

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36894
Docket No. CL-37505
04-3-02-3-543

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12922)
that:

Carrier violated the Transportation Communications Union (OFF-CORRIDOR) Agreement, as revised June 1, 1998 when it improperly disqualified P. Berkowitz from the Group Sales Area at the Philadelphia Call Center.

Carrier shall now be required to reinstate P. Berkowitz in the Group Sales Department and compensate her for lost overtime in the department. Since the Claimant was forced to displace another job, she is due overtime for working outside the hours of the Group Desk job that she properly displaced (presently that overtime totals \$2,443.00). Since this is an on going situation, the overtime will accrue each and every day until this violation is corrected.”

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.

The Claimant in this dispute was attempting to qualify in a Group Sales Agent position at the Philadelphia, Pennsylvania, Reservation Sales Office when the dispute arose. She is covered by the parties' Corporate Clerical Agreement.

The Claimant was on a Leave of Absence from December 8, 1998, through August 3, 1999. She returned to work on August 4, 1999, at which time she made application to displace a junior employee assigned to position of Group Sales Agent #89824. The Carrier granted her application. Since the Claimant had not worked in the Group Sales group previously, she was entitled, pursuant to Rule 8(a), to a 30 calendar day qualification period. During this period the Claimant experienced problems with various aspects of the duties performed by Group Sales employees. Pursuant to Rule 8(a) the 30-day period was extended to give the Claimant further opportunity to qualify. She was, however, disqualified on September 30, 1999, and exercised her seniority to another position.

By letter dated November 22, 1999, the Organization stated that, upon her return, the Claimant was given an Arrow skills test to see what basic training would be needed to help her return to service. This test is given to any employee returning to the Call Center after an absence of six months or more. The Claimant received a score of 77% and was not given additional training. She was placed on the Group Desk job and received what the Organization termed "inconsistent" training. The Organization pointed out that the Claimant did not receive training from the Manager, the Lead Clerk or any training assistant, including a Clerk, who is "group qualified" and volunteered to help the Claimant. By letter dated December 21, 1999, the Carrier asserted its right, as management, to determine who assists in the training of an individual who is attempting to qualify for a new position and asserted that the Claimant had been assigned highly qualified personnel to assist her.

Rule 5 of the Governing Agreement states as follows:

“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 of applicants being sufficient, seniority shall prevail.

NOTE: The word “sufficient” is intended to more clearly establish the prior right of the senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

The company shall be the judge of fitness and ability, but shall not act on a capricious, arbitrary and discriminatory manner in the application of this rule. Alleged violations of this obligation may be appealed in accordance with Rule 25 (Grievances).

Rule 8 of the Governing Agreement states as follows:

- (a) Employees awarded bulletined positions or exercising displacement rights will be allowed thirty (30) calendar days in which to qualify and failing to qualify may exercise seniority under Rule 10. The thirty (30) calendar days may be extended by agreement between the appropriate organization representative and the proper corporation official.**
- (b) When it is evident that an employee will not qualify for a position, after conference with the District Chairman, he may be removed from the position before the expiration of thirty (30) calendar days and be permitted to exercise seniority under Rule 10. The appropriate organization representative 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 filed this claim on behalf of the Claimant which was denied by the Carrier. By letter dated September 14, 2001, the Division Chairman progressed the dispute to the Director, Labor Relations. The claim was denied by the Carrier on November 29, 2001. The dispute was then referred to the Board.

The Organization argues that the Carrier misapplied Rules 5 (Promotion, Assignments and Displacements) and 8 (Failure to Qualify) of the current Agreement when it failed to qualify the Claimant for the Group Sales Agent position. It contends that, under Rule 8, the Carrier has the contractual responsibility to confer with the Organization representative prior to the disqualification and to provide employees attempting to qualify the full cooperation of the department head and others. It asserts that the Carrier failed to do either. The Organization contends that the Claimant did not receive sufficient training and that a fellow Clerk who volunteered to train the Claimant was denied that opportunity. It argues that the disqualification of the Claimant from the Group Sales position compromises the Claimant's seniority rights under Rule 5, in that the position from which she was disqualified is no longer available to her in the exercise of her rights.

The Organization further argues that it was not evident that the Claimant was having trouble qualifying for the Group Sales position, contending that, since the Carrier extended the qualifying period to almost 60 days, the Claimant must have been doing a satisfactory job. It argues that this is supported by the fact that, after her disqualification, the Carrier allowed the Claimant to displace onto a position with "practically" the same duties and responsibilities as the Group Sales position. The Organization urges that the claim be sustained.

