

In the Matter of the Arbitration Between:

NORFOLK SOUTHERN CORPORATION
(NORFOLK AND WESTERN RAILWAY)

and

Case No. 3
Claim of C. E. Johnson
Difference in Pay for
Disqualification

TRANSPORTATION COMMUNICATIONS
INTERNATIONAL UNION

STATEMENT OF CLAIM: The Carrier violated the Agreement dated May 1, 1973, as amended November 1, 1980, in particular Rule B-7, B-10, Addendum N-21 and others, when Clerk C.E. Johnson was arbitrarily disqualified, effective August 12, 2002, from Demurrage Clerk position T3756 in the Central Yard Operations (CYO) in Atlanta, Georgia.

As a result of the Carrier's action, it shall now be required to compensate Clerk Johnson for the difference in her pro rata rate of pay versus the Demurrage Clerk Position T3756 rate of pay of \$148.15 per day effective August 13, 2002, and continuing each Monday thru Sunday until assigned position T3756 and given a reasonable of (sic) period of time to be able to fulfill all the requirements of the position.

FINDINGS OF THE BOARD: The Board finds that Carrier and Organization are, respectively, Carrier and Organization, and Claimant employee within the meaning of the Railway Labor Act, as amended, that this Board is duly constituted and has jurisdiction over the parties, claim and subject matter herein, and that the parties were given due notice of the hearing which was held on August 23, 2004, at Norfolk, Virginia. Claimant was not present at the hearing. The Board makes the following additional findings:

The Carrier and Organization are Parties to a collective bargaining agreement which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Clerical craft.

Claimant in this dispute was attempting to qualify on the Demurrage Clerk position T3756 in the Central Yard Operations (CYO) at Atlanta, Georgia when the dispute arose.

Claimant was on Leave of Absence for medical reasons. She returned to service on July 29, 2002, at which time she made application to displace a junior employee assigned to the Demurrage Clerk position. Claimant was entitled, pursuant to Rules B-7 and B-10, to a reasonable period of time to qualify and satisfactorily

fulfill all of the requirements of the position. Rule B-7 reads in pertinent part:

Except as provided in B-6 and B-8, assignment and displacement rights to advertised positions or vacancies under these rules shall be based upon seniority, fitness and ability. Fitness and ability being sufficient, seniority shall prevail. The term "fitness and ability" shall not be construed as meaning "eminently qualified"; however, it shall mean that the successful applicant must possess the basic skills required of the position and evidence the reasonable probability that he/she will be able to satisfactorily fulfill all of the requirements of the position within a reasonable period of time.

Also, the provisions of Rule B-10, state:

Employees awarded bulletined positions will be allowed a reasonable time in which to qualify and, failing, shall retain all their seniority rights, may bid on any bulletined position, but will not displace any regularly assigned employee.

At the beginning of the assignment, the Carrier furnished Claimant the necessary materials to learn the various duties of the position. There is no indication Claimant was informed that she would be required to take an essay test to confirm her qualifications. She was provided training and assistance with her work as needed over a period of approximately eight days. Nothing suggests that the claimant was told about her progress, or lack thereof, in handling the requirements of the position during this time or that she was given other substantive assistance.

On the morning of August 12, 2002, local supervision administered a demurrage test, in essay format, to Claimant. She was the initial person to be tested; such a procedure had not previously been utilized. Claimant answered only six of twenty questions correctly. She was then advised that same morning that she did not possess the necessary qualifications for the position and was given a letter from Director Woods of CYO which reads in part:

This disqualification determination is due to your inability to demonstrate that you possess the necessary skills to perform the essential functions of the

* * *

RULE C-1 - - DISCIPLINE, and RULE C-2 - - GRIEVANCES, of the May 1, 1973 Agreement shall be amended to provide the following:

The appropriate BRAC Local Chairman shall be sent a copy of the letters assessing discipline against the employees he/she represents.

A record of the proceedings of all discipline hearings shall be made and the General Chairman of BRAC shall be sent a copy of such records in addition to the employee and his Local Chairman.

A record of the proceedings of hearings conducted in accordance with Rule C-2 is not required.

The Rule C-2 hearing on behalf of the Claimant was held on September 19, 2002. A transcript of the testimony and evidence presented at the hearing was not prepared or presented on the property by either Party. Hearing officer Davis concluded as follows in letter dated September 27, 2002:

Testimony produced in the hearing proved you failed to pass a basic demurrage test administered by the Demurrage Group, and that you had been provided training time, a demurrage manual and a Demurrage Tariff as training aids.

Therefore, your disqualification from the Demurrage Clerk position JP T3756 is upheld and affirmed.

On September 26, 2002, the Organization filed this claim on behalf of the Claimant under Rules B-7, B-10, Addendum N-21 and C-3. The Local Chairman alleged that Claimant proved in the investigation that she possessed the basic skills to perform the essential function of the Demurrage Clerk's position if given a reasonable period of time. Rule C-3 reads in pertinent part:

(a) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within 60 days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the carrier

shall, within 60 days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances.

