Award No. 8210
Docket No. TE-7371

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Whitley P. McCoy, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS

THE NEW YORK CENTRAL RAILROAD COMPANY, BUFFALO AND EAST

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on The New York Central Railroad (Buffalo and East) that:

1. Carrier violated agreement between the parties hereto, when on the 13th day of February, 1953 and continuing thereafter, it arbitrarily and capriciously, failed and refused to permit Mrs. J. L. Nixon, an employe covered by Telegraphers' Agreement, with seniority on the Fall Brook District of the Pennsylvania Division, to exercise seniority on the position of Agent, Dundee, New York, as provided in said Agreement.

2. Carrier shall be required to permit Mrs. J. L. Nixon to exercise seniority on position of Agent, Dundee, New York, in accordance with provisions of the Agreement.

3. Carrier shall be required to compensate Mrs. J. L. Nixon for all wages lost as a result of failure and refusal to permit exercise of seniority as aforesaid.

4. Carrier shall be required to compensate Mrs. J. L. Nixon for all travel and waiting time, together with actual necessary expenses incurred as a result of refusal to permit exercise of seniority on position at Dundee, New York.

EMPLOYES' STATEMENT OF FACTS: There is in full force and effect collective bargaining agreement between The New York Central Railroad Company (Buffalo and East), hereinafter referred to as Carrier or Company and The Order of Railroad Telegraphers, hereinafter referred to as Employes or Telegraphers. The agreement was effective July 1, 1948 and is, by reference, with all amendments thereto, made a part hereof as though set out herein word for word.

The dispute involved herein was handled on the property, in the usual manner and in accordance with the Railway Labor Act, as amended, to and including the highest officer designated by Carrier to handle such disputes. The Carrier having failed and refused to adjust the grievance, in accordance

ness to exercise the displacement. Awards of this and other divisions have held that its judgment must be free from arbitrary and partial motives. If its action is dictated by proper considerations, the individual ideas of the members of the Division cannot be substituted for the conclusions it has reached.

Assuming, as we must, that both the management and Mrs. Smithe's representatives acted altogether in good faith, **we can only reach the conclusion that the question of her fitness was one upon which reasonable minds might differ. And such being so, it must follow that the prerogative which the carrier has reserved has not been abused.** In reaching a decision it is hardly competent to examine the actual experience of those who later performed the duties of the position. Former awards, notably those involving one-armed and short-legged men, willing to assume all risks, have indicated that it is only what might occur that matters." (Emphasis added.)

Award No. 2031, Referee Elwyn R. Shaw:

"The present Referee is of the opinion, after reviewing all of the prior decisions submitted to him, that certain true general rules are applicable to a situation of this kind and that it has been the intention of this Board and previous Referees sitting with this Board to follow these general rules, notwithstanding isolated language in some of the awards. It is a general rule that in the first instance the Employer must be the judge of the fitness and ability of an employe and that to hold otherwise would destroy the basic attributes of management, and there is nothing in the agreement to contradict this elementary rule, but the very fact that there is an agreement touching on the subject necessarily modifies it to some extent, and as to that modification we are of the opinion that it requires the Carrier's action to be free from fraud, caprice and unreasonableness. Within the limits of honesty and good faith and without the absence of fraud, caprice or unreasonableness the Carrier must be permitted to determine the question of fitness and ability."

Award No. 6028, Referee Dudley E. Whiting:

"Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment. The exercises of such judgment is a prerogative of the management and unless it has been exercised in an arbitrary, capricious or discriminatory manner we should not substitute our judgment for that of the management."

CONCLUSION: The Carrier exercised its discretion according to principles established by your Board in declining to allow the claimant to take over the agency at Dundee after full consideration of her qualifications.

There is no reason to reverse the decision made by the Carrier in good faith and the claim should therefore be denied.

No facts or arguments have been herein presented that have not been made known to the Employes.

(Exhibits not reproduced.)

OPINION OF BOARD: Prior to January 29, 1953, the Claimant held the position of Telegrapher-Clerk at Signal Station YD at Corning, New York. She was displaced on that date, and gave the Carrier notice that she desired to displace the Agent at Dundee, who was junior to her. She was

given permission to post for the job, and started posting on February 9, 1953. On the fifth day of her posting the Carrier disqualified her as physically unable to perform the warehouse work required of the position at Dundee. She thereupon reverted to the extra list.

Upon request of the Claimant and the General Chairman she was given a hearing in connection with her disqualification. The hearing was held by the Trainmaster who had made the original decision, and he affirmed the decision that the Claimant was not physically able to perform the heavy work in the warehouse.

On the evidence we cannot find that the decision was arbitrary or capricious. The Claimant was given a reasonable length of time in which to qualify, as required by Rule 27(f), and upon personal observation of the Trainmaster was unable to move the heavier pieces of freight to get the proper addresses.

The Organization raises certain claims of technical violations of rules by the Carrier, with respect to the timeliness of the hearing, delay in rendering decision, etc. So far as these contentions have merit, we think some of the objections were waived by failure to make timely protest, and the others resulted in no injury to the Claimant. The fact that the hearing was held by the same officer who made the original decision was not a violation of the Agreement and does not invalidate the proceedings.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That both parties to this dispute waived oral hearing thereon;

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. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 10th day of January, 1958.