

Award No. 10689

Docket No. CL-9977

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Richard F. Mitchell, Referee

PARTIES TO DISPUTE:

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

GRAND TRUNK WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that the Carrier violated the Clerks' Agreement:

(1) When January 21, 1957, it assigned Mr. Earl G. Fontaine to position of Clerk-In-Charge advertised in Bulletin #49 in the General Accounts Section of the Accounting Department, Detroit, Michigan, and refused to assign the position to Miss Florence Mihalciuc who was the senior bidder.

(2) That Miss Florence Mihalciuc be assigned to position of Clerk-In-Charge, General Accounts Section, and compensated for the difference in wages received and what she would have received had she been properly assigned on this position, and that compensation due will run until the condition has been corrected.

EMPLOYEE'S STATEMENT OF FACTS: On January 16, 1957, the General Accountant issued Bulletin No. 49, advertising position of Clerk-In-Charge for bid. This position was assigned to Mr. Earl G. Fontaine by bulletin number 50, dated January 25, 1957, effective January 21, 1957, notwithstanding the fact an application had been filed within the bulletin period by Miss Florence Mihalciuc, an employee senior in service to Mr. Earl G. Fontaine. Because the Agreement was violated in assigning Mr. Fontaine to the position, claim was filed and progressed in the usual order up to the highest officer designated by the Carrier for that purpose without settlement being made. Copies of correspondence exchanged between the parties are attached hereto and made a part hereof, and identified as Employees' Exhibits "1" through "12". There is an Agreement, effective January 15, 1955, between the parties, which by reference is made a part of this Statement of Facts.

POSITION OF EMPLOYEES: This dispute involves the application of the agreement between the Carrier and the Organization regarding the proper assignment of employees to positions for which their seniority entitles them to in accordance with the rules of that agreement. There is in evidence an Agreement between the parties, from which the following rules are quoted, in whole or in part, for ready reference:

capricious or discriminatory manner, we will not substitute our judgement for that of the management."

In Award 5025 the Board found:

"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 on 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 employe contesting sufficiency of the finding has the burden of overcoming it by proof. Otherwise the Carrier's action will not be disturbed."

Numerous other awards have held similarly.

The claim of the employes should be denied, as not supported by the Working Agreement.

This case has been handled in the usual manner on the property up to and including the highest officer designated to handle claims and grievances, and has been declined.

All data contained herein has been in substance, presented to the employes and is a part of the matter in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The pertinent facts are not in dispute. Under date of January 16, 1957, Carrier issued Bulletin #49 — advertising a new position of Clerk-In-Charge in the General Accounts Office of the Accounting Department, Detroit, Michigan. We quote from Bulletin 49, the duties listed:

"Location of Position Detroit, Michigan

Title of Position Clerk-In-Charge

Brief Description of Duties: Supervision of General Accounts Department-Assist General Accountant in preparation of annual reports for I.C.C. Public Service Commission — Tax Assessors — Income Tax Schedules — Directors reports. Preparation of monthly budget, Official Payroll and special work of a non-recurring nature."

Claimant, who was the senior employe, made application for the position, but was not assigned thereto, Carrier assigning a junior male employe thereto.

That the claim was properly presented, appealed on the property and progressed to this Board, has not been challenged by either party.

The employes contend that Claimant was discriminated against because of her sex. This Board has ruled that Carriers are not justified in rejecting a Claimant's application on account of her sex, and with the finding we agree. Award 7817 — There should be no distinction contained in this or any other applicable rule between male and female employes, but there must be proof in the record of the discrimination. There is no proof in this record of discrimination against this Claimant.

Claimant contends that the record shows sufficient fitness and ability entitling her to the position and that under Rule 8 of the Agreement she was entitled to the opportunity guaranteed by that rule.

There have been filed with this Division many fitness and ability claims,

and the Board has held that it is a prerogative of Carrier to determine the fitness and ability of the Employee, and we will not substitute our judgment, based solely on a paper record, for that of the Carrier unless it can be shown that Carrier was arbitrary or capricious in reaching its decision.

In Award 8196, this Division said:

"This Board in passing upon similar cases has formulated certain principles, the most basic of which is that it is the prerogative of Management to determine fitness and ability of applicants and that this Board will not substitute, on a paper record, its judgment for that of the Carrier unless it can be shown that the Carrier's action was an abuse of discretion.

A good exposition of the applicable principles are set forth in Award 3273 (Carter) here reiterated:

"It is the function of management to select competent employees. Except when it has limited itself by contract, the right to selection is wholly within the discretion of management. Award 3151. Under the cited rule, the Carrier has the right to determine in the first instance the fitness and ability of applicants for the position. Award 2427. Fitness and ability for promotion to a position of greater responsibility must be commensurate with the requirements of the position to be filled. Award 2990. Fitness and ability does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance or assistance. Award 2427. It means that the applicant must have such training, experience and character as to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time, usually the qualifying period fixed by the Agreement itself. The Carrier is required under the rule to give the position to the senior applicant if his fitness and ability are sufficient and it may not properly insist upon the right to make the assignment to the applicant which it deems best qualified. Award 2534. After the Carrier has determined that a senior applicant lacks sufficient fitness and ability, the burden is upon such applicant to establish that he possessed reasonable sufficient fitness and ability to occupy the position. Award 1147. Where there is evidence, which if believed, is sufficient to sustain the Carrier's judgement that a senior employee lacks sufficient fitness and ability for the position sought, the judgment of the Carrier will not be disturbed. Award 3057. Otherwise stated, whether an employee possesses sufficient fitness and ability for a position within the meaning of the rule is a matter exclusively for the Carrier to determine and such a determination once made will be sustained unless it appears that the action of the Carrier was capricious or arbitrary. Award 2692."

Rule 5 of the Agreement is the specific rule covering the right of an employee to a particular position.

We quote Rule 5:

**"RULE 5 — PROMOTION, ASSIGNMENTS AND
DISPLACEMENTS**

Employees covered by these rules shall be in line for promotion. Promotion, assignments, and displacements shall be based on senior-

ity, 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."

It will be noted that Rule 5 provides that promotion shall be based on "seniority, fitness and ability, fitness and ability being sufficient, seniority shall prevail." The Carrier held that the Claimant did not qualify for the position.

The record shows that the Carrier's decision was entirely proper. The primary duties of the new position were the supervision of employes in the General Accounts Department and the preparation of Annual Reports for the I.C.C. Public Service Commission, Tax Assessors, etc. as set out in the Bulletin.

Miss Mihalcic requested a hearing to discuss the reason she was not awarded the position. That hearing was held, and the record shows that she had little if any experience in preparing the reports that the new employe was required to prepare. That her position was that of Stenographer-Clerk, and that she had held only stenographic positions.

The Organization argues that the Carrier was contractually obligated to grant Claimant a 30 day trial period on this position under the provisions of Rule 8. With this, we do not agree. Rule 8 does not apply in this case as the Claimant was denied the position.

The Carrier was right, and there must be a denial Award.

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

That there was no violation of the Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of July 1962.