

AWARD NO. 13

CASE NO. 15

PARTIES TO THE DISPUTE:

BROTHERHOOD OF RAILWAY, AIRLINE AND
STEAMSHIP CLERKS, FREIGHT HANDLERS,
EXPRESS AND STATION EMPLOYEES

and

CHICAGO AND ILLINOIS MIDLAND RAILWAY COMPANY

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. Carrier violated the Agreement between the parties when it refused to permit Clerk S. H. Gregory to exercise her displacement rights over a junior employee who was regularly assigned to the position of Keypunch Operator-Clerk.
2. Carrier shall now be required to compensate Clerk S. H. Gregory for eight (8) hours' pay at the straight time rate of the Keypunch Operator-Clerk position beginning with August 21, 1978, and continuing for each and every workday thereafter, Monday through Friday, account being denied the position held by a junior employee.

OPINION OF BOARD:

Claimant, with seniority date of September 2, 1976, was displaced effective August 15, 1978 by a senior employee. Claimant in turn tried to displace a junior employee from the position of Keypunch Operator-Clerk. Following an interview with the auditor on April 16, 1978, in which it was determined that Claimant did not know how to operate a Keypunch machine, she wrote the following letter:

Since you questioned my ability to do keypunch operation today, I would appreciate the opportunity to learn your keypunch duties at NO pay on August 17 and 18, 1978, and thereafter take any test you feel necessary to allow my displacement of M. J. Sloman on August 21, 1978.

I am sure I can perform the duties of the Key-Punch Operator Clerk position and I believe I am entitled to at least prove this. Please advise.

Claimant's request to learn on the job was declined and she was found by the Auditor to have insufficient fitness and ability to displace the junior employee. Claimant was so notified by letter of August 21, 1978 as follows:

This will acknowledge receipt and is my disallowance of your August 15th request to displace junior employee Sloman from the position of Key Punch Operator-Clerk in the Accounting Department and your conference demand of August 16th (later confirmed in writing) to be taught the duties of this position in the first 30 days on your own time, particularly familiarization with the operation of the data recorder (key punch) machine.

As admitted in our conference, you did not possess sufficient fitness and ability to perform the duties of this position at this time, and were advised that the displacement provisions did not require we grant you 30 days to learn or that we teach you the duties of this position on your own time.

I believe one of the local colleges teaches data recorder operation and should you become proficient in its operation, later consideration could be given to your bid on such a position when it becomes vacant, and the 30 days in which to qualify.

Subsequently Claimant was placed on the furlough list from which she worked from time to time. In February 1979, the same Keypunch Operator-Clerk position onto which she had tried to displace, became vacant due to a promotion. At that time, Claimant was the most senior bidder of the three applicants for the vacant job. Her bid was accepted and she was allowed time to qualify under Rule 16.

In the meantime, the present claim was instituted and progressed by the Organization alleging a violation of "Rules 3, 16, 19 and any related rules" because Claimant had not been permitted time to qualify under Rule 16 in August 1978. The claim was denied at all levels and finally appealed to this Board.

Before turning to the Rules at issue in this case, it is necessary to comment upon an ancillary argument joined by the parties concerning what, if any, effect is to be given the memorandum titled Introduction, dated September 23, 1975. The document in question is a joint memorandum prepared, signed and distributed by the parties to all affected employees, as follows:

To: Clerks, Telegraphers, Freight Handlers
Express and Station Employees

INTRODUCTION

Attached is your personal copy of the new C&IM-BRAC collective bargaining agreement that becomes effective October 1, 1975.

The C&IM and BRAC representatives have been working many months to combine the former separate agreements of clerks and telegraphers and to dovetail into one seniority roster all those previously shown on six rosters.

It is suggested that you study the entire agreement. Your specific attention is called to several changes that were adopted in combining agreements, particularly in the following rules:

- Rule 1 - All clerks and telegraphers have been included within the scope rule.
- Rule 3 - Seniority is immediately established by new employees as soon as they show up on the payroll instead of when assigned by bulletin.
- Rule 9 - The bulletin period has been extended from 5 to 7 calendar days and the exception of not bulletining dock laborer jobs eliminated; dock laborer jobs will be bulletined after October 1, 1975.
- Rule 16 - The 30 days in which to qualify may, by agreement, be extended 30 days more. A previous misunderstanding also permitted an exercise of seniority when disqualified AFTER the qualification period--this has been canceled and such disqualified employees (after the qualification period) will be considered in an unassigned or furloughed status.
- Rule 18 - The addition of a note recognizes an actual displacement is necessary regardless of any paper notices of intention.
- Rule 21 - Rest day changes now require abolishment of a job and rebulletining with the new rest days.
- Rule 23 - A change in an employees' physical condition that disqualifies him for his position will permit an exercise of seniority by agreement.

