Award No. 7414

Docket No. CL-7413

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

THE SAINT PAUL UNION DEPOT COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the rules of the current Agreement, effective February 1, 1951,

1. When on August 3, 1953 it refused to allow Rachel H. Anderson, a senior employe, to displace on Position No. 42 held by E. J. Prescott, a junior employe;

2. That the Carrier now be required to place Rachel H. Anderson on Position No. 42 in line with the rules of the Agreement, and

3. That Rachel H. Anderson be compensated in addition to her regular salary at the proper rate of pay for Position No. 42 for each and every day that she is illegally held off of Position No. 42.

EMPLOYES' STATEMENT OF FACTS: On July 21, 1953 the Carrier issued Bulletin No. 345 advertising Position No. 42, which bulletin we are submitting as Employes' Exhibit "A". This position was awarded to one Edward J. Prescott on July 27, 1953. On August 3, 1953, Rachel H. Anderson, an employe who was senior to employe Prescott, returned from leave of absence and requested to displace employe Prescott. On August 6, 1953, the Carrier declined Rachel Anderson's request (See Employes' Exhibit "B"). This case was handled up to and including the highest official to whom appeals are made. The Carrier contended that Rachel Anderson lacked the necessary qualifications to hold the position. A request was made by the Employes for a hearing as provided for in the Agreement with the Carrier under Rule 20. This hearing was agreed to and held in the office of the Vice President and General Manager on June 11, 1954 at 2:00 P. M. No minutes were taken of this meeting but the hearing was confirmed on June 17, 1954 by Vice President and General Manager H. P. Congdon's letter of that date (See Employes' Exhibit "C"). This letter was acknowledged on June 30, 1954 by the General Chairman (See Employes' Exhibit "D").

POSITION OF EMPLOYES: There is evidence between the parties an agreement bearing the effective date of February 1, 1951 which contains the following rules:

Declining Promotion. Employes declining promotion or declining to bid for a bulletined position will not thereby forfeit any seniority rights."

It is our position, that under the provisions of this Rule we have the right to determine the "fitness and ability" of the applicant and in this particular case Mrs. Anderson did not have the physical fitness nor physical ability to perform the duties required of Position No. 42.

It will be noted, among major assigned duties to applicant, ". . . must be qualified to assist on inventories in the yards and offices of both properties as occasion arises." This involves inventory of rail, frogs, switches, other track material, locomotive repair material and car repair material. It involves considerable walking through railroad yards, shops and storehouses, both outdoors and indoors, in winter and in summer; primarily in the fall and winter months when inventories are usually taken. We have had as high as 88" of snow fall in the City of St. Paul just a few years ago, 40" of which fell during the month of March alone.

It will also be noted that appeal for hearing on behalf of Mrs. Anderson was not held within the period provided for in Schedule Rule 20 of the Agreement effective February 1, 1951. However, in order to be entirely fair with Mrs. Anderson and with the thought in mind that perhaps a hearing would make clearer to Mrs. Anderson our reasons for declining to award the position to her, the management waived its rights under Rule 20 and did hold such a hearing, although we felt that we could have stood on the Rule and closed the case on that basis. Even though this hearing was held, and she was properly represented by officers of the Brotherhood, and at which all of the circumstances of this case were thoroughly discussed and explored, it did not change the position taken by her.

As stated in Exhibit "A" attached, Mrs. Anderson is a frail woman 56 years of age and in our opinion entirely incompetent physically to perform some of the duties of this Position under the rugged weather conditions which exist in this latitude during the winter months.

There is not the slightest disposition on the part of the joint management of these two companies to discriminate against women for outdoor positions when they are competent, especially physically, to perform their duties. For example in the past five years at Minnesota Transfer we have had ten women at different times on outside messenger assignments. As a matter of fact, if any other woman in our employ who was physically fit and physically able to perform the duties of Position No. 42 had applied for the job and had had the proper seniority, it would have undoubtedly been awarded to her.

(Exhibits not Reproduced.)

OPINION OF BOARD: Claimant, a female, age 56, seniority dating from June 3, 1923, applied for Position No. 42, bulletined July 21, 1953, awarded August 6, 1953, to one of the opposite sex who was next in line of seniority.

Pursuant to rules that govern, the position should go to senior applicant, fitness and ability being sufficient. Petitioner acknowledges carrier's right to determine fitness and ability of an applicant if there has been no abuse of privilege, but goes on to say that it is an abuse of privilege to disqualify one for promotion to a position within scope of the Agreement, due only to a difference in sex.

Carrier denies the charge that it has discriminated between female and male employes for promotion and seemingly agrees it would be a violation of the Rules Schedule to do so. Other instances are cited where women are and have been used in "outdoor positions", and, as to the one in question, carrier says:

"* * * if any other woman in our employ who was physically fit and physically able to perform the duties of Position No. 42 had

applied for the job and had had the proper seniority, it would have undoubtedly been awarded to her."

Carrier's assurance, above stated, does not remove the doubt in claimant's mind that the promotion would have been hers except for her sex, and petitioner continues to share that doubt.

We have examined the record carefully for some evidence of discrimination. In the many letters exchanged while the dispute was being investigated on the property, carrier's answers all have to do only with claimant's alleged disqualification and do not remotely touch upon the proposition that any woman applying for the position would have been summarily disqualified.

Reference made by carrier to extreme weather as adding to the burdens of the position, brings a sharp rebuke from petitioner and contributes, no doubt, to the belief that by mentioning the rigors of winter, management officials demonstrate some thinking that this hardship which petitioner disputes, is levelled against women in general. On the other hand, carrier takes the stand that, "this is simply a case where the responsibility of the management dictated a refusal to permit a woman of this age to do the work expected of the incumbent in question."

We cannot take the record up to this point to mean that a younger and more rebust woman would have been disqualified for lack of physical fitness on the position that was open to bid.

The balance of the record has to do with disclosures allegedly made after or at an investigation (hearing) of which no record was kept. Carrier urges that the hearing amounted to a concession on its part in response to an untimely request from petitioner.

It would have mattered less whether the request for a hearing was timely if dispute did not presently exist over what was said at the hearing, and petitioner now seeking to bolster the record before us by inserting ex-parte statements as a part of its "Surrebuttal Reply", a sufficiently questionable practice that entitles such statements to little, if any, weight.

The record before us does not amount to a showing that management's exercise of judgment as to fitness and ability of one who seeks promotion was arbitrary, capricious, or discriminatory, and 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

The Agreement was not violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 20th day of September, 1956.