

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

MIDLAND VALLEY RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway Clerks that the Carrier violated the Clerks' Agreement beginning July 1, 1954 when,

(a) It assigned Mr. C. A. Montgomery to permanent vacancy, covered by Bulletin No. 955, dated June 25, 1954, in the Accounting Department at Muskogee, Oklahoma, and declined and refused to consider the application of Mr. Louis Schott, the senior applicant, and,

(b) That Mr. Louis Schott shall now be assigned to the position described in Bulletin No. 955 and compensated for all monetary loss sustained from July 1, 1954 until final settlement of this claim.

EMPLOYEES' STATEMENT OF FACTS: On June 25, 1954 the position E-2, General Division Clerk, Accounting Department, Muskogee, Oklahoma, was advertised as a permanent vacancy due to the occupant thereof, Mr. A. L. Overby, having retired. Employees' Exhibit 1.

Bids were received for this position until 12:00 Noon, June 30, 1954. On July 1, 1954 carrier posted Bulletin No. 957 awarding the position to Mr. C. A. Montgomery. Employees' Exhibit 2.

Mr. Schott's seniority date is February 2, 1927. Mr. Montgomery's seniority date is July 11, 1929.

On July 3, 1954 Mr. Schott requested reason for his non-assignment as provided in Rule 17 of the Clerks' Agreement. Employees' Exhibit 3.

Mr. Schott was advised by the carrier on July 12, 1954 that he did not possess sufficient fitness and ability to perform the duties and assume the responsibilities incident to the position. Employees' Exhibit 4.

POSITION OF EMPLOYEES: There is in evidence an agreement between the parties bearing effective date January 1, 1953 in which the following rules appear and which the Employees cite as being in violation:

OPINION OF BOARD: A. L. Overby, General Division Clerk in Carrier's Accounting Department at Muskogee, Oklahoma, retired July 1, 1954. Prior thereto, a permanent vacancy was advertised by Bulletin No. 955 dated June 24, 1954, which was awarded to C. A. Montgomery with seniority date of 7/11/29, by Assignment Bulletin No. 957, posted July 1, 1954.

Carrier concedes that Louis Schott, then holding a Division Clerk position, with seniority date 2/2/27, and an applicant for the General Division Clerk vacancy, was senior to Montgomery, to whom Carrier awarded the position.

Carrier advised Schott by letter dated July 12, 1954, that he was "not assigned to the position of General Division Clerk, because in our opinion you did not possess sufficient fitness and ability to perform the duties and assume the responsibilities incident to this position."

Carrier argues:

"Under this Rule (10-b) the appointing officer is the judge of the applicant's merit, capacity and fitness and ability. * * * There is no mandatory rule requiring that clerical employees be afforded a trial on an assignment. * * * Seniority is a valuable asset and should be carefully guarded, however, the rules do set out methods by which certain standards are to be given consideration in filling vacancies. The power to fill is given the Carrier. Its use of the same is limited by these rules. The burden of establishing facts sufficient to require or permit the allowance of a claim is upon him who seeks its allowance . . ."

There is a difference between the parties as to the manner, or by what rule, the case is before us. However, we accept Carrier's argument that "regardless . . . it is a fact that this claim was considered in conferences (between the parties) at which claimant's alleged qualifications for the disputed position were discussed, which fact must be considered as a waiver, or correction, of any previous procedural defect claimed."

Claimant Schott has held the position of Division Clerk since February 2, 1927. The Organization claims, and Carrier does not dispute it, that Schott had on various occasions filled the position of General Division Clerk, filling all of the duties involved "except as to two items which require a total of about five (5) hours per month in their performance."

Carrier describes the General Division Clerk position as a subordinate supervisory position responsible for "directing and securing the cooperation of the eight Division Clerks and two rate clerks," and is required to possess technical knowledge of the work being performed as training and instruction of new employees is also a duty of the position. However, Carrier's representative also conceded it "might have been possible" for Schott to have done training and instructing of new employees who may have come into the General Division Clerk's office during the more than 27 years he has held the position of Division Clerk.

