Award No. 14055

Docket No. CL-14821

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John H. Dorsey, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC COMPANY — TEXAS AND LOUISIANA LINES

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, (GL-5493) that:

(a) Carrier violated the current Clerks' Agreement when on May 21, 1962, Carrier arbitrarily and capriciously refused to permit common laborer Mrs. Mattie E. Watson to displace common laborer S. J. Boutte, her junior or some other junior laborer in the Purchasing-General Stores Department, Houston, Texas, solely because she was a female.

(b) Mrs. Mattie E. Watson be paid one-half day's pay for May 21, 1962, and for a day's pay at the common laborer rate of pay for May 22, 1962, and each succeeding work day thereafter until date she is permitted to displace Laborer Boutte or some other laborer her junior as a result of this violation of the Agreement.

EMPLOYES' STATEMENT OF FACTS: Mrs. Mattie E. Watson was employed by the carrier as a laborer in its Store Department at Houston on March 1, 1944 and she continued to hold a regular assignment as Laborer in that department until May 21, 1962. Just prior to May 21, 1962, she was on vacation and upon returning to work on that date following her vacation found that she had been displaced off her regular position by a senior employe due to a force reduction. Upon discovering that she had been displaced by a senior employe she contacted General Forman A. J. Joyce, Jr., advising him that she desired to displace S. J. Boutte who held a Common Laborer's position and who was her junior. Mr. Joyce advised her that she could work until noon that day and in the meantime he would consult Storekeeper Reynolds to determine if she would be permitted to displace Boutte. At noon Mr. Reynolds advised her that she would not be permitted to displace Boutte, although she had been performing the same type work that he was. When Mr. Reynolds advised her she could not displace Boutte she wrote Mr. T. E. Martin, Purchasing Agent, advising him that due to the fact that her

"Under the application of the above rule, when claimant was relieved on July 5, 1956, he had the right to request an investigation to determine whether or not he was properly removed from the position or whether the action of the Carrier was arbitrary, but no request for an investigation has been made in this case. Therefore, we are forced to hold that in the absence of claimant complying with the plain wording of the rule there is nothing that this Board can do but to interpret the rules to mean that claimant here has failed to avail himself of the provisions of the rule."

CARRIER'S EXHIBIT NO. 4 reproduces this Award of Special Board of Adjustment No. 100.

CONCLUSION:

Carrier has shown that Mrs. Mattie E. Watson was employed as common laborer in the Stores Department at Houston when it was impossible because of the War to employ men capable of performing **all** of the work of common laborer. Carrier has shown that Mrs. Watson was given employment as long as there was a position available to her by reason of her seniority, the duties of which were light enough for her to perform. Carrier has shown that the decision to deny Mrs. Watson the right to displace on a job, **all** of the duties of which she was not capable of performing, was a proper one. Carrier has shown by the Claimant's own statement that she was incapable of performance of even the light work to which she was assigned. Carrier has shown that Claimant and her representatives did not avail themselves of the opportunity under the Rules for a hearing but were content to rely upon seniority alone as a basis for the claim here presented. Carrier has shown that claimant has failed in her responsibility to present positive proof to support this claim.

Wherefore, premise considered, Carrier respectfully requests that the Board deny in all its particulars this claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant, a female, was employed as a laborer. She sought, unsuccessfully, to displace a male laborer whose seniority was junior to hers. Petitioner avers: (1) Claimant had a contractual right to displace the junior employe; and, (2) she was denied exercise of the right because of Carrier's intent to rid itself of female laborers.

Carrier says it did not permit Claimant to effect the displacement because she lacked sufficient fitness and ability to perform the tasks of the position. It states that in making the determination, Claimant's age, sex, and physical condition, along with the nature of the work, were among the factors considered. To this Petitioner responds that Claimant had been employed as a laborer for a number of years; **ergo**, she had the fitness and ability to perform the work of any laborer position.

The issue, as framed on the property, is whether Claimant possessed the fitness and ability to perform the work of the position on which she attempted to displace the incumbent.

In Award No. 12994 we held:

"Whether an employe possesses sufficient fitness and ability for a position within the meaning of the rules is a matter exclusively for the Carrier to determine and such a determination once made will be sustained unless it appears that the action was capricious or arbitrary. See Award 3273 — Carter; Award 10000 — Webster; Award 10689 — Mitchell; Award 11572 — Hall; Award 12433 — Seff.

"We cannot substitute our judgment for that of Carrier's. Our function is limited to a review of the Carrier's decision to ascertain whether it was made in good faith upon sufficient supporting evidence. Here the Carrier determined that Claimant lacked the qualifications to satisfactorily perform the work involved. Petitioner has not proven that Claimant possessed the necessary knowledge and qualifications as to permit seniority to prevail nor has Petitioner established that the action of the Carrier was arbitrary, capricious or designed to circumvent the Agreement."

In the instant case Petitioner has not proven that the action of Carrier was arbitrary or capricious or designed to circumvent the Agreement. We will deny the Claim.

