

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21107
Docket Number CL-21201

James C. McBrearty, Referee

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

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood, GL-7819, that:

1. The Carrier violated, and continues to violate, the roles of the Clerks' Agreement when it denied Helen F. **Grunke** the Class "A" Accountant position, **Customer** Accounting Center **Office**, General Office, St. Paul, Minnesota.

2. The Carrier shall **now** be required to place Helen F. **Grunke** on the Class "A" Accountant position, and **reimburse** her for **any** loss of **wages** resulting from her being denied the right to exercise seniority on the Class "A" Accountant position.

OPINION OF BOARD: Claimant commenced employment with Carrier on August 9, 1962. Thereafter, she worked in many different positions, the last one of which being a clerk **in** the **BNAFI** (Burlington Northern Air Freight), where she remained until, as a result of a Carrier operational change; BNAFI was transferred to Los **Angeles**, thereby making Claimant a free agent.

When Claimant became **aware** of the fact that she was a free agent and as such would have to exercise **seniority**, she attempted to exercise seniority rights by displacing a junior **employee** on a position as Class "A" **Accountant**, Customer **Accounting** Center, St. Paul General Office Building.

Claimant's **written** request for the Class "A" Accountant position "as rejected by Carrier; the determining factor being her failure to successfully **pass** a written test.

On **February** 26, 1974, Claimant wrote to Carrier **requesting** a hearing under the provisions of Clerks' Agreement **Rule** 58, entitled, "Grievances". A hearing was then held on March 6, 1974. As a result of this hearing, Carrier issued a decision **on** March 21, 1974, sustaining the original decision to reject Claimant's request for the Class "A" Accountant position.

Claimant **and** Carrier have held conferences, but have been **unable** to reach a solution resolving the dispute. Hence, this claim has been referred to the Board.

Carrier has raised certain procedural objections concerning the Claimant's method of prosecuting the claim, and the parties have debated **that** question at length. However, our disposition of this dispute on its merits makes it unnecessary to rule on the procedural question.

In **urging** that the claim be sustained, Claimant has cited the following two (2) Rules:

Rule 7. **Promotion.**

Employees 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 **employee** to bid in a new position or vacancy **where** two or more **employees** have adequate fitness and ability.

Rule 2. **Non-Discrimination.**

The parties to this agreement pledge that there will be no discrimination **against** any **employee** because of race, color, creed, national origin or sex. **This** obligation to not **discriminate** in employment includes, but is **not** limited to placement, upgrading, transfer, demotion, rates **of** pay or other **forms** of compensation, selection for training including apprenticeship, lay-off or termination.

In regard to Rule 7, Claimant argues **that** "fitness **and** ability" **means** Claimant need only possess potential to be able to perform the duties of the position within reasonable time.

Now, it is true that Awards 14762, 13850, 8197, and 5348 have held that it **is** not **necessary** for an applicant to be **immediately** qualified to assume all the duties of **a position** without some assistance or training, or at least a break-in or trial period. However, there **must** be a reasonable probability that the employee would be able to perform all the duties of the position **within a** reasonable period of time. If the **employee** is **obviously** unfit or unqualified, as in a situation where the job in question requires a high degree of skill which can be acquired only after a long period of training and there is no evidence that the **employee** has these skills or related skills, then Carrier is **not** required to give him or her a trial period.

Claimant had only worked previously as machine operator and a timekeeper in the Material Bureau, Bill Bureau, ~~AFE~~ Billing, and ~~BNAFI~~. Yet, Class "A" Accountants, because of their experience, handle major accounts; difficult cases; issue waybill corrections; **write** letters, and **use** the telephone to deal with big shippers.

After reviewing **Claimant's** attendance, punctuality; and general work habits, Carrier determined that Claimant had to obtain at least a score of 70 **on** a job-related test dealing with Customer Accounting before she **would** qualify for the trial period.

Claimant did not successfully pass the test, and this was made the determining factor by Carrier that she did not have sufficient fitness and ability.

A determination of how much weight should be given test **results**, along with other **relevant** factors, is a matter of judgment. **When** such judgment is exercised honestly and upon due consideration, it is not arbitrary action **even** though **there may** be room for two opinions.

There is nothing in the record which indicates unjust treatment or an arbitrary and or capricious judgment on the part of Carrier. 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. We are not permitted to blithely substitute our judgment for that of Carrier in disputes of this type under our limited review authority.

Moreover, we have held that for the Board 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 she sought. The record **in** the instant case is barren of such evidence that would support a finding that Claimant possessed the indispensable **fitness** and ability. Claimant herself testified that she would need "a small length of time and some help" in order to do the work in the department.

Finally, on the issue of "discriminatory treatment", Claimant **argues** that since the test was not properly validated in accordance with Title 41, Chapter 60 of the Federal Code, and therefore, also violates **Rule 2** on Non-Discrimination.

This Board is not empowered to interpret or enforce federal laws or regulations dealing with test validation. Claimant must apply to the Equal Employment **Opportunity Commission** for relief under Title VII of the Civil Rights Act in that regard.

As far as **Rule 2** is **concerned**, the record does not show substantial probative evidence necessary to support a contention of discrimination.

The record shows that of the seven (7) or eight (8) **employees** who took the test, two (2) passed. Five (5) of the **employees** who took the test were **women**, and only one (1) of them passed. No minorities took the test.

This test sample is too **small** for the Board to come to the sweeping generalization that Carrier's **test** disqualified a "disproportionate" number of women and minorities, and was therefore "discriminatory" within the meaning of Rule 2.

Furthermore, it is worthy of note in regard to the alleged "discrimination" that Claimant herself stated in the record that the test was "very definitely" job related.

In fact, Claimant's suggestion that the test "should be more in regard to general knowledge rather than Customer Accounting knowledge" would leave Carrier more open to a charge of "discrimination", since the test would be less job related.

Accordingly, on the basis of the record considered as a whole, established precedent, and the foregoing findings and conclusions the Board is 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 **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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1976.