

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20561  
Docket Number CL-20533

David P. Twomey, Referee

PARTIES TO DISPUTE: ( **Brotherhood** of Railway, Airline and Steamship  
( Clerks, Freight Handlers, **Express** and  
( Station **Employees**  
( **Missouri** Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the **System** Committee of the Brotherhood  
(GL-7432) that:

1. Carrier violated the Clerks' Rules Agreement, in particular Rule 6 7 and 16, when It arbitrarily and capriciously **refused** to assign **Mrs. Margaret Lincoln** to the position of Investigator-Senior **No. 498**.  
(Carrier's **file 280-732**)

2. Carrier shall now be required to compensate Mrs. Lincoln for the difference in rate of **pay**, amount \$7.97 per day, beginning April 14, **1972**, and continuing each **subsequent** work day thereafter, Monday through Friday, **until** the violation is corrected.

OPINION OF BOARD: The Claimant **was** the only bidder on the position of **No. 498 Investigator-Senior** in the office of the General Claim Freight Agent **in Palestine, Texas**. She had **twenty-seven years** of employment relation6 with the Carrier, fifteen year6 of which **was** on furlough status. Her **seniority** date in her present district is October 8, 1971. **Position 498 was** bulletined on March 13, 1972. The Carrier declined to **assign** the Claimant to **Position 496**, for the reason6 : that **she** had **never** been **assigned** a position which would prepare her to perform the **duties** of **Position 498**; that **she** did not have the **fitness** and ability to perform the **duties** of **Investigator-Senior**; and that **she** **was** offered a **test** to **demonstrate** her **fitness** and ability, which **she** declined, and which the Carrier considered a6 further evidence that the Claimant did not have the **requisite fitness** and ability for the **position**. The Carrier assigned one Mr. T. F. Newman, a **new** employee to the position.

The pertinent **provisions** of the Agreement are:

"**RULE 7. PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS**  
(a) **Employees covered by** there rules shall be in line for promotion. Promotions, assignments, and displacements under these rule6 shall be based on **seniority, fitness, and ability**; **fitness** and ability being sufficient, **seniority shall prevail**, except, however, that **seniority shall not apply** in filling the position6

"named **in** paragraph (c) of this rule. (In filling positions listed in Paragraph **(c)** of this rule preference shall be given to **employees** coming under the provisions of this agreement.)

(b) 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 (2) or more employes have adequate **fitness** and ability."

**"RULE 16. TIME! IN WHICH TO QUALIFY**

(a) **Employees** awarded bulletined positions, or those exercising displacement rights, will be allowed thirty (30) days **in** which to qualify, and, falling **shall** retain all their seniority and may displace youngest **em**-ploye in **his** group.

(b) **Employees will** be **given** full cooperation of other employes in their **efforts** to qualify."

Awards **13196 (Coburn)** and **19660 (Blackwell)** involved disputes of the same general nature on the **very** same property and between the same parties. In **13196** the Award held:

"Under well established and accepted principle **this Board** will ordinarily **refuse** to interfere with **carrier** management's exercise of **discretion** or judgment in determining the **fitness**, ability and general qualification of an employe, absent any applicable **agreement provision restrict-**ing such **action**, or where there is credible evidence of arbitrary or **capricious** carrier conduct. In **this case**, Carrier's right freely to **exercise** such **judgment is** fettered **by the** clear and **unambiguous** language of Rules 7 (a) and **16 (a)**. Those rule were violated when **Claimant was** not permitted to **demonstrate** his **fitness and** ability to perform the duties of the **position** he **sought** to obtain by the exercise of **his** contractual seniority . . ."

In **Award 19660**, the **Board** set out a procedure **concerning** burden of proof in **such cases**. Based on **19660**, in order for Carrier's **position** to be **sustained**, we must **first find some** credible evidence of **record** which provides a reasonable basis for Carrier's disqualification of the **Claimant**. If such evidence **is** found, then **in** order for the **Organiza-**tion's position to be sustained, we **must find** that a preponderance of the evidence of record show that the **Claimant was** qualified to perform the position. (See **also 12931 (McGovern)** on **burdens** of proof.)

The first reason given by the Carrier for declining to assign Claimant ~~was~~ that she had never been assigned a position which would prepare her to perform the duties of Investigator-senior No. 498. Rules 7(a) and 16(e) contemplate that the Claimant have reasonable fitness and ability--potential--to learn and perform the duties of the position, to be demonstrated by a thirty day trial period under proper supervision. These rules do not require prior experience, otherwise there would be no need for the 30 day qualification period. Further, Carrier did not require of Mr. Newman, the new employee assigned Position 498, that he have served in a position that would prepare him to perform the duties of Position 498.

Another reason given for declining to assign Claimant, which reason is enmeshed in the Carrier's first reason, is that Claimant does not have the fitness and ability to perform the duties of Investigator-Senior Position No. 498. This is just an assertion on the part of the Carrier. Carrier submits no probative evidence to back up its assertion, other than that it offered the Claimant a test, which she declined to take.

Concerning the test upon which Carrier relies as evidence of a reasonable basis for Carrier's refusal to assign Position 498 to Claimant, the Claimant was the only person selected out and asked to take a test before going on to an Investigator position. Indeed, whenever the test in question was utilized, it was utilized only after the employees required to take the test had been on such a position for 30 days or more. To have requested the Claimant to be the only person to have to take the test without 30 day experience in the position is patently unfair; and certainly cannot be utilized to demonstrate her lack of fitness and ability to perform the duties of Investigator-Senior Position No. 498.

The Carrier has not sustained its initial burden of proof, and therefore we will sustain 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 bearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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.

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Page 4

A W A R D

Claim sustained subject to appropriate adjustment in the difference in rate of **pay per** day from **July** 5, 1972, on which date **Claimant was assigned** to the higher rated Record Clerk position.

RATIONAL RAILROAD **ADJUSTMENT BOARD**  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1974.