NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20916

THIRD DIVISION Docket Number CL-20789

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Burlington Northern Inc.

STATEMBNT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7614) that:

1. The Carrier violated, and continues to violate the rules of the Clerks' Agreement, when it denied Mr. Adolphus Vargas the position of Car Distributor No. 005 in the Car Distribution Center, Omaha, Nebraska.

2. The Carrier shall now be required to place Mr. Vargas on the position of Car Distributor No. 005 and reimburse him for any loss of compensation incurred as a result of having been denied the position.

OPINION OF BOARD: In September, 1968, as a result of an amalgamation of car distributor positions, a Central Car Distribution Department was established at Omaha. In March, 1973, by agreement and Letter of Understanding between the parties, this department was realigned to around-the-clock service and three additional Car Distributor positions were established. These positions were duly placed on bulletin and Claimant was one of the applicants for the position of Car Distributor No. 005. Claimant was interviewed, his background was reviewed, but he was not assigned; it having been determined by Mr. Collins, the Regional Manager Freight Equipment, that he did not possess sufficient fitness and ability,

In fact, on April 19, 1973, this job was awarded to Kaup, with seniority date of March 19, 1956, which was inferior to Claimant's seniority date of May 1, 1952. Petitioner asserts, among other allegations, that Claimant was the senior applicant and, that in denying him this position, Carrier violated the Clerk's Agreement. Demand is made that Claimant be so assigned and that he be compensated for any wage loss incurred.

Formal hearing, as requested under the Rules, was held on May 9, 1973, and on May 25 Claimant was advised by the Superintendent that the decision of Mr. Collins would not be reversed. The dispute was then progressed to this Board through various intermediate appeal procedures.

As a matter of primary consideration, asserted by Carrier as jurisdictional in impact, it is contended that Petitioner's appeal on the property from the employing officer directly to the Vice-President Labor Relations bypassed the "intermediate appeal to a regional officer".

Further, that such "bypassing" violated Rule 56 and Carrier's letters of February 9 and May 5, 1970, which set forth the appeal procedures to be followed in respect to designated Carrier officials. Accordingly, Carrier contends that this claim is fatally defective and must be dismissed.

We note, however, as asserted by Petitioner, that Rule 58 which applies to "GRIEVANCES" provides that "An employe who considers himself otherwise unjustly treated" must make "written request. . . to his immediate superior . . . " . (Emphasis supplied). Additionally, Carrier's letters of February 3, 1969, and February 9, 1970, specifically state that:

> "In other than discipline cases there will be only two steps for the handling of claims and grievances. They should be initially filed with the employing officer of the individually named Claimant. If not settled at that level such claims and grievances may be appealed to Vice President-Labor Relations at St. Paul, Minnesota."

The conflicting aspects of this issue are argued vigorously by both principals and many prior 'Awards are cited as precedent. We are persuaded, however, that this is not a discipline case and that in view of the express language of Rule 58 and the above quoted letters of Carrier, the procedures applicable to "Grievances" were complied with by Petitimer. In short, that the bypassing of the "intermediate appeal to a regional officer" did not render this claim jurisdictionally defective. Accordingly, we do not sustain Carrier's objection on this issue.

Petitioner, on its part, raises the objection that Claimant was denied due process in that Superintendent Whitacre rendered the decision rather than the hearing officer. We do not agree. This Board has held repeatedly that such procedure is not improper. Moreover, there is no rule in the Agreement which prescribes who shall conduct hearings and who shall render the decision. We do not, therefore, sustain Petitioner's objection on this point.

See Awards 16347, 15714, 14021, and 20828, among many others.

We proceed, therefore, to the merits of this dispute, in connection with which the following Letter of Understanding, agreed to by both principals, sets forth the procedures to be followed in filling the new "car distributor" positions:

"March 15, 1973
File: CL-4

Mr. R. M. Curran, Genl Chrmn
Bro of Ry., Airline & Steamship Clerks
540 Endicott Building
St. Paul, Minnesota 55101

Dear Sir:

This will serve to confirm conference between Messrs. Williams and Memcok March 15, 1973 covering the establishment of additional Car Distributor positions at Omaha.

As explained to Mr. Williams, the present staffing at Omaha consists of two Car Distributors working 8:00 AM to 5:00 PM, one worked from 9:00 AM to 6:00 PM and one working from 2:30 PM to 10:30 PM. In order to establish 24-hour service, it is proposed to assign three additional Car Distributor positions on or about May 1. In order to familiarize the successful applicants with the work requirements of the Car Distribution Center, it is proposed that the successful applicants be assigned in advance of the actual commencement of the 24-hour operation with the present car distributors, which will result in these applicants temporarily working hours other than those advertised for a period of some two to three weeks.

At the conclusion of the discussions, it was agreed that such temporary assignment would not be the subject of claims on the part of any employees.