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

That the parties waived oral hearing;

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 Carrier did not violate 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 22nd day of December 1965.

LABOR MEMBER'S DISSENT TO AWARD 14055, DOCKET CL-14821

The Referee erred in basing his decision on the "promotion" rule of the Agreement, as there was no "promotion" involved. Rule 12 — Promotion Basis — never entered the picture in this dispute, since Claimant was not seeking a promotion, but was merely seeking to displace a junior employe who was holding a "laborer" position, a position exactly the same as the position from which Claimant had been displaced by an employe senior to

her, both of which carried the same rate of pay. Claimant had held a position of "laborer" since March 1, 1944 (more than eighteen (18) years), and it is axiomatic that she was fully qualified to work a position of laborer and was not open to question under any rule of the agreement concerning qualifications, fitness and ability.

To support his decision, the Referee cites Award 12994 (Referee Hall), but he can hardly find support therein, for the Referee found that the position was re-established for a short period of time and the former incumbent was assigned thereto to explain and perform the duties of a newly-established combined position which differed from those with which Claimant was familiar. That is not a fact in this dispute, since no position of laborer was bulletined or re-established and Claimant would simply have been moving from "laborer" to "laborer" with no difference in rate of pay, duties, classification of work, location, etc; however, such a move would have been a **demotion**, since the position she desired had been abolished and she was required to exercise her seniority **downward**, that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

In Award 12994, the Referee cited Awards 3273, 10000, 10689, 11572 and 12433. A mere reading of those Awards clearly establishes that they differ substantially from the instant dispute, i.e.:

Award 3273: Position of Traveling Auditor was bulletined and the Claimant applied therefor and was found to lack the fitness and ability for promotion to a position of greater responsibility commensurate with the requirements of the position to be filled; Claimant sought promotion to a position other than in the classification in which he had been working. That is not a fact in this dispute, since no position of laborer was bulletined for bids, and Claimant would simply have been moving from "laborer" to "laborer" with no difference in rate of pay, duties, classification of work, location, etc; however, such a move would have been a **demotion**, since the position she desired had been abolished and she was required to exercise her seniority **downward**, that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

Award 10000: Position of Relief Clerk was bulletined and Claimant therein filed application. The Referee found that "a search of the record fails to reveal any evidence of a probative nature presented on behalf of the Claimant which shows that he was qualified" to operate four different types of IBM machines, duties which he had never before performed for Carrier; Claimant was aspirant for promotion to a position other than in the classification in which he had been working. That is not a fact in this dispute, since no position of laborer was bulletined for bid, and Claimant would simply have been moving from "laborer" to "laborer" with no difference in rate of pay, duties, classification of work, location, etc; however, such a move would have been a **demotion**, since the position she desired had been abolished and she was required to exercise her seniority **downward**, that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

Award 10689: Position of Clerk-In-Charge was bulletined and the claimant made application therefor; the Referee held that the record showed that she had little if any experience in preparing the reports necessary to the

position, that she had held stenographic positions only. The promotion rule of the agreement was relied upon by the Employes since the Claimant aspired to a different class of work. That is not a fact in this dispute, since no position of laborer was bulletined for bid, and Claimant would simply have been moving from "laborer" to "laborer" with no difference in rate of pay, duties, classification of work, location, etc; however, such a move would have been a **demotion**, since the position she desired had been abolished and she was required to exercise her seniority **downward**, that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

Award 11572: Position of Mail Clerk was bulletined and Claimant bid for such position although it was in a classification other than any position on which she had previously worked for Carrier. The Promotion Rule of the Agreement was relied upon in support of the Employes' position. That is not a fact in this dispute, since no position of laborer was bulletined for bid, and Claimant would simply have been moving from "laborer" to "laborer" with no difference in rate of pay, duties, classification of work, location, etc; however, such a move would have been a **demotion**, since the position she desired had been abolished and she was required to exercise her seniority **downward**, that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

Award 12433: This Award is the **only** one cited which could be considered in any way to be material with the instant dispute. It concerned an employe attempting to displace a junior employe. That is as far as the similarity can be extended. In this Award, Claimant failed to bid for a new position, and it was assigned to a junior employe. After taking a leave of absence, Claimant advised she was returning to service and desired to displace the successful incumbent. This would have been a promotion; however, the bulletined duties thereof could not be performed by Claimant, as was determined through actual tests being given to her which she could not pass, i.e., "ability to take and transcribe dictation at a rapid rate.", and the Referee held that her "performance in the test she took demonstrates that she did not possess the skill necessary to satisfy the qualifications for the job in question". None of those facts are present in the instant dispute: No position of laborer was bulletined for bid, and Claimant would simply have been moving from "laborer" to "laborer" with no difference in rate of pay, duties, classification of work, location, etc; however, such a move would have been a **demotion**, since the position she desired had been abolished and she was required to exercise her seniority **downward**, that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

This claim reeked of Carrier's desire to rid itself of female employes, evidenced by the fact that rather than to abolish positions held by the "junior" employes, Carrier abolished positions occupied by female employes (this Claimant and female claimants involved in Dockets CL-14835, 14837, 14856 and 14852, all carrying similar decisions rendered by this Referee). Why should carrier abolish positions occupied by female employes when it had similar positions occupied by junior employes who happened to be male? The answer is obvious.

