

PUBLIC LAW BOARD NO. 2035

Parties: Brotherhood of Railway and Airline Clerks
and
Former Penn Central Transportation Company

Statement of Claim: "Claim of the System Committee of the Brotherhood
GL-8424, that:

- (a) The Carrier has violated the Clerical Rules Agreement of February 1, 1968, in particular Rule 2-A-7 and others, when they denied the claimant, who was returning from a leave of absence, the right to select a position bulletined during his absence which was awarded to a junior employee.

Friday, May 2, 1975, the claimant returned from a leave of absence. Tuesday, May 6, 1975, Robert Boyd, the claimant, Roster #1837, attempted to displace Angela Walker, Roster #1912, from clerical position Symbol #AB-287 which was awarded to this junior employee October 16, 1974, while the claimant was still on his leave of absence.

Robert Boyd, by virtue of the fact that he held and still holds an Auxiliary Clerk position in the same department and has been required on several occasions to cover position #AB-287 in the past, was qualified, and senior to the incumbent, Angela Walker, and should have been permitted to displace her.

- (b) Claim is filed in behalf of Robert Boyd for one (1) day's pay commencing Tuesday, May 6, 1975, and continuing every work day thereafter until adjusted or corrected as a penalty when the Carrier violated the Clerical Agreement.
- (c) This claim is filed in accordance with Rule 7-B-1, and should be allowed."

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Discussion: Rules 2-A-7 and 1-B-1 have been cited by the parties are being relevant to this dispute. They state in their relevant parts:

"Rule 2-A-7 - Returning from Leave of Absence

An employee returning to duty after leave of absence, sickness, vacation, disability or suspension, shall either return to his former position, if available to him, or shall select any position bulletined during his absence which was awarded to a junior employee. If such employee elects to return to his former position, he may, within seven calendar days thereafter, select any position bulletined during his absence which was awarded to a junior employee."

"Rule 1-B-1 - Qualifications for Bulletined Positions or Vacancies.

(a) Employees covered by these rules shall be in line for promotion. Promotion, assignment, and displacement shall be based on seniority, fitness and ability being sufficient, seniority shall prevail.

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

(b) Where the words 'qualified employee' is used in this Agreement, they shall mean that an employee has 'sufficient fitness and ability' as those terms are defined in paragraph (a) above."

The operative facts are that the Claimant held position S-89 in the Accounts Receivable Section of the Customer Accounting Center from May 1, 1974 to September 10, 1974. On September 11, 1974, he was granted a leave of absence until May 2, 1975. Upon his return he occupied his former position.

On May 6, 1975, the Claimant attempted to displace a junior employee who was the incumbent of Clerical position AB-287 in

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the Accounts Receivable Section, Customer Accounting Center. Management did not allow him to make this displacement.

Organization's Position

The Organization stated the Claimant had a right under Rule 1-B-1 to exercise his seniority to a position which was advertised during his leave of absence. It added that the Claimant's past work experience qualified him for the position and the Carrier has no valid basis to deny him his displacement right because a supervisor determined during an interview that the Claimant was unable to demonstrate his fitness and ability for the position in question.

The Organization cited and described the several clerical positions the Claimant had worked at his work location from October 1970 to September 1974. The Organization maintained that the Claimant by working these several clerical positions in the Customer Accounting Center acquired an extensive working knowledge which would enable him to qualify for any position in this Department, were he given the possibility.

The Organization noted that the duties of Position AB-287 were part of the primary duties of Positions C-2 and AB-212-B prior to March 11, 1974 and that Auxilliary positions S-89 and AB-217 were expected to fill vacancies or assist on all positions in the Department, including AB-287.

The Organization stated the Carrier was in error when its supervisor stated its records revealed that the Claimant previously not performed the duties of AB-287.

The Organization stated that the manner in which the Claimant's qualifications for the job were determined to be insufficient,

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is questionable. The Claimant was not given any test, but just subjected to an interview by his supervisor. The record does not disclose the nature of the interview, and the Organization maintains that the "interview" was not an objective means to evaluate the Claimant's qualifications, but rather was a subterfuge to retain a junior employee in a position to which the Claimant wanted to displace.

The Organization stressed that the supervisor who interviewed the Claimant and found him not qualified has been a supervisor at the work location since the Claimant started to work there, and on several occasions had been the immediate supervisor. This supervisor knew full well the Claimant's previous work experience, and there was no need for an interview to determine the Claimant's work qualifications. It was completely uncalled for and it is totally lacking in any probative value to determine the Claimant's fitness and ability.