* * *

The Carrier denied the claim. The Organization appealed the denial. The Organization progressed the dispute to the Carrier's higher designated official. The Parties discussed the dispute in conference and exchanged a series of letters addressing the procedural aspects and merit of the dispute, but without resolution. The dispute was then referred to this Board for adjudication.

POSITIONS OF THE PARTIES: The Organization argues that the Carrier violated the Agreement when it arbitrarily disqualified Claimant from the Demurrage Clerk position on August 12, 2002. It contends that the Carrier has the contractual responsibility under Rule B-7, B-10, Addendum N-21 to sufficiently train Claimant and to allow her a reasonable period of time on the position to demonstrate that she can fulfill all the requirements of the assignment. The Organization maintains Carrier failed to provide Claimant with the sufficient training and time on the assignment to become qualified.

The Organization argues Claimant was decidedly disadvantaged for two reasons. First, she was not given advance notice that she would be the initial employee to be given a demurrage essay test. Second, she was not counseled about a need for her work to improve in specific areas. The Organization asserts the test questions did not match the duties or subject matter for which she received minimal training. Further, argues the Organization, the "essay" test questions were more difficult than the "multiple choice" test questions given to other employees subsequent to a formal demurrage class.

The Organization concedes that Claimant was not fully qualified for the position, but contends that she possessed the basic skills required to fulfill the duties. It points to Claimant's academic background, her previous experience in the

Agency Operations Center, and the fact that she had never been disqualified from a position in her career as evidence that she possessed the necessary fitness and ability to be allowed a reasonable period of time to qualify on the position.

The Organization relies upon the evidence submitted in the unjust treatment hearing and in the claim to argue that Claimant should have been provided more training and more time on the assignment. The Organization contends the audiotape of the unjust treatment hearing which it forwarded to the Carrier by letter dated April 1, 2004, was a genuine effort on its part to develop the facts in an objective manner. The audiotape was sufficient for the Carrier to review the hearing testimony and affirm its veracity, according to the Organization. The Organization further argues that Rule C-2, as amended, does not require that a transcript of the proceeding be made. The Organization contends that, if the Carrier decided a transcript of Claimant's unjust treatment hearing was necessary to make a decision regarding this dispute, the Carrier had the resources to record the hearing and produce a transcript.

Finally, the Organization argues that the claim was progressed in total consistency with the applicable rules. It insists the claim was handled in the same manner as all other "fitness and ability" claims which have been progressed over the past 31 years without exception by the Carrier. The Organization maintains there was no duplicate appeal or pyramiding of this claim at any level.

The Organization urges the claim be sustained and that Claimant be fully compensated for wages lost as a result of her improper disqualification.

The Carrier initially maintains the claim is procedurally defective. It argues the phrase "otherwise than covered by these rules" contained in Rule C-2 expressly prohibits the pursuit of an unjust treatment hearing, if it is alleged that any other rules of the Agreement cover the situation. Carrier contends that the appeal of a qualification determination in an unjust treatment hearing under Rule C-2 and that the presentation of a penalty claim under Rule C-3 in a concurrent manner constitute a pyramiding of claims which is inconsistent with the restrictive language of the Agreement. Further, the Carrier argues the claim filed under Rule 3 was not filed with the proper Carrier officer in accordance with the provisions of the rule. On this basis, and without consideration of the merits, the Carrier argues the claim should be dismissed.

In respect to the merits of the dispute, the Carrier contends it retains an exclusive right to determine Claimant's qualifications for assignments. It argues that Claimant was properly disqualified from the Demurrage Clerk position and that Carrier has exclusive right to determine Claimant's qualifications for a particular position. It contends the applicable agreement language does not set any mandatory time period that the Carrier must observe prior to disqualifying Claimant from a position.

The Carrier maintains that Claimant was given a reasonable period of time in which to qualify on the position. According to the Carrier, Claimant exhibited little or no progress in handling the requirements of the position after two weeks of training and working with the assistance of managers. It asserts that her poor test performance, only scoring six correct answers out of twenty questions, substantiated the fact that she had little comprehension of the functions of the job.

The Carrier takes exception to the Organization's allegation that the test was discriminatory because no others in the department had taken the test and there was no prior notice that she would be subject to the test. The Carrier maintains it has the right to develop tools to assess an employee's knowledge of and qualifications for a position because testing is not an issue under the Agreement. The Carrier maintains that someone will always be the first person to be tested. Furthermore, Carrier contends that the test was subsequently used to assess the qualifications of other employees for similar positions.

