

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31901
Docket No. CL-31979
97-3-94-3-365

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 TCU (NEC-1138) (GL-11059) that:

(a) The Carrier violated the Rules Agreement effective September 1, 1976, as amended and revised particularly Rule 2-A-5 and others when effective close of business March 12, 1992, Claimant was disqualified as Usher Gateman 1-WAUG-3, 6:00 a.m. - 2:00 p.m., relief Friday and Saturday, hourly rate of \$11.73, Roster No. 567.

(b) Claimant Dixon began on this position February 10, 1992, and was disqualified close of business March 12, 1992, which is 32 days and is in direct violation of Rule 2-A-5(a) and (b), and should now be immediately returned to this position and paid for all lost overtime worked by junior employees and 8 hours straight time each and every work day beginning with the close of business March 12, 1992.

(c) Carrier has no agreement between the Local Chairman M. W. Brown or A. P. Santoro, Jr. and the proper Corporation official to extend the time past 30 days as provided for in Rule 2-A-5(a).

(d) On February 11, 1992, Mr. Dixon was observed smoking and was told about it and it never happened again. On February 19, 1992, Mr. Dixon was observed making an incorrect announcement and he also corrected the announcement immediately and also immediately corrected the February 24, 1992, announcement. On March 4, 1992, this was within 2 hours of the first time he was ever at a Metroliner Gate. On March 10, 1992, this incident never took place.

(e) The above paragraph (d) shows Carrier did not live up to Rule 2-A-5(c).

(f) This claim to continue each and every day beginning close of business March 12, 1992, and until Mr. Dixon is returned to position 1WAUG-3.

(g) Claim filed in accordance with Rule 7-B-1 and should be allowed."

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 waived right of appearance at hearing thereon.

The Claimant began service in 1987 as a Baggage man. He obtained the opportunity to enter the position of Usher/Gateman on February 10, 1992. The Carrier states without contradiction that, on March 7, 1992, an Organization representative was advised that the Claimant was not making sufficient progress to qualify for the position.

On March 12, 1992, the Claimant was disqualified from the position and permitted to exercise his seniority on another position. The Claimant was notified of this through a letter from the Carrier outlining its reasons for believing that he was "unable to execute correctly the duties of an Usher/Gateman."

The Organization argues that the Claimant was improperly disqualified, basing its reasoning on Rule 2-A-5, which reads as follows:

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

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

The Organization correctly notes that the Claimant remained in the status of an Usher/Gateman for 32 calendar days, exceeding the 30 days covered in Rule 2-A-5. As a result, the Organization appears to say that the Carrier lost its chance to disqualify the Claimant within 30 days or to seek additional time for qualification by agreement with the Local Chairman.

In the Board's view, the Organization is turning Rule 2-A-5 on its head. The Rule's sole purpose is clear, as stated in its heading: "time in which to qualify." That is, it guarantees an employee 30 days in which to qualify for a position, limited only by the circumstances covered in Subsection (b). It says nothing concerning the Carrier's basic right to determine whether an employee is able to meet the requirement of a position.

Here, the Carrier (a) gave advance notice to an Organization representative that it believed the Claimant would not become qualified; (b) provided the rationale for its conclusion in a detailed letter to the Claimant; and (c) did so after granting the Claimant two additional calendar days for qualification purposes.

Central to this dispute is the Organization's failure to cite any Agreement provision which restricts the Carrier's right to determine an employee's ability to meet

the qualifications of a position or to require a Hearing or other procedure prior to removing an employee from a position on this basis.

This is borne out by Awards furnished by the Organization. Third Division Award 17535 concerned an employee in the position of Stockyard Foreman for seven months. The Award found the Carrier improperly "disqualified" the employee based on the Carrier's surrender of certain management rights in Rule 13(a), which provides in part as follows:

"Employees awarded bulletined positions, or employees securing positions through exercise of seniority will not be disqualified for lack of fitness and ability to do such work after a period of thirty (30) working days thereon. . . ."

Similarly, Third Division Award 19851 is a sustaining Award in which an employee received notice of disqualification on the 31st day because of Rule 19 which states that an employee "will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon."

In the matter here under review, no reference whatsoever is made to any Agreement provision such as those relied on in the cited Awards.

The third Award cited by the Organization, sustaining Third Division Award 24267, concerns an employee who occupied a position on three separate occasions over a two-year period, a situation hardly comparable to that here under review.

Rule 2-A-5 can be read only as an assurance that an employee will have ample time to attempt to qualify for a position; it goes no further. The Organization has failed to demonstrate that the Carrier's disqualification of the Claimant after 32 calendar days was arbitrary, capricious or in violation of any cited limitation of the Carrier's right to judge fitness and ability.

AWARD

Claim denied.

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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 4th day of March 1997.