The Referee took little time to decide this dispute and, we might add, a somewhat lackadaisical interest in the issue involved. Had he taken time

to analyze the case, he surely would not have cited the Awards he did in support of his decision. And had he scrutinized the facts of record, he would have found this dispute very similar to one on which he rendered a decision in Award 13961, adopted November 11, 1965, from which we quote:

> "He had previously qualified as a Foreman and continued to be on the seniority roster for that classification in District C. He bid for the advertised position. Carrier assigned the position to an employe with less seniority than Claimant. The Organization claims that the assignment deprived Claimant of his seniority rights in violation of the Agreement.
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> Carrier avers that the applicable Rule is:
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> 'PROMOTION:
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> Rule 10. (a) Promotions shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal.
>
> And, it points to our Awards which hold that we will not disturb Carrier's judgment as to ability and merit unless we find it arbitrary, capricious or discriminatory.
>
> The Organization contends that since Claimant had already qualified as a Foreman and was carried on the seniority roster for that classification his bid was not for a promotion; therefore, Rule 10 (a) is not applicable. It says that the applicable Rule is Rule 1 (d), under the caption "Seniority Datum", which reads:
>
> "(d) Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad."
>
> Further, the Organization contends that since Claimant had qualified for and was carried on the Foremen seniority roster his qualification for a position of Foreman was established and not subject to challenge by Carrier.
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> THE ISSUES
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> The issues are:
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> 1. Is the Promotion Rule applicable?
> 2. If the Promotion Rule is not applicable was Claimant given "consideration" for the position within the meaning of that word as used in Rule 1 (d)?
>
> THE PROMOTION RULE
>
> In the abstract reasonable men may differ as to whether Claimant bid for a promotion. * * *
>
> * * * * *

'From this we conclude that Claimant while not employed as a Foreman continued to hold the rank of Foreman. Therefore, his bid was for reinstatement; not for promotion. We find Rule 10 (a) not applicable.

* * * * *

The ultimate issue before us is whether Carrier had the contractual right to deny assignment to Claimant for lack of qualification. We look to the Agreement.

Rule 4 (a) provides for only one seniority roster for Foremen. No distinction is made for experience and ability. We cannot write such a distinction into the Rule. For the Rule to have effect as written we must conclude that all employes on the Foremen seniority roster are qualified to hold any position in that classification. * * *'

This Board respects the Carrier's judgment of fitness and ability of its employes. If the Promotion Rule was applicable in this case we would deny the claim.

Having found that Rule 1 (d) is the applicable Rule we find that Carrier was contractually barred from rejecting Claimant's bid for lack of qualifications. We will sustain the Claim."

Here, as in that dispute, Carrier had no contractual right whatever to reject Claimant's request for displacement for lack of qualifications, for she was not seeking promotion but merely seeking to exercise her displacement rights to another laborer position exactly like the one from which she had been displaced by a senior employe (male), carrying the same rate of pay, duties, classification, location, etc.; however, such a move would have been a **demotion,** since the position she desired had been abolished and she was required to exercise her seniority **downward,** that is, she was, of necessity, required to displace a junior employe. Generally, promotion carries with it a higher rate of pay. There was no difference in rate of pay of laborers in this dispute.

The seniority dates of laborers are not listed on a seniority roster, but their seniority rights will apply after they have been in continuous service with the railroad in excess of six (6) months (Rule 10 — Seniority Rosters). Seniority rights of employes covered by these rules may exercise * * * in case of * * * reduction of forces (Rule 11 — Exercise of Seniority).

Carrier asserted that Claimant could not fulfill the duties required of the position of "laborer"; but, that is one of the reasons for Rule 19 providing as it does, i.e.; "An Employe who * * * makes a displacement and fails, within a reasonable time, to demonstrate fitness and ability, shall vacate the position on which disqualified without loss of seniority".

Thus, Rule 19 is a protection for Carrier. However, this rule, cited by the Employes in support of their claim, is not a one-way street wholly for the Carrier's protection; the language is unambiguous, in that it provides "employe who makes a displacement", not "employe who is permitted to make a displacement". But the Carrier has by its action in this dispute, added the word "permitted", and its action has been condoned by this Referee,

thereby making null and void the right of an employe to exercise his seniority by virtue of his senior standing in relation to other employes.

Contrary to the old adage, females are not necessarily the "weaker sex"; as stated heretofore, discrimination account of being a female has not been condoned in the railroad industry for quite a long time, but it appears that the Referee has condoned it here.

This Award is a gross miscarriage of justice and a blatant ignoring of the rules of the applicable agreement. For these reasons, among others, I dissent.

/s/ C. E. Kief
C. E. Kief,
Labor Member
1-19-66