

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION
J. S. Parker, Referee

PARTIES TO DISPUTE:

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

LEHIGH VALLEY RAILROAD COMPANY

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

1. That the Carrier violated the existing agreement when it refused to assign Mr. Harold DeEsch, Clerk, Allentown, Pa., to position advertised in Bulletin 2143, 2144 and 2145 as Clerk-Typist, Bethlehem, Pa., December 28, 1948.

2. That so-called typing and arithmetic tests the Carrier requires employees from other districts to pass when bidding for positions in the Accounting Department are not in accordance with the Agreement and should be eliminated.

3. Mr. DeEsch be compensated at the rate of \$233.32 per month in addition to other earnings for the period January 11, 1949 to February 28, 1949.

EMPLOYEES' STATEMENT OF FACTS: On December 28, 1948, the following advertisement was posted to all clerical Seniority Districts:

Assignment notice covering three (3) positions in question, issued January 11, 1949, is reproduced:

**"LEHIGH VALLEY RAILROAD COMPANY
OFFICE OF THE AUDITOR OF DISBURSEMENTS
BETHLEHEM, PA.**

"DATE — JANUARY 11, 1949

"ASSIGNMENT

"Number

2143-A	Title of Position	— Clerk-Typist
	Position Number	— 159
	Location	— Accounts Bureau, Bethlehem, Pa.
	Has been awarded to	— Clara E. Cressman
	Roster Rights	— January 3, 1949
	Rate of Pay	— \$233.32 per month
	Whose Position was	— New Employee
	Effective date	— January 11, 1949

"2144-A	Title of Position	— Clerk-Typist
	Position Number	— 160
	Location	— Accounts Bureau, Bethlehem, Pa.

The Carrier maintains it has shown by the above record that it has adhered strictly to the provisions of the promotion rule, Rule 39, in consideration given this claimant for the disputed position. The claim should be denied for the following reasons:

1. The claimant was given full and unprejudiced consideration for the disputed position.
2. The Carrier exercised its discretion according to principles projected by this Board in declining to award the position to the claimant after a test of his typing ability disclosed he did not have sufficient fitness and ability.

OPINION OF BOARD: On December 28, 1948, the Carrier bulletined three Clerk-typist positions for a temporary period not to exceed two months. The positions were established principally to perform typing work in connection with the preparation of certain government forms and speed and accuracy in typing were essential to proper performance of their work.

Bids were received from three employes. Two of these employes held seniority in the accounting department where the positions were established while the third, the Claimant, held seniority in another district. The first two positions were filled and are not in controversy. It is conceded Claimant would have been entitled to fill the third except for questions pertaining to his fitness and ability.

After Claimant submitted his bid he was called to the Carrier's office for an interview. There it was ascertained he had never worked on an assignment requiring so much accuracy and speed in typing ability and doubt was expressed as to his being able to properly perform the duties of the position. He was then required to take a typing test. This disclosed he was inaccurate and his typing speed was slow. Thereupon the Carrier refused to assign him the position on the ground he did not have sufficient fitness and ability to fill it. Later the position was filled by an experienced typist who held no seniority.

The gist of the Claimant's contention is the Carrier violated the agreement between the Carrier and the Brotherhood in failing and refusing to assign Claimant to the position in question. Heretofore we have noted that except for questions relating to fitness and ability Claimant would have been entitled to the assignment. The governing and all decisive portion of the agreement is Rule 39, which reads:

"Employes 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 being sufficient, seniority shall prevail.

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

Claimant really raises but two questions. At the outset he challenges the Carrier's right to require him to take the typing test to which reference has already been made, also an arithmetic test. While the record as to whether the last mentioned test was also required is confusing we shall assume it was. Thus the question: In attempting to ascertain fitness and ability under the provisions of Rule 39 did the Carrier violate the agreement by requiring Claimant to submit to reasonable tests calculated to aid in establishing those matters? We do not think so.

In the instant case the accuracy and speed of the Claimant were in question. Neither the speed test, nor for that matter the arithmetic test, were complicated or complex. Under the circumstances they were required to supply the Carrier with additional information regarding the employee's fitness and ability, hence they were necessary, and proper. This Division of the Board has long recognized, that in the absence of anything in the agreement to the contrary, reasonable tests may be used by the Carrier to assist it in determining the fitness of an applicant. (See Awards 4918, 5006.)

Finally Claimant insists he had the fitness and ability to perform the job notwithstanding the Carrier's conclusion to the contrary. The facts, rules and issues, involved in this case are similar to those involved in Award 4918 which in our opinion is sound authority for denying the instant claim. The same holds true of Award 3151. However, although we might well do so we do not propose to base this decision upon those two Awards alone. The established rule (e.g., Awards 5006, 4485, 4466 and 3273) is that fitness and ability in the first instance is a matter which rests in the sound discretion of the Carrier and that once it makes a finding the senior applicant for a position is lacking in fitness and ability the employee contesting sufficiency of that finding has the burden of overcoming it by proof. Otherwise the Carrier's action will not be disturbed. In the present case the Claimant has wholly failed to sustain that burden.

In reaching the conclusion just announced we have not overlooked a contention to the effect Claimant's natural ability and experience would in a reasonable time have enabled him to acquire the necessary fitness and ability to do the work of the position in question. Even so, under the peculiar circumstances of this case, the suggestion has no merit and the argument with respect thereto is entitled to little, if any, consideration. This, as we have indicated, was a temporary position, created for the purpose of supplying the government with income tax information and other data of like character. At the outside the work of the position would not have lasted over two months. The record clearly reveals that Claimant's lack of experience was such that he could not possibly have acquired the required fitness and ability, i.e., speed and accuracy, to properly perform the work of the position within that period of time.

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 Employee involved in this dispute are respectively carrier and employee 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 15th day of September, 1950.