Award No. 4358
Docket No. CL-4356

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

THE PENNSYLVANIA RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, including Rules 2-A-2 and 2-A-3, when it awarded clerical position, Symbol No. F-146, Pitcairn Transfer, Pitcairn, Pa., Pittsburgh Division, to an employe junior to the claimant.

(b) Elizabeth J. Litzinger, the claimant, be assigned to this position, and be compensated for all lost earnings, beginning September 18, 1946. Claim to be continuous until proper award has been made. (Docket C-327.)

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes of which the claimant in this case is a part, and the Pennsylvania Railroad Company (hereinafter referred to as the Brotherhood and the Carrier respectively).

There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and the Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act, and which has also been filed with the National Railroad Adjustment Board.

This dispute was progressed to the General Manager of the Central Region of the Carrier by means of a joint submission. The General Manager is the "chief operating officer designated to handle labor disputes". This joint submission is attached as the Employes' Exhibit "A" and will be considered as a part of this statement of facts.

The claimant involved in this case is an employe covered by the Scope of the Rules Agreement, holding seniority rights in the seniority district of the Pittsburgh Division, Central Region, and is employed in the Office of the Freight Agent, Pitcairn, Pennsylvania.

On Bulletin No. 51, dated July 2, 1946, Clerical Position, Symbol No. F-146, Pitcairn Transfer, was advertised as a permanent vacancy, rate $235.70 per month; tour of duty 6:00 A. M. to 11:00 A. M.—12 Noon to 3:00 P. M.; relief day Tuesday; seven-day per week position, with duties as follows:

is clear that this provision of the rule was never intended to apply to such a situation as involved in the instant case since Miss Litzinger had not been assigned to position F-146 on a permanent basis.

It is desired to emphasize the fact that Miss Litzinger's bids for positions F-146 were not considered because she stated she was not qualified. She was not regularly assigned to the position and subsequently disqualified, which would have brought her case within the purview of Rule 2-A-3. Consequently, there is no significance in the fact that she occupied position F-146 for more than 30 days in her capacity as extra clerk. As has already been made clear, her use in the position was merely to insure that so far as possible the work of the position would be kept up, the remaining duties being taken over by other clerks in the same office. If in a similar situation the Carrier should be forced in an emergency to use a typist in a stenographic position for 30 days, it is not reasonable to assume that the Carrier could not thereafter insist upon the qualification of competent stenography for the position. Such is the effect of the argument in the instant case. This might mean in cases of extreme labor shortage such as has existed in the past, and still exists to some extent, an office would be permanently deprived of a stenographer, or in the case in dispute, of a qualified comptometer operator.

In handling the case with the General Manager, the General Chairman also made the statement that "It is not disputed that she fulfilled the duties of the position during this period without overtime and without any unusual assistance." As has been shown above, Miss Litzinger was unable to perform all the duties of the position and required assistance to the extent of two hours per day, whereas Miss Knapp required no such assistance.

It is, therefore, respectfully submitted that the Carrier acted strictly within the provisions of the Agreement in assigning Miss Knapp to position F-146 and that the Claimant is not entitled to any compensation in connection therewith.

III. **Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement and to Decide the Present Dispute in Accordance Therewith.**

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, which constitutes the applicable Agreement between the parties, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, Subsection (i) confers upon the National Railroad Adjustment Board the power to hear and determine disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions". The National Railroad Adjustment Board is empowered only to decide the said dispute in accordance with the agreement between the parties to it. To grant the claim of the employes in this case would require the Board to disregard the agreement between the parties hereto and impose upon the Carrier conditions of employment and obligations with reference thereto not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take any such action.

CONCLUSION

The Carrier has established that no violation of the Agreement occurred by reason of the failure to assign Miss Litzinger to position F-146 and the Claimant is not entitled to any alleged loss of earnings.

Therefore, the Carrier respectfully submits that your Honorable Board should dismiss the claim of the Employes in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant prior to July 2, 1946, was assigned to an Extra List at Pitcairn Transfer. On date above mentioned, as appears

from the Joint Statement of Facts herein, Bulletin No. 51 was issued by Carrier advertising clerical position F-146 with duties described as follows:

> "Qualified comptometer operator, preparation of ballot envelopes and records; computing tonnage from waybills; preparing various car reports."

