

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21246  
Docket Number CL-21058

Joseph A. Sickles, 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-7737) that:

1. Carrier violated the Clerks' Agreement when it arbitrarily and capriciously refused to assign Mr. J. E. William to the position of **Investigator-Senior #503**. (Carrier's File 280-757).

2. Carrier shall **now** be required to assign Mr. J. E. Williams to Investigator-Senior position \$503 and compensate him for eight **(8)** hours at Investigator-Senior rate of pay each day beginning September 12, 1973, and each work day thereafter until the violation is corrected. **Claim** is in addition to any other compensation received by Mr. Williams.

OPINION OF BOARD: A "**Senior-Investigator**" position was bulletined in the Freight Claim Department, which required:

"**10.** Major Duties To be responsible for the investigation and settlement with claimants and the distribution thereof between carriers **on** various types and classes of freight loss and **damage** claims. To perform such other similar or lower rated duties as may be assigned, properly coming within the rate of pay. **Experience as Investigator-Junior is required.** A written test is **required.**" (underscoring supplied)

Claimant, a Station Accountant in the Freight Office (an office totally separate from the Freight Claims Dept.) with three years seniority, applied for the position, however, it was assigned to a "new **employee**".

The Carrier asserts that under Rules 4 and 6 of the **Agreement**, **Claimant's** "**fitness** and ability" were insufficient.

**Rules** 4 and 6 state in pertinent part:

"**RULE 4. PROMOTION BASIS**

(a) Employee covered by these rules shall be in line for promotion. Promotion, **assignments** and displacements under these **rules** shall be based **on** seniority, **fitness** and ability; **fitness** and ability being sufficient, **seniority** shall prevail.

NOTE 1: The word 'Sufficient' **is intended** to more clearly establish the prior rights of the senior of two or more **employees**

of the same seniority district having adequate fitness and ability for the **position** or vacancy sought in the exercise of seniority."

"**RULE 6. VACANCIES AND NEW POSITIONS**

\* \* \* \* \*

\* \* \* \* \*

(d) **Employees** filing applications for positions bulletined on other districts or **on** other **rosters** will, if they possess sufficient fitness and ability, be given preference over **non-employees.**"

Carrier based its judgment **on** the Claimant's written test score of 24-259. (passing 75%) and his experience with the Carrier during the three years of **employment.** Carrier maintains that Claimant's experience was in **no** way related to the "Investigator-Junior" experience required by the bulletin to perform sufficiently in the Senior Investigator position.

It is not disputed that the Carrier has the right to determine the **employee's** fitness and ability (see for example Awards 6028, 4485, 15002, 20658, and 15493). Claimant **maintains,** however, that Carrier's denial of his application was arbitrary and capricious, because he meets the stated requirements:

"Q. When and where did you acquire the qualification and fitness to perform the duties of **investigator-senior** in the freight claims office?

A. I feel that 3 years of railroad experience would enable me to at least learn with the background previously acquired to work the job although I do not have any freight claim experience at the present time. Also I might add that working as a station accountant I understand that part of the work as a station accountant also is connected with freight claim work such as **OS&Ds** which are practically the **basis** for some freight **claims.** (underscoring supplied)."

Moreover, according to the Organization, under Rule 7 the **employee** is guaranteed the right to demonstrate his ability:

"**RULE 7. FAILURE TO QUALIFY**

\* \* \* \* \*

\* \* \* \* \*

(b) **Employees** who have been awarded bulletined positions, or **employees** whose exercise of seniority over junior **employees** has been approved, will be allowed 30 calendar **days** in which to qualify, except as provided for in Section (d) of **this Rule.**

\* \* \* \* \*

\* \* \* \* \*

(e) Employer will be **given** full cooperation of **department** heads and others in their efforts to qualify."

Based on **Rule** 7, the Organization alleges the Claimant should be given the opportunity to demonstrate his **competencies**. But, Carrier notes that said **rule** is only applicable **when a** position has been assigned - and thus is not material to the instant case. **This** Board **is** not empowered to change or alter Agreements and therefore we are **inclined** to concur with Carrier's assertion that it need not allow a **30-day** "trial period" for employee who have not been previously assigned.

The Organization maintains further that the test which the **Carrier** asserts the Claimant failed, is not a valid consideration as the Carrier refused to disclose the contents of the test. **Numerous** Awards cited in this case support the Carrier's right to administer a "reasonable **test**".

Award 5025 states in pertinent part:

"**This** Division of the Board has long recognized, that in the absence of anything in the agreement to the contrary, reasonable tests may be used by the Carrier to assist it in determining the fitness of an applicant. (See Awards 4918, 5006.)"

(Also see Awards 1593, 19144 and many others.) **However** the authority cited indicates that there must be grounds on which the Board can establish the test as reasonable. The Carrier has refused to provide the test, As a result, we have no valid basis for consideration of the test in the instant case, and in accordance with our Award 20658, we may not rest our conclusion solely on test results.

We feel that Carrier erred when it refused to provide the test, **so** that it could be properly assessed. But, that does not dispose of the dispute. Once we eliminate from consideration the test score - as we do in this case - we must consider the remainder of the record to ascertain if Carrier has supported its decision.

Award 20658 and others (see 19660 and 15494) hold:

"...when a Carrier makes a determination that an **employee** is not qualified. the burden shifts to the **employee** to demonstrate to the contra-. Accordingly, a close scrutiny of the record, as handled on the **property**, is **appropriate** to determine if Claimant has satisfied the **above stated burden**. (underscoring supplied)"

The Claimant testified that he had sufficient **competency** to learn the duties of the Senior Investigator:

"Q. Mr. **Williams** have you ever been assigned to any job in the Freight Claim Office?

A. No air.

Q. Are you fully familiar with the job duties and requirements of an investigator-senior?

A. No sir, I **am** not. Usually a person who had **never** working in the freight **claims** couldn't possibly have, but I feel like to do have the ability to learn to work the job.

\* \* \* \* \*

Q. **When** you made application for the job of **Investigator-Senior**, No. 503, did you understand the major duties of this job?

A. I understood that there would be a period of **time** in which to learn or qualify if awarded the job. No sir, I was not aware of the general duties of the job..

\* \* \* \* \*

Q. Do you feel that given **the** time and cooperation that you can learn the job that you bid on in the freight claims department?

A. Yea sir."

We are mindful of the **Organization's reliance** upon **sustaining** Award 20561. Although we do not have before **us** the docket in that dispute, the Award shows that the factual **circumstances** there were significantly different than those **presented** in this dispute..

After a thorough and extensive review of the complete record developed on the property and the arguments of the **parties, we are** unable to find that **Claimant** has presented to us a sufficient showing to support his contention that he was qualified to hold the position for which he applied. Accordingly this claim is dismissed for failure to meet the burden of proof.

**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 **Employee** involved in this dispute are respectively Carrier and **Employee** 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

Award ~~Number~~ 21246  
Docket Number CL-21058

Page 5

That the Claim be dismissed.

A W A R D

Claim dismissed.

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

ATTEST:

*A. W. Pauls*  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.