The Organization stated that the Carrier's reliance on Rule 1-B-1 to justify their actions is ludicrous. The Claimant had demonstrated his sufficient fitness and ability during his entire career with the Carrier, and therefore his seniority should have prevailed. The fitness and ability of the Claimant does not mean that he must be able to step in and perform the duties of the job without guidance or assistance. The Organization stated the employee must have the potential to perform all the duties in a reasonable time. It added that since the Claimant had demonstrated his fitness and ability while performing other assignments at the Center, it is reasonable to assume that he could have performed the duties of AB-287 within a reasonable time. The Organization stressed that the Carrier has not met its burden of proof to show that the Claimant could not perform the duties of the job.

Carrier's Position

The Carrier stated the claim lacks merit because it is well established by Board awards that the matter of determining an employee's qualifications to perform a job is a management prerogative, and the Board will not substitute its judgment for that of Management as long as Management has not exercised its authority in arbitrary or unreasonable manner. Moreover, the Organization has the burden of proof to show that the Carrier acted in an arbitrary or unreasonable manner.

The Carrier stated the Organization has not met its burden of proof to show that the Carrier acted arbitrarily in this case. It added Rule 2-A-7 does not give an employee a demand right to select any position irrespective of qualifications. All that this Rule does is to provide the employee with the same opportunity as if he had not been absent. It does not act as a waiver of any requirements of qualifications that would otherwise be required of the Claimant. The Carrier further stated Rule 1-B-1(a) gives it right to insist upon an employee being qualified before being permitted to exercise his displacement rights.

The Carrier stated the Organization has alleged, but has not proved, that the Claimant possessed the necessary qualifications for the job. The Carrier added that the Organization makes much of the Claimant's prior work record, but that review does not demonstrate the Claimant's competence to perform the work. All that the Organization's evidence does is create the suspicion of a presumption, which is a clear acknowledgement of the Claimant's lack of qualifications. The Organization asserts that the Claimant should have been given an opportunity to qualify. The Carrier stated that this side steps the core issue, namely, whether

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the Claimant was qualified to hold the position on May 6, 1975. The Carrier states the Claimant was not qualified, and the Organization has not refuted that contention.

The Carrier stated that when the Claimant's prior work experience is analyzed, none of the positions worked by the Claimant, except for the six-month period between March - September 1971, were positions that involved handling banking operations or customer financial charges. The Organization was not able to point to any job that the Claimant performed that had identical duties to Position AB-287. The Carrier further stated that Position AB-287 was transferred from the Detroit Office to the Philadelphia Office in 1974 in connection with operational consolidation. Accordingly, the Claimant's prior work record does not support the contention that the Claimant has held positions of equal or similar responsibilities.

The Carrier stated that despite its determination that the Claimant lacked the qualifications for the position, it nevertheless afforded him an opportunity, by an oral examination, to demonstrate his fitness and ability. This was an additional opportunity to demonstrate his fitness. It was not an effort to show which of two employees was the most qualified. The Carrier stated there was no impropriety in this oral examination and the Claimant has not cited any examples of any improprieties in the questioning of the oral examination.

The Carrier further stated that it had granted the Claimant a nine month leave of absence for educational purposes, and it would have been short sighted for it not to have used the Claimant in any job for which he was qualified and to take advantage of whatever additional training he had received during his leave.

Findings: The Board, upon the whole record and all the evidence, finds that the employee and Carrier are Employee and Carrier within the Railway Labor Act; that the Board has jurisdiction over the dispute, and that the parties to the dispute were given due notice of the hearing thereon.

The Board finds this an extremely difficult case. This case, unlike Award No. 9, involves a Claimant who has worked for a number of years in the very Department where the cognizant job was situated, and had also worked the various jobs in the Department. This presumably would give him a general knowledge of the spectrum of the several clerical jobs therein. The description of Position AB-287 reveals it required the performance of routine banking and credit transactions such as:

"Process bank and draft plan charge to customers, prepare deposits where required, handle charge backs and correspondence relating to bank and draft plans, etc."

The Board finds it difficult to conclude that the Claimant, who had worked from 1970 to September 1974 in the Customer Accounting Center and had handled among other matters accounts receivable, credit regulations, interpreted freight way bills, and collections of bills from delinquent accounts, was not qualified to handle the processing of bank and draft charges or prepare bank deposits. The Board finds it a reasonable assumption that the Claimant could learn and perform these duties in a very short time, assuming he could not perform them, ab initio.