Carrier states that "because of the poor state of the Department's (General Division Clerk) work falling within that position's jurisdiction, partly due to certain inefficiencies on the part of the retiring incumbent of the position, a committee consisting of the Vice President and Comptroller, Auditor, Chief Clerk, and Head Receipts Clerk . . . was formulated and charged with selecting a qualified applicant having adequate fitness and ability for assignment to the permanent vacancy. They found claimant (Schott) did not possess the required adequate fitness and ability to qualify him for the position, that C. A. Montgomery, his junior did, and Montgomery was awarded it as the 'senior qualified employee making application for the position' per Rules 9 and 10 (b) 1."

Carrier sets forth that it exercised particular care in selecting the "senior qualified employe," that this was essential due to "the poor state of the Department's work." It recites a list of objectives the Special Committee set up as its guide to fill the vacancy. They cover 5 main subjects, and thereunder have a total of 17 subdivisions. Carrier maintains it has the prerogative to establish the qualifications to be required of an applicant for a position.

It must be accepted that Schott, in filing as an applicant for the position of General Division Clerk—a promotion for him—was exercising his right under Rule 8:

"Promotion, Assignments and Displacements.

"Employes covered by these rules shall be in line for promotion. Promotion, 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."

The Organization argues that Carrier's Special Specifications, set up by it to be met by applicants for the position vacancy, are "no part of the agreement between the parties" and are violative of the Agreement; that such special qualifications are not contemplated by either Rule 8 or 10 (b); that Carrier's Special Committee, set up to pass upon applicants for the bulletined vacancy, "graded Schott **below average** on practically all of the above characteristics."

Since this entire action began when Schott exercised his rights under Rule 8 and bid in a bulletined vacancy, let us examine one portion of this Rule:

"Promotion . . . shall be based on seniority, fitness and ability . . ." (Emphasis added).

If Carrier's contentions are correct in this case, and supported by the Rules, they could find adequate strength for their position if the above quoted portion of Rule 8 had read in this order: fitness, ability and seniority—or, as is sometimes found in Wage Agreements generally, "fitness and ability being equal, seniority will prevail." The framers of the applicable agreement did not even revert to an alphabetical sequence (ability, fitness and seniority); they chose the sequence seniority, fitness and ability, giving the prime position to seniority. And they used the verb "shall."

To probe further into Rule 8, the parties added:

"Fitness and ability being sufficient, seniority shall prevail."

One notes they say fitness and ability being "sufficient"—they did not use the words "equal" or "superior"—"seniority shall prevail."

And in the note which forms the balance of the Rule's language the parties say:

"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." (Emphasis added.)

But, what of Carrier's argument that its Special Committee on qualifications had rated Schott "below average" on the job specifications they had

established as qualifying standards in filling the vacancy in question? If Schott had a mark of "below average" it is natural to assume that Montgomery, the successful job bidder, rated a higher mark, therefore was superior.

The Organization cites Award 2534 (Blake), a portion of which reads:

"In its action in rejecting claimant and appointing Stephenson to the position the Carrier disregarded the letter and spirit of this Rule * * * It appointed Stephenson simply because it considered him, by reason of his past experience, **better qualified** for the position than claimant.

"If the Carrier can do what it has done in this instance rights to promotion, under the Agreement, would be nullified and the bulletining of positions would be a farce. See U. S. Railroad Labor Board Decision No. 2639 and Award No. 2427 of this Division. Upon the facts of record the Carrier acted arbitrarily and capriciously in denying claimant an opportunity to demonstrate his 'competency and capacity for increased responsibility.' See Award 108."

