

Award No. 6489

Docket No. CL-6563

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

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

**MISSOURI PACIFIC RAILROAD COMPANY
(Guy A. Thompson, Trustee)**

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees on the Missouri Pacific Railroad, that the Carrier violated the Clerks' Agreement.

1. (a) When, on October 29, 1952, it failed and refused to permit Clerk Earle H. Funk, Jr., to exercise his seniority—displacement rights over a junior employe upon the position of Assistant File Clerk, Kansas City, Missouri, General Manager's office, for which position the Employes hold claimant was qualified according to the intent and purpose of the Clerks' Agreement;

1. (b) When, on Monday, October 27, 1952, it failed and refused to permit Clerk Earle H. Funk, Jr., to exercise his seniority-displacement rights over a junior employe upon position of Relief Janitor—Caller at Coffeyville, Kansas, for which position claimant was qualified in accordance with the intent and purpose of the Clerks' Agreement;

2. When, on November 28, 1952, it failed and refused to permit Clerk Mrs. Cecelia Postlewait to exercise her seniority-displacement rights over a junior employe upon position of Assistant File Clerk, General Manager's office, Kansas City, Missouri, for which position claimant was qualified in accordance with the intent and purpose of the Clerks' Agreement;

3. When, on December 1, 1952, it failed and refused to permit Clerk Mrs. Naomi E. Needham to exercise her seniority-displacement rights over a junior employe upon position of Assistant File Clerk, General Manager's office, Kansas City, Missouri, for which position claimant was qualified in accordance with the intent and purpose of the Clerks' Agreement;

4. That the Carrier shall be required and directed by appropriate Board Order to comply with the spirit and intent of Qualifying

Rule 7, and of the provisions of Rule 6(a) and related rules of the Clerks' Agreement, which action on October 23, 1952, October 27, 1952, November 28, 1952, and December 1, 1952, as shown in (1), (2) and (3) hereof was in violation of, and place the senior of the three claimants involved upon the position of Assistant File Clerk, Kansas City, Missouri, and that each claimant named be reimbursed for actual wage loss suffered, if any, growing out of the Carrier's violation of Agreement provisions.

EMPLOYES' STATEMENT OF FACTS: The Missouri Pacific Railroad maintains two General Managers and two Assistant General Managers, one each on the Southern District located at Little Rock, Arkansas and one each on the Western District located at Kansas City, Missouri. The Clerks' seniority rosters of General Manager, Assistant General Manager, Superintendents and Mechanical and Engineering forces are divided into two separate district rosters, one the Southern District, the other the Western District.

There is a clerical force subject to the provisions of the Clerks' Agreement in each General Manager-Assistant General Manager's office of approximately 40 employees, which consists of such clerical classifications as—

Chief Accountant
 Assistant Accountants
 Chief Statistician
 Statistical Clerks
 General Clerks
 Material Clerks
 Timekeepers
 Report and Statement Clerks
 Bill and Voucher Clerks
 Stenographer—Clerks
 Stenographers
 Comptometer Operators
 File Clerks
 Assistant File Clerks
 Office Boys or Office Girls.

There is an Office Manager or Assistant to the Assistant General Manager in charge of each office, which position is not subject to the Clerks' Agreement. There is a Chief Clerk in each General Manager-Assistant General Manager's office, which is an "excepted" position under the Clerks' Agreement. There is a Secretary to the General Manager and Secretary to the Assistant General Manager which are "excepted" positions. There is what is known as "Transportation Assistant" in each of the Assistant General Manager's offices, which positions are excepted but the filling of same is restricted to an employee from the respective district seniority rosters, such as Southern District and Western District.

There is a File Clerk in each General Manager-Assistant General Manager's office, a restricted position which is not subject to the seniority provisions of the rules of the Clerks' Agreement, but does come within and under the provisions of all other rules. This File Clerk, while not shown in the list of classifications specifically as "Chief File Clerk" is, nevertheless, regarded generally as Chief File Clerk because he does have charge of the files, does the marking and numbering of files, making proper record and designation thereof.