The Claimant is entitled to enjoy the benefits of his seniority, and in the absence of a clear showing that he was not qualified and fit to perform the assigned work, Rule 2-A-7 is entitled to credence and weight.

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While the Board agrees that the Carrier is entitled to exercise its managerial judgment as to the qualifications of the involved employee, the exercise of this managerial judgment must be based on rational grounds. The Board finds that the record does not show that the Carrier has reasonable and well founded reasons for holding that this experienced clerical employee was not qualified to displace to the position involved, especially with a short orientation period. It is not untoward for an employee to contend that he is qualified to perform a new job with a short training period. The employee is entitled to enjoy the benefits of his seniority unless it materially impedes the efficient operations of the Carrier's business.

In summary, when the Board weighs the legitimate conflicting positions of the parties, the weight of the probative evidence favors the Claimant.

Award: Claim sustained.

Order: The Carrier is directed to comply with the Award,
on or before October 15, 1979.

Jacob Spidenberg
Jacob Spidenberg, Chairman and Neutral Member

F. T. Lynch
F. T. Lynch, Employee Member

M. M. Berner
M. M. Berner, Carrier Member

September 14, 1979

PUBLIC LAW BOARD NO. 2035

Clarification of Award No. 13

Parties: Brotherhood of Railway and Airline Clerks
and
Consolidated Rail Corporation

On October 23, 1979 the Board met in executive session in Washington, D.C. to review a draft of proposed Award No. 13.

The Carrier interposed an objection to the measure of relief that the proposed Award intended to grant the Claimant, i.e. an additional day's pay for each day he had been denied the job he attempted displace a junior employee. This involved a period of time from May 6, 1975 to date of Award. After a comprehensive discussion, the Carrier furnished additional information on November 1, 1979 which had been requested by the Neutral Member of the Board.

The Carrier stated that granting the claim in full was not making the Claimant whole, but granting him a windfall, and furthermore was assessing it a penalty when the Agreement contained no provision for assessing penalties against a party found violating the Agreement. The Carrier also stressed the Claimant was not an exemplary employee and had been dismissed twice from its service since the filing of the instant claim, but had been restored to service each time when the discharge was converted to a suspension.

The Carrier stated that the Board, if it granted the Claimant any damages at all, should make him whole but not allow him to be unduly enriched.

The Organization, on the other hand, urges the claim be allowed

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in full, because otherwise no effective deterrent existed to prevent the Carrier from violating the Agreement. Without adequate monetary damages, the Carrier is free to breach the Agreement without there being any meaningful restraints placed on it.

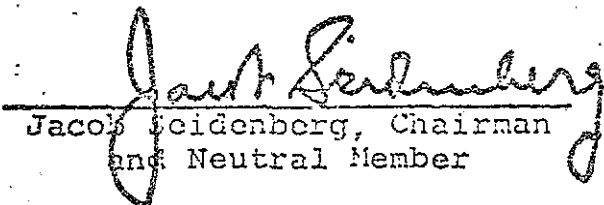
Having given due consideration to the arguments of the parties as well as the data furnished subsequent to the executive session, we find that the appropriate relief to be, in part, to grant the Claimant from May 6, 1978 to September 24, 1975, the difference in the monthly rate between Job S-89, the job initially held by the Claimant, and Job AB-287, the job to which the Claimant was not permitted to displace, or the difference between \$956.28 and \$1051.90 per month, namely, \$95.62 per month.

The record reveals that Job S-89 was abolished on September 24, 1975 and the Claimant displaced a junior employee from Position F-124, which paid the same monthly rate as AB-287, or \$1051.90. Since September 24, 1975 all positions held by the Claimant paid a monthly rate not less than \$1051.90.

On July 28, 1978, position AB-287 was assigned to an employee who was senior to the Claimant. Therefore, for the period from September 24, 1975 to July 28, 1978, when the violation ceased, or for a period of 22 months, the Claimant shall be paid an additional sum of \$1000.00 as damages for not being allowed to occupy a position he would have held, but for the Carrier's breach of Rule 2-A-7.

We find that the facts of this case warrant these damages being assessed.

In summary, we find that the Claimant be awarded \$95.62 per month from May 6, 1975 to September 24, 1975, plus the sum of \$1000.00 as the complete settlement of his claim. --



Jacob Seidenberg, Chairman
and Neutral Member

July 11, 1980