The Carrier argues that it did not violate any Rules of the Agreement when it removed the Claimant from the Group Sales position. It contends that it went overboard to assist the Claimant while she was attempting to qualify by extending the qualification period to almost double what is allowed in the Agreement. The Carrier asserts that it exercised its prerogative and right to remove an employee from a position when it was obvious she could not qualify thereon.

The Carrier further argues that Rule 5 governs the manner in which employees are promoted, assigned, and displaced, and that together with Rule 8,

prescribes the manner in which employees are promoted and assigned to various bid and bump positions based on their qualifications. It contends that Rule 8 outlines the manner in which an employee can be disqualified from a position. The Carrier argues that it permitted the Claimant to exercise her seniority to the position in dispute (under Rule 5) and that she was afforded the 30-day qualification period, which it extended to almost 60 days (under Rule 8).

The Carrier further contends that when the Claimant's Supervisor realized she was not going to qualify within the 30-day period, the Supervisor, recognizing the Claimant's long service with the Carrier, requested two extensions in order to give the Claimant a fair shot at qualifying for the position. It argues that the Claimant knew that she was on shaky ground and that she was advised repeatedly that she was not following the instructions given her in her efforts to qualify.

The Carrier further argues that, unless it is shown the Carrier has been arbitrary, unreasonable or tried to circumvent the Agreement, the contract gives the Carrier the unfettered right to determine the qualifications, fitness and ability of employees attempting to qualify for positions. Citing authority, the Carrier contends that, because the Organization did not submit any proof that its actions were arbitrary or unreasonable, the claim must be dismissed.

The Carrier's final argument asserts that the Organization has not shown that the Claimant suffered any loss in compensation and that there is no justification for any monetary payment in this dispute. The Carrier urges that the claim be denied.

The Board is persuaded that the claim on behalf of the Claimant must be denied. It was the burden of the Organization to prove that the Carrier's actions violated the Agreement. The evidence is insufficient to establish that the Carrier violated any provision of the Agreement when it failed to qualify the Claimant for the Group Sales Agent position.

The provisions of the Agreement are clear and the Board has no authority to go beyond them. The Carrier complied with Rule 5 when it gave the Claimant the opportunity to displace a more junior employee and it complied with Rule 8(a) when

she was allowed 30 days to qualify for the position. The Organization's claims that the Carrier misapplied the provisions of the Agreement are without merit.

The Carrier, in accordance with the provisions of Rule 8(a), extended the Claimant's opportunity to qualify for the position by almost another full month. The Organization acknowledges this fact but then asserts, on that basis, "the Claimant must have been doing a satisfactory job." The Organization's conclusion is not warranted. If the Claimant had been performing satisfactorily, the 30-day time period would not have been extended. The Carrier was simply giving the Claimant, a long-term employee, some additional time to try to qualify for the position. When it finally concluded that the Claimant was not, and would not become qualified, it disqualified her and removed her from the position.

As for the Organization's argument that the Carrier may only disqualify a displacing employee after a conference, the Board is persuaded that Rule 8(b) only requires a conference prior to removing an employee "from the position before the expiration of thirty (30) calendar days . . ." [Emphasis added] In this case the Claimant was not disqualified before the original 30-day period expired. It is undisputed that the 30-day period was extended and, in compliance with the remainder of Rule 8(b), the "appropriate organization representative [was] notified in writing the reason for the disqualification.

Finally, the Organization argues that, contrary to Rule 8(c), the Claimant was not given "full cooperation" in her effort to qualify for the position. It points, in particular, to a co-worker who volunteered to train the Claimant but was allegedly denied that opportunity. To help an employee attempting to qualify for a position during the 30-day period, the Carrier must, at a minimum, demonstrate equipment, provide training manuals, and answer questions presented by a displacing employee. The Carrier is not required to establish a full-blown training program. The Board is persuaded that the Claimant had ample warning that she was not succeeding; the mere fact that the 30-day period was extended is sufficient to demonstrate that. As for the co-worker volunteer, the evidence establishes that she did not volunteer to help train the Claimant until "[s]ometime in October 1999," that is, after the Claimant had been disqualified on September 30, 1999.

A review of the language of the parties' Agreement clearly states that the Carrier has the right to determine the qualifications, fitness and ability of employees attempting to qualify for positions, subject only to a requirement that it not exercise that authority in an arbitrary or discriminatory manner. This is supported by arbitral decisions, in particular, Award 618 of Special Board of Adjustment No. 973 and Third Division Award 35473. The Board is persuaded that the Carrier gave the Claimant a fair chance to qualify and did not exceed the bounds of its discretion.

Because the Organization failed to demonstrate that the Carrier violated any provision of the Agreement, it failed to meet its burden of proof; and the Board must find in favor of the Carrier.

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 February 2004.