Award No. 14762
Docket No. CL-15697

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

BOSTON AND MAINE CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5812) that:

(1) Carrier violated and continues to violate the rules of the Clerks' Agreement, when it assigned junior employes to each of two (2) clerical vacancies in the "Rate Section", so-called, of its Freight Traffic Department, General Office, Boston, Mass.

(2) Carrier shall be required to assign Miss Elizabeth M. Phelan to either the position of Head Clerk—Rate Section (weekly rate $128.31) or the position of Rate Clerk (weekly rate $120.16).

(3) Carrier shall be required to compensate Miss Phelan the difference between the rate of her assigned position and the rate of pay applicable to the position of Head Clerk—Rate Section or the position of Rate Clerk from September 3, 1964 and continuing until she is properly assigned to one or the other of those positions.

EMPLOYE'S STATEMENT OF FACTS: Just prior to the vacancies resultant in the instant claim, the so-called "Rate Section" of the Freight Traffic Department was comprised of the following:

	NAME	TITLE	WEEKLY RATE	SENIORITY
X	C. F. Heard	General Traffic Mgr.	—	9-10-23
X	R. C. Donovan	General Mgr. Frt. Rates	—	2-23-23
X	D. P. Felt	Mgr. Freight Rates	—	7-7-30
X	F. H. Williard	Rate Analyst	—	9-4-28
	A. A. Conn	Head Clerk - Rate Section	$128.31	1-16-29
	E. A. Leger	Rate Clerk	120.16	12-17-41
	J. E. MacKinnon	Rate Clerk	113.91	5-5-55
	B. M. Castine	Rate Clerk	113.91	3-22-57
	E. J. Stasio	Rate Clerk	112.71	6-30-61

Miss Phelan, the claimant, who has been working in the Division Section of the Traffic Department as a Division Clerk for almost ten years, had never worked in the Rate Section and was not qualified for either of the positions.

The claimant did not, in the opinion of the Promotion Committee, have "adequate fitness and ability" to cover the positions claimed. Therefore, consistent with numerous awards, the claim was declined.

(Exhibits not Reproduced.)

OPINION OF BOARD: Claimant, with seniority date of July 21, 1941, made timely application for promotion to the assignment of Head Clerk-Rate Section, or, in the alternative, to the assignment of No. 2 Rate Clerk. The Promotion Committee met and advanced two clerks, junior in service to Claimant, to the two above described positions. At the time of her application, Claimant was a Division Clerk with duties involving interline divisional settlement work. The positions applied for involve rates and tariffs. Both positions are under the Freight Traffic Department. Claimant contends that Carrier violated the rules of the agreement by promoting two employes, junior in seniority to this Claimant, to positions she had applied for.

The rules pertinent to this proceeding are:

"Rule 3(b) Within the confines of each seniority district, employes have prior rights in accordance with their length of service within the district (fitness and ability being sufficient) to promotion, assignment, displacement and work."

"Rule 6

PROMOTION, ASSIGNMENTS AND DISPLACEMENTS

(a) 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.

(b) The word 'promotion' as used in section (a) of this rule shall be considered as meaning the right to a position irrespective of whether it is of the same, greater or lesser remuneration or the right to a position having more attractive hours of service.

(c) The word 'sufficient' is intended to more clearly establish the right of the senior employe where two or more employes have adequate fitness and ability.

(d) Nothing in these rules shall be construed to annul any arrangement in any General Office seniority district with respect to Promotion Committees where now or hereafter established."

"Rule 8

(j) Employes assigned to new positions or vacancies shall be allowed thirty (30) calendar days in which to qualify, and failing, may

return to their former positions or bid on any bulletined position with seniority rights unimparied. Employes affected may return to their former positions or bid on any bulletined position with seniority rights unimpaired. This rule shall not be construed to mean that employes shall be given a thirty (30) calendar day trial on any position they may bid for, but the trial mentioned is only to be given upon the assignment being made."

The involved claim is properly before this Board under the time limit rule.

This claim appears to be unique in that it emanates from the action of a "promotion committee," legally constituted by the agreement. This appears to be an immaterial fact for the reason that Claimant has the same remedy of appeal that she would have had, had Carrier made the initial promotions. The issue is the same and the prior awards used as precedent are the same.

The only question to be resolved in this proceeding is: Did the Promotion Committee act arbitrarily, unreasonably or capriciously?

At the outset, we agree with Carrier's contention that the Carriers decision as to fitness and ability of an employe cannot properly be disturbed unless the Claimant meets the burden of proving, with competent evidence as distinguished from mere argument, that Carrier's action was unreasonable, arbitrary or capricious. (Awards 2692, 6311, 6317, 12994 and 14013) which brings us to the basic issue or question to be resolved; did the Promotion Committee act arbitrarily?

Based on the evidence contained in the record, this question must be answered in the affirmative. Claimant in this proceeding met her burden of proof head-on and has amply proven that she has sufficient or adequate fitness and ability for the position applied for (Rule 6(a) and 6 (c)). Carrier admits that Claimant possesses the required seniority.