Carrier's main defense of its action may be found in its declaration that a Carrier has the prerogative to establish the qualifications to be required of an applicant for a position, see Award 5238 (Boyd):

"* * * The Carrier had the right in the exercise of its managerial prerogatives to establish the qualifications for the work, if done in good faith. * * *"

Carrier cites many other Awards, but we will refer to but two here. One is Award 3537 (Carter) which holds:

"It must be borne in mind that the responsibility for the safe and efficient operation of a railroad rests with management. The selection of capable employes is the prerogative of management and this responsibility rests with management completely except as it has been voluntarily limited by agreement with the Organization. The general purpose of Rule 8, and similar rules on other carriers, is to eliminate favoritism and prejudice in assigning positions within the scope of the Agreement. This is accomplished by requiring the senior applicant in point of service to be assigned if he has sufficient fitness and ability to do the work. This does not mean that the employe has to be immediately fitted for the job. It means that he has such intelligence, training and experience that it could be reasonably assumed that he could do the work in a satisfactory manner after a brief apprenticeship, usually a qualifying time fixed by the rule itself. Naturally this requires the exercise of judgment, a function of management. Whether management has exercised an honest judgment requires an investigation of an intangible thing difficult of ascertainment. We cannot properly substitute our judgment for that of management because the official charged with the responsibility is usually familiar with the record of the employe, his habits, personality and character, and many other items bearing upon his fitness and ability which cannot be reflected in the record presented before this Board. We are limited, therefore, to a close scrutiny of the record to determine whether there is evidence of favoritism or prejudice, and if there is sufficient evidence to support the determination made by the Carrier.

"We find no evidence in this case that Carrier's officials were prejudiced against this claimant or that they unduly favored the employe assigned. We think also there was evidence in the record requiring the exercise of judgment which is sufficient to sustain the conclusion reached by the Carrier that Claimant did not have sufficient fitness and ability for the position sought. We agree with the Organization that Rule 8 ought not to be used as an excuse

for the exercise of arbitrary action. But, in the absence of a showing of undue favoritism towards the one assigned or prejudice against the employee rejected, or a showing that the evidence was not sufficient to sustain the exercise of managerial judgment, this Board cannot interfere. Awards 3151 and 3273."

The other Award is 3160 of this Division without a referee.

Both decisions covered cases where Carrier awarded a bulletined position to the junior of two applicants, and Carrier was upheld in both cases.

However, in Award 3537, the bulletining was for a General Clerk assignment position, and the Bulletin posted clearly stated: "Must have thorough knowledge of I.C.C. Accounting Classification."

Carrier in that instance awarded the job to the junior applicant because he had knowledge of I.C.C. Accounting Classification, and the senior applicant did not.

In the case of Award 3160, handled by this Division without a referee, Carrier awarded a bulletined vacancy as Maintenance of Way Timekeeper to the junior applicant, (a man) who had maintenance of way experience, because the senior applicant (a female) who had no Maintenance of Way experience, was barred (by State law) from working the necessary overtime the duties required, and being a female, did not possess "fitness and ability" for the performance of the roadwork forming part of the duties of the position.

But in the case now before this Division, entirely different circumstances obtain. Here the senior applicant had about 27 years experience and the junior applicant had about 25 years experience—both as Division Clerks.

For that reason we hold that generally Awards 3537 and 3160 are not applicable in the facts here obtaining, but there is here sufficient evidence for a finding, as Referee Carter put it in Award 3537, of "undue favoritism towards the one assigned or prejudice against the employee rejected."

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 violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January, 1957.

DISSENT TO AWARD 7645 (DOCKET NO. CL-7629)

Award 7645 is not based upon facts of record and is in error.

The majority correctly shows from the record that a committee was "formulated and charged with selecting a qualified applicant having adequate fitness and ability for assignment to the permanent vacancy" in the

General Division Clerk's position and that that committee "found claimant (Schott) did not possess the required adequate fitness and ability to qualify him for the position".

Neither Award 7645 itself nor the record substantiates the majority's holding herein that "there is here sufficient evidence for a finding, as Referee Carter put it in Award 3537, of 'undue favoritism towards the one assigned or prejudice against the employe rejected'".