The Carrier argues the Organization failed its burden of proof to establish that Claimant was qualified for the position. Specifically, Carrier contends, without a record or transcript of the Rule C-2 hearing, the Parties and Board have no substantive evidence to review on appeal. Carrier maintains that the hearing itself does not satisfy the requirement of providing a record to support the claim. Likewise, Carrier insists it was proper not to accept the audiotape presented by the Organization. It argues that the Organization's attempt to enter an audiotape of the hearing into the record almost two years after the event was untimely and this action did not alleviate the Organization's responsibility to create a transcript of the record if it desired to rely upon such evidence. Moreover, the Carrier maintains that the information provided by the Organization in its correspondence regarding Claimant's capabilities was anecdotal and unsupported by any official record and, therefore, should be barred from consideration.

Last, the Carrier argues there is no justification for any monetary payment in this dispute. It maintains there is no liability associated with the claim because the handling of the claim on the property was procedurally defective and there is no merit to the dispute. It urges that the claim be dismissed or denied.

DISCUSSION AND ANALYSIS: The Board is not persuaded that the claim should be dismissed on the alleged procedural issues.

First, there is no evidence to support the Carrier's assertion that this dispute represents a pyramiding of claims. This dispute centers on the disqualification of Claimant on August 12, 2002. While a portion of Rule C-2 cited by Carrier does lead one to conclude it would be for disputes otherwise than covered by the rules of the Agreement, the language of Rule C-2 must be considered in its entirety. The Note appended to Rule C-2 clearly provides that Rule C-2 may be used to request a hearing for a disqualification - as in this case - which is covered by other rules. Further, the Board recognizes that there has been a long standing practice of progressing similar disputes in the same manner without procedural exception by the Carrier.

Second, Carrier argued the initial claim was not presented to the proper officer in accordance with the provisions of Rule C-3. In response, the Organization contended the claim was filed with the officer named by the Carrier. The file is bereft of any information to establish that Carrier notified the Organization of its designation of anyone other than the officer to whom the claim was presented.

In respect to the merits, the Board is persuaded that the claim should be sustained in part. The Board notes that the Carrier is within its right to disqualify Claimant from the Demurrage Clerk position. It retains managerial rights to monitor the progress of employees and develop tools such as tests to assess an employee's knowledge or qualifications for a particular position. The Carrier adjudged that Claimant exhibited little to no progress in handling the requirements of the position and that she had poor test performance after two weeks on the assignment.

After Claimant was disqualified, she was afforded an unjust treatment hearing. She was given an opportunity to develop testimony and evidence to establish that she did have the qualifications necessary to retain the Demurrage Clerk position.

Rather than present a record of the hearing as evidence for appellant review, the Organization insisted that a record of the hearing was not required and based its position on the amended language of Rule C-2 which states, "A record of the proceedings of hearing conducted in accordance with Rule C-2 is not required."

Although Rule C-2 does not require either party to make a record of the hearing, the Organization carries the requisite burden of proof in a case of this nature. The record reflects that there is not sufficient evidence contained herein to support the Organization's position. As such, the Organization can not demonstrate that the Claimant possessed the requisite fitness and ability in accordance with Rule B-7 for the position in question.

The record fails to establish that Claimant was qualified for the assignment; therefore, Carrier acted within its rights when it disqualified the Claimant. Its decision was based on the Claimant's performance and test results. However, an employer's authority to make such determinations, while broad, is not unlimited. The Carrier must make its determination based on a reasonable standard and not in abuse of its discretion. There is no indication that Claimant was counseled about the quality of her work or that she knew about the introduction of a new testing procedure for qualifying. She received only eight days to qualify for the position, which in light of the requirement that Claimant received a reasonable time to qualify and the complexity of the position the Board tends to be insufficient. Without this critical information, Claimant was disadvantaged and she was not given a reasonable opportunity to improve her work or to prepare for the demurrage test. This information would have been beneficial for her to qualify.

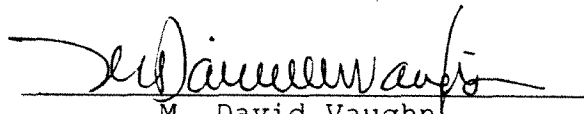
The Board holds the Claimant is entitled to more qualifying time under Rule B7 and B-10 on the position into which she had bid, if the position still exists. She is also entitled during that period to be advised as to areas of her performance where improvement is needed and as to what will be required of her by way of testing and examination. The Carrier remains entitled to pass on her qualification for the position, subject to review through the grievance/arbitration process.

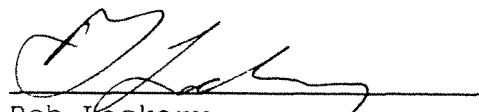
In respect to the compensation requested, the record is insufficient to establish that Claimant was qualified for the

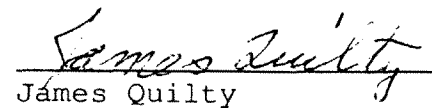
position; and there is insufficient evidence to establish whether Claimant would have qualified if she had been given the additional time on the assignment. Therefore, that portion of the claim is denied.

AWARD: The claim is sustained in accordance with the findings.

Dated this 12th day of April, 2005.


M. David Vaughn
Neutral Member


Bob Lockery
Carrier Member


James Quilty
Employee Member