If the above is in accord with Mr. Williams understanding of the discussion, I would appreciate your so indicating by signing this letter in the space provided below end returning one copy to the undersigned.

Yours truly,
T. C. DeButts /s/
T. C. DeButts
Vice President"

"CONCURRED IN:

Robert M. Curran /s/
General Chairman, BRAC"

Additionally, since Claimant's bid for the disputed position was rejected by Carrier under Rule 7 of the Agreement, we quote Rule 7, which reads as follows:

"Rule 7. PROMOTION

"Employes covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to excepted positions.

"NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior clerk or employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

Basically, it is Petitioner's contention that Claimant did not receive a "fair interview"; that as senior employe he was entitled to the assignment; that, in any event, Claimant should have been given the assignment and afforded a two-week period in which to familiarize himself with the work requirements of the new position so that he could be properly trained; that Claimant "need not be immediately qualified" but "must be assigned so he can prove whether or not he has that fitness and ability"; and, finally, that Claimant was discriminated against" because of his "Spanish-American descent".

We stress at the outset that seniority alone was never intended as the sole determining factor in making promotions. Rule 7 is precise on this issue. "Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail. . .". Thus, Claimant was required as smatter of first priority to qualify under the "fitness and ability" standard. The record evidence is conclusive that he failed to meet this test. He was afforded a fair and impartial interview, on the basis of which it was determined that he did not possess the necessary qualifications to meet the requirements of the new position.

Indeed, his own testimony at the hearing fully supports the latter conclusion. He testified to his service "as stenographer", as "crane operator", as "chief clerk", as a "yard clerk and mail handler", did "typing", kept records and acted as "timekeeper", worked on "payrolls and preparation of forms", and that he had "a little knowledge of some car distribution", which was in fact handled by others. In short, that he did not possess the necessary qualifications of fitness and ability to assume the complex duties and greater responsibilities of Car Distributor.

We cannot agree with Petitioner's contention that, under the above quoted Letter of Understanding, Claimant, as senior employee, should have been assigned and then afforded a two week trial period in which to qualify. The Letter is precise that such trial period will be given to the "successful applicant". Obviously, this did not apply to Claimant for he failed to qualify; nor is there anything in the record which entitled Claimant to a "training" period merely on the basis of his seniority. Conversely, the record is amply clear that quite a number of other employes were interviewed and that the final decision on the assignment was made primarily on the basis of fitness and ability, and, secondarily only on seniority.

Carrier cites a host of precedents substantiating its contention that the procedures it followed here were well within its Management prerogatives and in full conformance with the Agreement. We quote from only one, Award 16480 (Dorsey), which involved the same Organization and which fully sets forth the applicable and controlling principles:

> "This Board has been petitioned to interpret and apply rules identical or similar to Rule 6 in a great number of disputes. In essence, we have held in such cases that: (1) the current possession of fitness and ability is an indispensable requisite that must be met before seniority rights become dominant; and (2) this Board will not set aside Carrier's judgment of fitness and ability unless it is arbitrary or capricious or has been exercised in such a manner as to circumvent the Agreement. See, for example, Award Nos. 11941, 12461, 13331, 14011, 15164. Also, we have held that for us to set aside a Carrier's judgment the record must contain substantial evidence of probative value that the claimant possessed, at the time, sufficient fitness and ability to perform the duties of the position which he sought. Id.
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> "The record in the case before us is barren of evidence that would support a finding that the Claimant possessed the indispensable fitness and ability. In fact the record as a whole can be construed as an an admission by the Claimant that he was lacking in the requisite. For the foregoing reasons we will deny the claim."

The above quoted language is unique in that it is precisely applicable to the Claimant in this dispute.

We acknowledge the many prior Awards cited as precedent by Petitioner as to "the true meaning of fitness and ability"; that Claimant need only possess "the potential" in order to qualify. We point out again that the record evidence in this dispute does not show that Claimant possessed the necessary qualifying "potential". The difficulty, however, lies in interpretation of the word "potential"; and, additionally, who is to make such determination. The overwhelming weight of authority supports the proposition that such right of determination falls within the purview of Carrier's management prerogatives, if fairly and reasonably exercised. Such is the case here.

See Awards 3273, 3283, 10225, 12450, 14736, 17192, 18463, 18774, 18802 and 19129, among a host of others.

Finally, on the issue of "discriminatory treatment", the record is replete with assertions and declarations by Petitioner that Claimant was discriminated against because of his "Spanish-American descent". In point of fact, these are merely conclusory statements which are unsupported factually. This is a far cry, however, from the requirement of substantial probative evidence necessary to support such contention. The record is completely absent of such proof and speaks to the contrary. Particularly is this true in the light of Carrier's statement of Equal Employment Policy dealing with promotions, and quoted verbatim in the record.

Accordingly, on the basis of the record evidence, established precedent and the foregoing findings and conclusions we are compelled to 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 the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 16th day of January 1976.