- Rule 42 - Second meal period provisions for employees required to work overtime have been added.
- Rule 45 - Work performed in advance and continuous with starting time will be considered subject to the minimum payment under the call rule.
- Rule 52 - Local travel time and expense provisions that existed for telegraphers were adopted for all employees under the agreement.
- Rules 53-71-72-73-74-75-76 are rules continued in force, particularly for employees at depots, stations and interlockers.

Springfield, Illinois
September 23, 1975

Otis J. Hawthorne
General Chairman, BRAC

A. E. Brockschmidt
Manager of Personnel, C&IM

A. N. Fitzjarrrell
District General Chairman, BRAC

John F. Hennecke
Personnel Administrator, C&IM

J. A. Conder
Division Chairman, BRAC

The parties had widely disparate views concerning the import of this document. The Organization insists that the Introduction is part and parcel of the Agreement and fully as binding as any of the numbered rules. The Carrier argues that the Introduction is nothing more than a cover sheet or transmittal document and has no useful purpose in interpreting and applying the Agreement. In the judgment of this Board, the Introduction has much more significance than that accorded it by Carrier; but less than contended for by the Organization. The Introduction is not incorporated by reference into the Agreement and may not prevail over the plain language of that Agreement. However, wherever the Rules of the Agreement listed in the Introduction are deemed vague or ambiguous, then the Introduction is valuable evidence of the mutual intent of the parties regarding the meaning of those Rules.

The Introduction does not concern us in this case in any event, because the plain language of Rules 8 and 16 require no recourse to external evidence concerning the intent of the parties. The proper disposition of this case

turns upon the construction and application of Rules 8 and 16, reading as follows:

Rule 8 - PROMOTION BASIS - provides:

Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; except, however, that the management shall be the judge as to fitness and ability, subject to appeal as provided in this schedule; fitness and ability being sufficient, seniority shall prevail.

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

* * *

Rule 16 - TIME IN WHICH TO QUALIFY - provides:

Employees entitled to bulletined positions will be allowed thirty (30) working days in which to qualify and failing to qualify will retain their seniority and return to their former position. When it is definitely determined, through hearing if desired, that the employee cannot qualify, he may be removed before expiration of thirty (30) working days. An employee who fails to qualify on a temporary vacancy may immediately return to his regular position.

Employees will be given full cooperation of department heads and others in their efforts to qualify.

NOTE: Time in which to qualify may be extended for up to an additional thirty (30) working days by mutual agreement between the employee's department head and the local chairman.

It is important to note the distinctions in language between the above-cited Rules and those contained in the contracts leading to the sustaining awards cited by the Organization. See Awards 3-14509; 3-18088; 3-21067 and 3-21353. In each of those cases relied upon by the Organization, the contract language clearly and unmistakably linked the time in which to qualify with the exercise of displacement rights. A contrary line of cases has construed language identical to that in the Agreement before us to hold that in the absence of

express language, the time to qualify rule does not apply to the displacing employee unless he/she initially demonstrates sufficient fitness and ability to be entitled to the position. In that connection, denial Award 3-12394 virtually is on all fours with the facts and Agreement language in the present case. See also, Awards 3-1147; 3-14976 and 3-20361. The teaching of those cases, which we deem dispositive herein, is that an employee whose application under a rule like Rule 8 to displace onto a position is rejected by Carrier, must make a prima facie showing that he/she possesses the minimum fitness and ability to perform the major duties of the position. This does not mean that the senior employee must have equal or superior fitness and ability to those of the junior employee. This is not a comparative ability test, but rather a question of adequacy. Thus, the Claimant must show that she had at least adequate fitness and ability to perform the major duties of the position of Keypunch Operator-Clerk as of August 16, 1978. Whether or not the qualifying time rule applies to displacements, it is clear that an employee is not entitled to use the thirty (30) day qualifying time in order to develop or achieve minimum fitness and ability which she lacks at the time she seeks to displace. Award 3-1147. It cannot be contested seriously on this record that keypunching ability was a requisite part of the work of the Keypunch Operator-Clerk. Nor is it debatable that Claimant at the time she sought to displace did not know how to operate a keypunch machine. Whether she could have achieved minimum competence in two days on her own time or in thirty days on Company time essentially is irrelevant for purposes of Rule 8. Because she did not possess the minimum competence to perform the work as of the time she sought to displace the junior employees, she was not entitled to the position under Rule 8. The subsequent acceptance of Claimant's

bid as the senior applicant when the position became vacant and was bulletined in February 1979 does not establish retroactively her fitness and ability to do the job as of August 1978. See Awards 3-12394; 3-14013. Based upon all of the foregoing, the claim must be denied.

FINDINGS:

Public Law Board N. . 2011, upon the whole record and all of the evidence, finds and holds as follows:

1. that the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was not violated.

AWARD

Claim denied.

Dana E. Eischen, Chairman

R. O. Norton, Employee Member

A. E. Brockschmidt, Carrier Member

Date: Aug 27, 1980