



Award No. 18802

Docket No. CL-18992

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Gene T. Ritter, Referee

PARTIES TO DISPUTE:

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

**CHICAGO, MILWAUKEE, ST. PAUL &
PACIFIC RAILROAD COMPANY**

1) Carrier violated and continues to violate the Clerks' Rules Agreement at its Fullerton Avenue Office Building, Chicago, Ill. when it failed and refused to assign the senior applicant to Position 09810, Assistant Bureau Head.

2) Carrier shall be required to assign employee M. Peterson to Position 09810.

3) Carrier shall now be required to compensate employee M. Peterson the difference in the date of pay between Position 09810 and that of the position assigned to for each work retroactive to January 6, 1969, and for all subsequent days until the violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: Employee Marie Peterson is regularly assigned to Analysis Clerk Position 09850 in the Finance & Accounting Department, Office of Assistant Comptroller, Seniority District No. 71, where she has a clerical seniority date of March 1, 1945.

During her railroad career employee Peterson, without question as to her fitness and ability, has successfully filled positions of Reclaim Clerk, Per Diem & Record Tracer, Joint Wheelage Clerk, Statement & Mileage Clerk, Special Misc. Timekeeper, AFE Clerk, and Analysis Clerk in Seniority District No. 71.

In its Bulletin #382 dated December 20, 1968 Carrier advertised a vacancy account of illness on Assistant Bureau Head Position 09810 (Auditor of Capital Expenditure). Employee Peterson made application for Position 09810 but was not assigned thereto.

On January 6, 1969, Bulletin #382-A awarded Position 09810 to employee A. Schultz, who has a seniority date of July 10, 1945 in Seniority District No. 71. Shown on that bulletin as other applicant was employee M. Peterson.

The positions occupied by employee Schultz during her railroad career are Key punch Operator-Clerk, AFE Bill Clerk, and AFE Analysis Clerk.

OPINION OF BOARD: In Bulletin No. 382 dated December 20, 1968, Carrier advertised a vacancy because of illness on position known as Auditor of Capital Expenditure. Claimant made application for this position, but was not assigned to the same. On January 6, 1969, this position was awarded to another employe with junior seniority. Carrier gave the reason for passing over Claimant's seniority, her lack of fitness and ability for the advertised position. The Organization contends that under Rules 7 and 8 of the current Agreement, Claimant should have been allowed the promotion and given 30 days within which to qualify (as set out in Rule 8). Carrier contends that the claim presented on the property and progressed to this Board for adjudication was not properly presented to the Carrier Officer authorized to receive the same in accordance with Rule 36(a), Section 3, First (i), of the Railway Labor Act and/or Circular No. 1 of the Board, and is, therefore, barred and should be dismissed. Carrier also maintains that Carrier has the exclusive prerogative to determine fitness and ability of any of its employes, and that under Rule 7, fitness and ability is equally determinative of the rights of an employe for promotion as his seniority. The Organization further alleges that lack of experience was the only criteria used by Carrier in denying Claimant's promotion, which is not a proper criteria.

It is the opinion of the Board that the claim "for all subsequent days until the violation is corrected" should be dismissed from that part of Item 3 for the reason that the same was not handled in the required manner on the property. As to the merits of this case, this Board finds that Rule 7 of the Agreement required the Carrier to first determine the fitness and ability of the employe prior to promotion. If fitness and ability is sufficient for all applicants of the higher position, then and in that event, seniority alone shall prevail in the determination of which applicant is to be awarded the higher position. The finding of fitness and ability is a condition precedent to the innovation of the seniority requirement. The Awards are abundant to the effect that Carrier has the prerogative to determine fitness and ability, and that the finding of Carrier concerning fitness and ability will not be disturbed unless this finding was arbitrary or capricious. Awards Nos. 15494 (Zumas); 16321 (Dugan); 17848 (Dolnick) and many others.