The majority states:

"But, what of the Carrier's argument that its Special Committee on qualifications had rated Schott 'below average' on the job specifications they had established as qualifying standards in filling the vacancy in question? If Schott had a mark of 'below average' it is natural to assume that Montgomery, the successful job bidder, rated a higher mark, therefore was superior."

Following that statement is a quotation from Award 2534, cited by the Organization, in which Award our decision was based upon Carrier's statement that the claimant therein was not "equally qualified" with the employe assigned and that they gave the position "to the best qualified person."

Obviously, rating Claimant Schott "below average" in the instant case is not an admission that he was qualified for the position. Nowhere in the record can it be shown that assignment was made to the position of General Division Clerk on the basis of the best qualified from among other applicants qualified therefor, or that Claimant Schott was qualified but was denied assignment to the position because his qualifications were not equal or superior to the qualifications of the employe assigned thereto. On the contrary, the record irrefragably shows that the Carrier's position was consistent throughout the handling of this case, viz., that in its opinion Claimant Schott "did not possess sufficient fitness and ability to perform the duties and assume the responsibilities incident to the position."

The majority does not say Claimant Schott is qualified except to state—; "Here the senior applicant had about twenty-seven years' experience and the junior applicant had about twenty-five years' experience—both as Division Clerks". The majority's quotation from Award 2534 shows that experience in the work is not the sole consideration for assignment to a position. That is especially true where the position, as herein, is supervisory.

The Carrier cited the following reasons in defense of its action:

"Over the 28 years so many incidents have occurred that have shown that Mr. Schott does not have the fitness and ability for this position that all of them cannot be cited here. However, there are shown below a few examples to support some of the reasons why the head of the department felt the position should not be assigned to Mr. Schott.

'1. As an example of Mr. Schott's lack of tact and failure to possess the personality traits to succeed as a supervisor, see copies of memorandums dated January 30, 1954, February 1, 1954, and February 17, 1954, (2) which are attached as Exhibit A, regarding his treatment of an employe assigned to him for help and training.

'2. It is common knowledge in the Accounting Department that Mr. Schott is prejudiced against women clerks being assigned to division clerk positions, and at times has been openly antagonistic toward them. It has been necessary in the past to speak to his immediate supervisor about his attitude toward his fellow workers.

'3. Mr. Schott lacks enthusiasm and willingness to work and show progress on his present job, as is shown by the fact that no progress was made in his present work assignment which was 19 months behind at the end of September 30, 1950, regardless of how many abstracts were involved, until July 1954, when he gained one month after he was not assigned to the position in question here.

'4. The head of the department has talked to Mr. Schott on various occasions about his lack of good judgment of how much time should be spent on settlements where the proper settlement would have a very small effect on our revenue. It was not uncommon for Mr. Schott to spend hours on some minor technicality.

'5. From time to time complaints were received from the Traffic Department about Mr. Schott taking up their time and arguing with them about their decisions on trivial division matters.

'6. Mr. Schott's language has often been out of order in speaking to the Chief Clerk and to the head of the department. It seemed he could not express himself without using curse words. The women clerks near him have complained of his abusive language.

'7. Mr. Schott is a difficult person to understand. He has trouble expressing himself so that people can follow his trend of thought.'

"While Mr. Schott is capable of checking divisions and he certainly should be for having spent 28 years doing nothing else, the head of the department had to select a man who they could have confidence in to protect the Companies' revenues and to secure the co-operation and respect of the other division clerks, even though he was two years junior to Mr. Schott."

While the majority states that the Carrier does not dispute the Organization's claim that Claimant Schott temporarily filled the position of General Division Clerk on various occasions, several awards cited on behalf of the Carrier herein show that this Division has held that qualifications to fill a position temporarily are not necessarily sufficient to discharge all duties of the position on a permanent basis.

For the foregoing reasons, Award 7645 is in error and we dissent thereto.

/s/ **W. H. Castle**

/s/ **R. M. Butler**

/s/ **C. P. Dugan**

/s/ **J. E. Kemp**

/s/ **J. F. Mullen**