Award No. 14105
Docket No. CL-14577

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5471) that:

(a) The Carrier violated the basic intent and literal provisions of Rule 5 of the Agreement between the parties in the disqualification of Walter Penrose, Jr., Carl W. Merrifield, Gerald E. Bichel, William G. Stubbs, H. E. Langstaff and Benjamin H. Hill, applicants for and assignees to the positions of Machine Dispatchers (Coders) and Relief Coder-Conveyor Operator, and;

(b) The claimants named above be assigned to the said positions and paid the difference between the rate of Machine Dispatcher (Coder) and the rate of pay assumed subsequent to their disqualification for the period beginning November 4, 1962, in the cases of Walter Penrose, Carl W. Merrifield, Gerald E. Bichel and William G. Stubbs, and beginning with December 14, 1962, in the cases of H. E. Langstaff and Benjamin H. Hill, all claims for pay to run until such date as claimants are assigned respectively to positions of Machine Dispatcher (Coder) and Relief Coder-Conveyor Operator.

EMPLOYES' STATEMENT OF FACTS: The dispute here submitted by the parties stems from the installation by the Carrier in its Union Station, Kansas City, Missouri, of an automated system of sorting outbound United States Mail, the initial operation of which occurred variously in several steps beginning in September, 1962.

In anticipation of the problems of the parties incident to the initial operation of the new system, the parties signed an agreement June 22, 1962, copy of which is reproduced as pages 69 to 73 of Employes' Exhibit No. 1. The agreement established the titles of Conveyor Operator and Machine Dispatcher, the rates for same, the training of applicants and certain procedures to apply.

den rests upon the Claimant. See Awards 2031, 2350, 4918, 5328, 5417, and 5603 of this Division."

CONCLUSION

Without waiving in any manner Carrier's position as to merits of the claim, it is Carrier's further position that, assuming Claimants had qualified as Coders on the claim dates, there is no evidence that they could have successfully bid in Coder positions on those dates, and several Claimants have insufficient seniority to hold a Coder position at the present time (January, 1964). The penalty claims set forth in Employes' Statement of Claim are unwarranted, and should be dismissed.

The meaning and intent of Agreement Rule 5 between the parties here involved, as interpreted by your Board, are clear and do not support the Employes' position.

While it is a fact that claimants have greater seniority than some of the qualified Coders, it is also a fact that it was properly determined that claimants did not measure up to the fitness and ability requirements established by Carrier as necessary to be assigned the positions of Coder and Relief Coder-Conveyor Operator under Rule 5.

In Summation:

1. Claimants were given full and unprejudiced consideration for promotion and were found lacking in fitness and ability to perform duties of the position of Coder.

2. Carrier exercised its discretion according to principles laid down by this Board in declining to consider claimants qualified as Coders after a comprehensive consideration of their fitness and ability.

3. Claimants were shown to have been lacking in sufficient fitness and ability for the Coder positions, and no evidence has been brought forth to show the Carrier's findings incorrect, and, therefore, there can be no reason for this Board to set aside or reverse the decision made by the Carrier.

4. Carrier has shown that it adhered strictly to the provisions of Rule 5 by promoting the senior applicants possessing sufficient fitness and ability for the disputed positions.

The claim is without merit, and should be denied.

OPINION OF BOARD: The six Claimants were disqualified by Carrier between three and four weeks after they had been awarded bulletined positions on a newly installed mechanical mail sack sorting system. Each had been given a test, Test 33, a few days before disqualification, and each had scored under 85% on the test. Carrier stated at the time that each had been disqualified because the test result and personal observation had shown the Claimant not to have sufficient proficiency to qualify for the new job.

It is our opinion that in the instant case, Employes have the burden of proving the charge on which the Claim is based.

Employes contend that the determination by Carrier to disqualify Claimants was an abuse of authority based entirely on the results of Test 33 which had been unfairly given and which had been designed to circumvent the requirements of Rules 5 and 12 that the senior adequately qualified applicants for promotion be given the promotion ahead of junior more qualified applicants, the passing grade in Test 33, according to Employes, having been set to fail the less, though possibly adequately qualified employes.

Carrier argues that it did not base its determination that Claimants would not qualify solely on the results of Test 33, but also on observations of Claimants at work. Carrier denies that Test 33 and its passing mark were devised to select and pass employes who were the best qualified of the adequately qualified. Carrier asserts that the test was devised to measure the ability of the employes to meet one of the essential requirements of the job: the ability to remember and to identify code numbers; and that the 85% passing grade was selected, among other reasons, to screen out employes not adequately qualified successfully to operate the new system.