Rule 8 concerning the 30 working days time in which an employe has to qualify does not constitute a mandatory duty on Carrier to promote in accordance with seniority only. As stated by this referee, in Award 14976, the only function of such a rule is to make possible the correction of an erroneous acceptance of a position application. Also, see Awards 10689 (Mitchell); 16480 (Dorsey); and 13968 (Wolfe). This claim will be denied.

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: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 12th day of November 1971.

LABOR MEMBER'S DISSENT TO AWARD 18802 (CL-18992) (Referee Ritter)

This Award is seriously in error. The Majority, starting with a false premise, unjustly deprived Claimant of a promotion to which she was contractually entitled. Rule 7 of the current Agreement provides in part that promotions shall be based on seniority, fitness and ability. The Referee held that:

"Carrier gave the reason for passing over Claimant's seniority, her lack of fitness and ability for the advertised position."

Nothing of the sort occurred. Claimant's fitness and ability was not at issue when she was initially denied promotion. Rather, her "lack of experience" in the department was at issue. In writing, Claimant was advised:

"You have had only two years experience in this department with no beneficial experience acquired from any other department. The experience you gained in those two years constitutes only a limited portion of the knowledge and experience needed for the position in question."

As evidenced by the language of the Award, this issue was raised with the Referee. The Award indicates that he merely noted the argument before summarily dismissing it. The Referee was unable to comprehend the difference between "experience" and "fitness and ability" — not an unusual situation for him. The criteria of experience is that upon which Claimant's bid was rejected but that criteria cannot be found in the Agreement. Experience is not a requirement in the language of the Promotion Rule and cannot be added to the rule by this Board. For this reason, the Award is in error.

The Referee's further treatment of seniority as an innovation is also alarming. His statement:

"The finding of fitness and ability is a condition precedent to the innovation of the seniority requirement."

illustrates sloppy work. Seniority is not an innovation. Seniority provisions in Agreements are covered by clear and unambiguous negotiated rules. Its manifestation, likewise, is dealt with in clear and unambiguous negotiated rules. To treat seniority as an innovation — an act of introducing something new or novel — is outrageous.

Clearly, the Award is in error on at least two counts, and for these reasons,
I dissent.

/s/ J. C. Fletcher
J. C. Fletcher, Labor Member
Third Division, NRAB
December 8, 1971

**CARRIER MEMBERS' REPLY TO LABOR MEMBER'S DISSENT TO
AWARD 18802, DOCKET CL-18992
(Referee Ritter)**

The Dissenter's implication that Carrier's reasons for disallowing the claim must be narrowly restricted to the expressly stated reasons given by the lowest representative of Carrier in his handling of the claim, and the Dissenter's argument that in this case the lowest representative did not raise an issue concerning Claimant's fitness and ability when that representative said that Claimant had "only a limited portion of the knowledge and experience needed for the position in question" are both too patently frivolous to merit discussion; but there is hidden error in the Dissenter's diatribe about the "alarming" and "outrageous" use of the word "innovation" in the award, and we feel obligated to bring to light the true facts. These facts establish that the Dissenter is here charging the Referee with an error for which the Dissenter himself must bear sole responsibility.

At the adoption session the Carrier Members, being convinced that the word "innovation" in the finally typed draft was a typographical error and that the word used by the Referee in his own draft was "invocation," proposed that this error be corrected by replacing "innovation" with "invocation." The Dissenter himself, as the Labor Member who handled the case, violently and vociferously objected to the proposed correction; and that conduct of the Dissenter is solely responsible for the fact that the award was adopted and published with the word "innovation" appearing where the word "invocation" was obviously intended.

G. L. Naylor
P. C. Carter
R. E. Black

**REFEREE'S ANSWER TO LABOR MEMBER'S
DISSENT TO AWARD 18802, DOCKET CL-18992**

This Referee concurs with Carrier members' reply to the Labor member's dissent to this Award. The word "innovation" in the finally typed draft of this Award was and is a typographical error and should be corrected to read "invocation," as requested at adoption session.

/s/ Gene T. Ritter
Referee