In addition to Claimant's bid, Carrier received two other bids from employes senior to her. All three applicants received a memorandum from the Agent stating that the position called for a qualified comptometer operator and asking the three applicants to advise if they were qualified operators of such machines. Claimant answered "No", as did the other senior applicants. Thereafter, on July 15, 1946, Carrier posted a notice of award reading "*Award to be made later.*" *September 7, 1946, a supplemental notice of* award was issued showing "No qualified applicants." September 10, 1946, Bulletin No. 71 was posted by Carrier reading the same as Bulletin No. 51 and again Claimant and an employe senior to her bid on the position. September 21, 1946 notice of award was posted showing position F-146 as having been awarded to one Katherine Knapp (who was a new employe and, therefore, junior to Claimant), effective September 20, 1946. February 20, 1947 Miss Knapp was displaced by a senior employe in the exercise of seniority but said senior employe was disqualified the same day. The position was again bulletined on February 20, 1947, but Claimant did not bid thereon. Claimant worked the position from July 1st to September 20, 1946. No employe senior to Claimant is making claim for the position.

Employes claim the position should have been awarded to Claimant and cite Rules 2-A-3 (a) and (b) in support of their position, which reads as follows:

> "2-A-3. (a) An employe awarded a bulletined position or vacancy, or otherwise obtaining a position in the exercise of seniority, and failing to qualify within thirty days may exercise seniority under Rule 3-C-1.
>
> (b) When it is evident that an employe will not qualify for a position, he may be removed from the position before the expiration of thirty days and be permitted to exercise seniority under Rule 3-C-1. *The Division Chairman will be notified, in writing, the reason* for the disqualification."

Of prime importance in the consideration of this docket is the determination of the question as to whether or not Claimant "otherwise obtained *this position in the exercise of seniority", as contemplated by Rule 2-A-3 of* the Agreement. Claimant was placed on this position under the provisions of an Extra List Agreement and from July 1st through September 19, 1946, it was worked by her in accordance with the provisions of that Agreement. There is no doubt that she began this work as an extra clerk. Did her status as such change at any time during the course of her employment on the position by reason of having been employed thereon beyond thirty days under Rule 2-A-3 (b)? It appears from the Employes' Rebuttal Brief that it was on the insistence of the Division Chairman that this position was readvertised on September 10, 1946. It appears to us a reasonable conclusion that if Claimant had "otherwise" obtained the position as contemplated in Rule 2-A-3 (a) or was entitled to it under Rule 2-A-3 (b), there would have been no necessity for readvertising. We conclude, therefore, that as of September 10, 1946, the position was open to bid.

In view of the conclusion reached above the question now to be determined is whether or not Carrier violated Rule 2-A-2 (a) providing that in the assignment of employes to positions, fitness and ability being sufficient, seniority will govern. Did the Carrier's action in keeping Claimant on the position from July 1st to September 20, 1946 preclude it from questioning Mrs. Litzinger's qualifications in view of the provisions of Rule 2-A-3 (b)? We do not believe that it did for the reason that during the above mentioned period the work was all extra work and her qualifications to work the position as an extra are distinguishable from her qualifications to work it on a

permanent basis. It is quite understandable that as a temporary or makeshift arrangement in a somewhat restricted employment market, a position will be filled with the best qualified employe available though such qualification may not be sufficient to discharge the full duties of the position on a permanent basis.

In Award 4040 of this Division, the Board summarized the principles governing determination of fitness and ability to fill positions in the following language:

> "* * * In its consideration of claims involving fitness and ability for a position, this Division of the National Railroad Adjustment Board will not substitute its judgment for that of the Carrier or disturb its action, (1) if it appears such action was taken in good faith and with due regard for both the letter and the spirit of the Agreement; (2) except in those instances where such action is so fraught with bias and prejudice or with manifest intent to circumvent the Agreement as to lead to the conclusion its conduct with respect thereto was arbitrary, capricious and unreasonable; (3) if it appears there was just and reasonable basis for such action; and (4) if it appears from the record the evidence supporting such action was substantial even though there was other evidence of such character reasonable minds might differ as to the construction to be placed upon all the evidence when considered in its entirety."

The evidence in this docket indicates that the action of the Carrier meets those tests. It must be remembered that the two months and twenty days which Miss Litzinger worked on this position afforded her ample opportunity to demonstrate her worth and also to improve her skill, so that it cannot be said that reasonable opportunity was not given to her. There was some evidence in the record, contested but not effectively disproven, that the Claimant was unable to perform all the duties of the position and required assistance to the extent of two hours per day. These factors indicate to some extent that Carrier had reason to doubt the sufficiency of Claimant's ability to fill the position and was not arbitrary or capricious in rejecting her. It is worthy of note, although we do not view it as by any means controlling, that after the position was again thrown open for bidding on February 20, 1947, Claimant did not bid thereon. Might it not be said that this was an indication that she acquiesced to some extent in the Carrier's view of her qualifications for the position?

It follows from what has been said above that a denial award is in order.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier did not violate the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of March, 1949.