We are convinced by evidence in the record, not successfully rebutted by Carrier, and we find, that the results of Test 33 were the sole basis for Carrier's decision to disqualify Claimants. But, that fact alone is not a basis for us to find that Carrier's decision was arbitrary, capricious, unreasonable, an abuse of discretion or a devious avoidance of compliance with the basic and literal provisions of the Agreement. We might make a finding: (1) if it were proved that the test had not been rationally constructed (including selection of the passing grade) to measure the adequacy of an ability required for the performance of the duties of the involved position; (2) if it were proven that the test was not given in such a way that Carrier might reasonably expect the results accurately enough to measure such an ability so that Carrier could, on the basis of the results, arrive at a reasonable judgment of each employe's capacity in relation to the ability.

In the formal investigation on the property, Carrier's Mail Agent Juel stated:

> ". . . The Test 33 which consisted wholly of dispatches to specific offices was a test to determine if the employes had actually acquired the required knowledge of the current code dispatches. . . . Test 33 was actually a final examination to determine what the coders had actually learned in connection with their duties during not only the school period, but during their nearly 30 days' qualification period on the coding panel."

And, further, when Agent Juel was asked the basis for selecting 85% as the passing grade, Mail Agent Juel, after listing a number of other considerations, said:

> "So it was felt and required that some level of grading would have to be reached to eliminate employes from bidding on and holding positions which they were definitely not qualified to handle. It must be recognized that . . . the system cannot successfully handle the required volume of mail if it is staffed with employes who have to look up 15 and 20% of the mail they handle. So, all of these factors were taken into consideration in deciding on a grade level of 85%."

Employes did not successfully rebut the facts asserted in Mail Agent Juel's statements at the Formal Investigation. Thus, we cannot find that Test 33 was constructed (including the setting of the passing grade) arbitrarily or capriciously or as a device to avoid compliance with the requirements of the Agreement, although other reasonable people might have devised other better and/or more adequate means of testing for the required ability, the responsibility was Carrier's, and we cannot say that Test 33 was unreasonably devised, nor that its use was an abuse of discretion.

In its argument in its Ex Parte Submission Carrier argues:

> "In arriving at an 85% passing grade, management used a simple standard practice used in schools, colleges and industries and in Government testing bureaus to determine a fair passing grade for a particular test."

Carrier then proceeds to describe the method as taking the mean, mode and median of the marks achieved by those taking the test and setting the passing mark, apparently arbitrarily, below the mean. If the facts established by evidence in the record did not, as shown below, contradict this assertion that this was the way in which the passing grade was arrived at, we might find in it evidence that Carrier's use of the 85% passing grade was an arbitrary abuse of discretion, because a passing grade so arrived at need have no relationship to the minimum ability required adequately to perform the job. As is indicated in Mail Agent Juel's statement at the Formal Investigation set forth below, application of this method to test a test assumes some number of failures; it is possible that all takers of the test would actually be qualified at least at the minimum requisite level, but that a passing mark so set would require that some fail.

But the fact established in Mail Agent Juel's uncontradicted statements at the Formal Investigation are that the passing grade was determined as we have found above, and that the averaging method was actually used to test the fairness of the 85% passing mark, ex post facto, and not to establish it as the passing grade in the first place; Agent Juel said about the use of this averaging method:

> "Now, in an effort to determine whether a qualifying grade of 85% was reasonable and fair, we have used a simple standard practice used in schools, colleges eand industries and in Government testing bureaus to determine acceptable levels in applications of this type. The results of these tests proved we have not discriminated against any of those tested. . . ."

and said further:

"* * * * *

> It has been generally agreed by competent authorities and people trained in conducting tests of this kind that the result of any test of this kind should result in a few at the top, a great many in the middle, and a few failures."

We need not make any determination as to whether this method of testing the fairness of the test or of the marking of the test was a valid test, since Organization has failed to prove that the questions on the test or its marking was unfair.

While the evidence shows that the test was given without advance notice of the exact time it was to be taken and under different conditions for different employes, the evidence does not convince us that Carrier was unreasonable in expecting that the results were an accurate enough measure to judge each employe's capacity to learn and remember code dispatches. There was no evidence introduced that proved that Claimants had been singled out for specially unfavorable conditions under which to take the test. We thus cannot find on the evidence in this case that Carrier's exercise of judgment in relying on a test given under less than optimum conditions was an abuse of discretion, arbitrary or capricious.

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 the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 24th day of January 1966.