system instead of honoring Claimant's effort to bump, training him and allowing him to advance his career. This contention has the kind of common sensible ring that forces itself upon our attention. Clearly, a decision to bypass an interested veteran in favor of a person "off the street" might powerfully dampen morale. But it would be rash for this Board to substitute its judgment for that of the Carrier in this area. For one thing, if "fairness" were the only issue before us, the interests of the incumbent employee and the Carrier's legitimate need for an efficient operation on its ticket counters would deserve to be weighed as well as those of the Claimant in any such analysis. So too would the fact that the Claimant made an obviously bad choice under the circumstances in declining to undergo the training that would have facilitated his desired transfer. Thus, while fairness must always be a factor, our basic charge is to construe and apply the contract. In the absence of a finding of Carrier arbitrariness in making fitness and ability judgments, we conclude we are compelled under this Agreement to uphold them.

## AWARD

Claim denied.

## ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of September 1996.