

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33412
Docket No. CL-34522
99-3-98-3-159

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-11959) that:

- (a) The Carrier violated the TCU/NRPC NEC Agreement, in particular Rules 1-B-1, 2-A-5, 3-C-1 and others when it failed to allow Claimant Gary Jolley to exercise displacement rights on a Crew Dispatcher position in the Crew Management Services Department, 30th Street, Philadelphia, PA, on May 26, 1994.
- (b) Claimant G. Jolley be allowed to exercise displacement rights on to a Crew Dispatcher position effective immediately according to his seniority rights and that the Claimant be compensated at the Crew Dispatcher rate for each and every day withheld from a Crew Dispatcher position commencing May 26, 1994 and continuing each and every day thereafter until claim is properly adjusted.
- (c) Claim filed in accordance with Rule 7-B-1, is in order 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 were given due notice of hearing thereon.

On May 26, 1994, Claimant, an Amtrak employee since 1976, attempted to exercise his seniority to a Crew Dispatcher's position. Claimant had been out on medical leave from 1989 to 1994. Carrier denied his exercise of seniority based on his previous work experience as Crew Dispatcher and his disqualification from that position in April 1997. The Carrier asserts that the disqualification still stands and, in addition, that the Claimant was counseled and disciplined on numerous occasions prior to his disqualification for failing to properly perform his duties as Crew Dispatcher.

At issue in this case is whether the Carrier violated the Agreement when it failed to allow Claimant to exercise his seniority rights.

In Forth Division Award No. 4093:

"Ability, fitness and seniority are essential to appointment to positions of yardmaster. The Company's right to require employees to establish that they possess necessary qualifications, prior to being awarded such position is recognized."

The Board went on to state in the same Award,

"First it is well established that Carrier has the right and sole discretion to make determinations with respect to qualifications; we will not disturb that determination unless it is clear, by convincing evidence, that Carrier's decision was arbitrary or capricious. Furthermore, the burden of establishing the improper determination by Carrier falls on the Organization (see Awards 1372, 1940, 3728 and many others)."

In Public Law Board No. 4418, Case No. 5 it was also stated:

"The initial question in this case involves the application of the "fitness and ability" standard of Rule 5 to these circumstances. Rule 5 itself expressly provides that the Carrier shall judge a candidate's fitness and ability and that its judgement must stand unless it is arbitrary, capricious or discriminatory. In Public Law Board No. 2792, Case No. 23 (Eischen), it

was said that Rules 5 and 8 of the parties' Agreement should be read in harmony, so that

“ . . . the employee applicant possesses “sufficient” fitness and ability for purposes of Rule 5 if s/he may reasonably be expected to competently perform all the duties of the job within the 30-day qualifying period of Rule 8.”

It is clearly established in the aforementioned Awards that it is within the scope of the Agreement for the Carrier to make determinations based on fitness and ability. The Organization has failed to provide clear, convincing evidence that the Carrier violated the agreement by acting in an arbitrary or capricious manner in barring Claimant from exercising his displacement rights. Therefore, since the Organization has failed to meet the burden of persuasion, the claim must be denied.

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 13th day of July 1999.