

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21119  
Docket Number CL-21184

Irwin M. Lieberman, *Referee*

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and  
( Steamship Clerks, Freight Handlers,  
( Express and Station Employees  
(  
( Chicago, Milwaukee, St. Paul and  
( Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood  
(GL-7883) that:

1) Carrier Violated and **continues** to Violate the **Clerks' Rules** Agreement **in** Seniority District **No. 56**, when it unjustly treated **employee** V. L. **Sieverding** by failing to award her Clerk Position **No. 25740** and in lieu thereof **awarded** the position to a junior employee.

2) **Carrier** shall **now** be **required to** assign employee V. L. **Sieverding** to Clerk Position go. **25740** and give her a seniority date in District No. **56** as of August 7, **1974**.

3) Carrier shall **now** be required to compensate **employee** V. L. **Sieverding** the difference in rate of pay of Position No. **25740** and that of the position assigned to for **each** workday retroactive to **August 7, 1974** and for all subsequent **days** until the violation **is** corrected.

4) **Carrier** shall **now** be required to pay seven percent (**7%**) in-ter-eat, **compounded annually** on such difference in rate until such **time** as claimant is made whole.

OPINION OF BOARD: This dispute involves Claimant's fitness and ability for a promotion. The list of principal **duties** of the new **position** included the phrase: "Applicant **must** be a competent typist". Claimant had a **seniority** date of January **20, 1950** and the position in question **was awarded to another** employee with a seniority date of June 10, 1950. **Claimant was** advised that she **was** not assigned to the position **as "....in my opinion you** lacked the fitness and ability necessary to work position No. **25740."** Both Claimant and the employee who received the **promotion** were required to take a typing test; the **minimum** acceptable standard indicated by Carrier was **40** words per **minute**. Claimant took the test twice and **scored 20 words** per minute the **first** time and **15 words** per minute on the second **test**. The other **employee's** test score was satisfactory.

The relevant **Rules** provide:

**"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.

**NOTE:** The word 'Sufficient' is intended to **more** clearly establish the right of the senior **employee** to the new position or vacancy where two **or more employees** have adequate fitness and ability."

**"RULE & TIME IN WHICH TO QUALIFY**

(a) When an **employee** bids for and is assigned to a permanent **vacancy or** new position he will be allowed thirty (30) working days in which to qualify and **will** be given full cooperation of **department** heads **and** others in his efforts to do so. **However,** this will not prohibit an employee being removed prior to thirty (30) working days when **manifestly** incompetent. If an **employee** fails to qualify he shall retain all seniority rights but cannot displace a regularly assigned **employee...."**

Petitioner contends that Rule 8 establishes a qualifying period and gives the employee the opportunity to demonstrate whether or not he or she possesses the fitness and ability to learn and fulfill the position in question within a reasonable period of time. From this, it is concluded that immediate qualifications are **not** necessary for promotion: potential ability to perform is sufficient. It is argued further that the **Agreement** does not provide for testing nor was a test a necessary requisite for promotion. It was argued that Claimant was qualified for the position based on her past experience with Carrier: **she** worked three **years** as a **"time revisor" where typing** was not required; prior to that position she **spent** twelve years as a statistician which required **minimum amount** of typing; earlier, she **worked** two years as a stenographer with daily typing **of** letters and before that as a messenger where there was some typing required. The Organization argues that fitness and ability in this case, in **view** of Claimant's background, meant ability to increase her typing speed. It is concluded that **Claimant** was treated unjustly and that Carrier acted arbitrarily and capriciously **in denying Claimant her right to promotion.**

Carrier states that in view of the "competent typist" requirement of the position it **made** the determination that Claimant was not a competent typist and therefore did not possess sufficient fitness and ability for the position. It is argued that this determination simply was **not** arbitrary or capricious and there was no proof **to the contrary.** Further, it is contended

that **Rule 8** did **not** give Claimant the right to a **thirty day** on-the-job training period to acquire sufficient fitness and ability. In support of this latter argument, Carrier cited a series of awards including Award 18651, in which we said:

**"The Organization takes the position that a trial period of forty-five days is mandatory. There is no provision in the agreement requiring Carrier to give the employer such a trial and in the absence of evidence of probative value that the claimant possesses 'sufficient ability' the claim must be denied."**

Carrier also cited an early case, Award 52, in which we held, in the face of 8 similar argument by Petitioner, that the Claimant was without sufficient fitness and ability at the time to properly perform the duties of the position sought.

Both parties agree that this Board has held consistently over the years that the current possession of fitness and ability is an indispensable requisite which **must** be met before seniority rights become effective for 8 promotion. It is agreed further that Carrier's judgment of fitness and ability will prevail unless it can be shown to have been arbitrary and capricious. In addition, we **must** reiterate a long held principle that Carrier is not obligated to give an employee a trial on a position when it has determined that he is lacking in fitness and ability (see Awards 12394, 16480, 18025 and 18651).

The record of this dispute contains no evidence to show that the administration of the typing test was invalid in any respect or per se arbitrary or capricious. Although, as argued by Petitioner, there is no Agreement provision sanctioning the use of tests to determine fitness or ability, there also is no rule which precludes their use. It is well established, under those circumstances, that Carrier has the right to use tests as a criterion of ability. For example, in Award 18462 we held that "...in the absence of a contractual prohibition, it is within Carrier's managerial discretion to use tests to determine fitness and ability. The cases are legion in this regard, see Awards 17192, 14047, 15493."

Based on the entire record, we find that Petitioner has failed to produce evidence to show that the test of typing was unreasonable or that Claimant was qualified for the position in question. Since there is no indication that Carrier acted arbitrarily in its determination concerning Claimant's fitness and ability, the claim **must** 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 **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. Paulos*  
Executive Secretary

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