Much of Claimant's proof of her fitness and ability was gleaned from Carrier's letter dated December 11, 1964. In this letter Carrier did not question Claimant's preparation for promotion by becoming conversant with Coal Rates, Piggyback Rates, Revenue Prorates, Routing Guide Tariffs, Class Rate Tariffs and, in addition, the attendance of evening classes for eight years resulting in a "magna cum laude degree" in economics from Boston College. In fact, in its letter of December 11 with respect thereto, Carrier states:

> " '1. Coal Rates—Though coal rates move large volumes of traffic they are among the easiest of all rates to read and to handle. The positions in question do not involve coal rate construction.
>
> 2. Piggyback Rates — Your competence to handle piggyback rates is not questioned.
>
> 3. Revenue Prorates—In so far as this feature has acquainted you with Ex Parte Increase Tariffs your familiarity with them is not questioned.
>
> 4. Routing Guide Tariffs—These are simple and any clerk should be able to learn these in a matter of weeks.

5. It is not clear just what connection the reconstruction of commodity divisions has to do with the positions in question but to the extent that it has familiarized you with certain rates it has undoubtedly been helpful.

6. Class Rate Tariffs—Ability to check class rates and short line miles is rudimentary.' "

Carrier also advised Claimant (R-6):

" 'Let me say at the outset that neither I nor other members of the Promotion Committee have raised any question as to your ability to adequately fill any position for which your training has prepared you. * * *.' "

The reasons given for denying Claimant the right to promotion as contained in Carrier's letter of December 11 is as follows:

"(R-6)
'* * * The action taken by the Committee on September 3 was based entirely on the rather stringent requirements of the positions in question and its conviction that substantial **experience** in the field of freight rates **is a necessary requirement for fitness** for these positions. * * *.' "

"(R-7)
'* * * **Immediate knowledge** is required and there is no way of preparing for this work except to acquire this **experience** at the lower levels.' "

"(R-18)
'The claimant **had no experience** on any of the positions and never had been engaged in the type of work in the Rate Section.

* * * The Carrier could not possibly permit a totally **inexperienced** employe to move onto position No. 1 or No. 2 in the Rate Section **without first having necessary experience.** * * *.' "

"(R-19)
'Therefore, the Claimant, not having such experience, was not qualified on the work.' "

"(R-46)
'* * * Claimant however has no **experience** with making quotations directly to shippers and the public.' "

In Award 4026, Referee Douglas stated:

" 'Therefore, experience cannot be a consideration in determining the sufficiency of the initial fitness and ability for promotion. Since lack of experience appears to be the only reason Claimant was not assigned the position, Carrier violated the Agreement since Claimant should have prevailed because of her seniority.

This Division in a great number of awards has announced a fixed rule that we may not substitute our judgment for that of the Carrier in determining fitness and ability. Carrier alone is authorized to determine that question by its own judgment, freely exercised.

But under the facts in this record, and the rules of the Agreement it is clear that Carrier erred in its judgment under the plain meaning of the rules by basing its decision on experience alone. Compare Awards 2427, 2534 and 3139.' "

In this proceeding, Claimant's fitness and ability in her previous work was never questioned. Carrier had only the highest regard for her ability. Claimant's juniors in seniority were assigned to the positions because they had more experience. Rule 6 does not contain a provision whereby the best qualified or more experienced employe will be assigned. "Adequate" or "sufficient" fitness and ability meets the requirement enabling the senior employe to be assigned a position regardless of any superior fitness and ability possessed by junior employes. (Awards 11279, 8181, 8051, 10424).

Also in Award 11279, Referee Rose stated:

"Although the burden of proof in the sense of establishing the claim does not shift, this presumption is rebuttable and requires carrier to come forward with evidence which supports its judgment of Claimant under the Rule when he bid for the promotion and was denied it."

This record is void of evidence supporting Carrier's right to deny Claimant's promotion.

It is not necessary that the applicant be immediately qualified to assume the duties of the position without assistance or guidance. Fitness and ability means that the applicant need only to possess the potential to be able to perform all the duties of the position within a reasonable time. (Rule 8(j).) Obviously, an employe, despite his potential and seniority, would have no right to promotion, if it be required that he must have previously performed the work of the position to which he aspires (Award 5348, 13850, 8197).

In our opinion the Promotion Committee used experience as the only yardstick in determining the fitness and ability of this Claimant. This single standard of experience is not provided for in the rules and if allowed, would nullify seniority rights where two or more employes have adequate fitness and ability.

This Board is constrained to base an award strictly upon admissable evidence offered and received in the proceeding at hand. This Board must deny itself the highly speculative and philosophical luxury of deciding issues on the basis of assumption, conjecture, supposition, or surmise. The record in this proceeding reflects only that the Claimant had—at the very least—adequate fitness and ability for the position applied for. Claimant is not required to prove nor possess "superior" fitness and ability. Therefore the record compels this Board to find that Carrier's action in denying the promotion of Claimant was unreasonable, arbitrary, and capricious. This claim must be sustained.

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 violated.

AWARD

Carrier shall be required to compensate Claimant the difference between the rate of her assigned position and the rate of pay applicable to the position of No. 2 Rate Clerk from September 3, 1964 and continuing until she is properly assigned to the position of No. 2 rate clerk.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of September, 1966.

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