and ability for the typing work. It is true the Carrier gave as its reason for declining to use the claimant that she was not qualified for the work—not that she did not have sufficient fitness and ability. She had done no payroll typing for five years but the referee sustained the claim on the premise of sufficient fitness and ability which was not the issue at all. This was overtime work from the standpoint of the claimant; experience was essential—not just fitness and ability. Fitness and ability apply to filling positions—not overtime work and the point of the case was missed entirely in that if the employees used were bona fide ones, they were properly used regardless of fitness and ability of the claimant or how well she might have been qualified. That was not a fitness and ability case at all; it has no controlling effect or applicability to this dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The question here presented for determination is the interpretation of certain rules of the agreement based on the factual situation involved. There are three claimants and two positions involved. Claimant Clerk Earle H. Funk, Jr., sought to exercise his seniority displacement rights upon the positions of Assistant File Clerk, Kansas City, Missouri, and upon that of Relief Janitor-Caller at Coffeyville, Kansas. The other claimants, Clerk Mrs. Cecelia Postlewait sought to exercise the same right upon the position of Assistant File Clerk, General Manager's office, Kansas City, Missouri, at a later date than Claimant Earle H. Funk and Claimant Naomi E. Needham sought to exercise a similar right at a still later date. In each instance Carrier refused the request basing its decision on "lack of sufficient fitness and ability as you are not experienced and not considered qualified to perform the duties to this position." The only exception being in that the letter to Claimant Funk on the Assistant File Clerk position, the word "sufficient" was not used.

The positions sought were held at the time by a junior employee in point of seniority, but who had previous experience in the duties of the position.

The rules of the agreement cited are 4(a) and note thereto, relating to employees covered being in line for promotion, and providing for seniority status, with fitness and ability being sufficient, seniority shall prevail and: Note, defining the word "sufficient" as being intended to more clearly establish the prior right of the senior of two or more employees of the same seniority district having adequate fitness and ability for the position or vacancy sought in the exercise of seniority. Rule 7 (b), (d) and (e) dealing with "qualification" and allowing a 30-day period therefor; relating to failure to qualify and extension of period therefor. These rules are cited by Petitioners. The following rules of the Agreement are cited by Respondent: 6(a), entitled "Vacancies and New Positions"; 7 (b), (d) and (e) (which it is contended do not apply herein) and 7 (f), 4 (a) (which it is contended is sought to be circumvented) and 14 (j) dealing with "Employees who, because of lack of fitness or ability, are not permitted to exercise seniority on positions held by junior employees, assume the status of furloughed employee. . . ."

Numerous awards are cited by both parties in support of the respective positions taken.

The record is long and a detailed review of the same and of the many cited awards is not deemed necessary as the controlling factors in the claims apparently hinge on one proposition:

Did the Carrier by refusal in each of these instances exercise its managerial prerogatives in an unreasonable, arbitrary, capricious and discriminatory manner such as to prejudice rights of Claimants?

We think not and for the following reasons: The burden rests on Claimants to establish by positive proof the experience, fitness and ability of each to perform the duties of the position sought and this test has not been met under the record presented. No sufficient showing appears to meet this impor-

tant test. In one instance, that of Claimant Funk, it is shown that he possessed an excellent educational background but no proof was offered of experience in the duties of the position sought. Such a showing is deemed not to be sufficient.

Also in the presentation of the claim there is considerable discussion relative to the training period designated, however, under the facts here presented we deem this not to be the controlling factor. Also discussion of a similar position in the General Manager's office at Little Rock, Arkansas, as being comparable to the situation here. At Little Rock there are two positions of Assistant File Clerk. Likewise we do not believe that can be considered controlling here.

In a review of the record, rules and awards cited, we feel that the awards cited which more nearly meet the principles involved here are Award 6143 wherein is cited numerous awards of the Division, among them: Award 5238 (involving these same parties with an interpretation of Rule 4 of the Agreement), also Awards 2350, 4918, 5417 and 5603 bearing on the proposition that the employer must be the judge of the fitness and ability of an employe if there is nothing in the rules abrogating such right. Also, if the action taken by the Carrier is not shown to be unreasonable, arbitrary or capricious in the determination made and, citing from Award 5417 as follows:

“Repeated decisions of this Division of the Board have established the rule that once fitness and ability of an employe have been found by the Carrier to be lacking, the burden rests upon the Claimant to overcome that decision by substantial and competent proof”, “citing Awards 1147, 2031, 2491, 3273, 3469, 4040 and 5147 of this Division in support thereof.”

Claimants have not met the burden of proof necessary to establish ability and fitness and there is no showing on this record that the action taken by Respondent Carrier was unreasonable, arbitrary or capricious to the prejudice of the seniority rights of Claimants. Hence, we find no violation of the Agreement.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 11th day of February, 1954.