

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21327
Docket Number CL-21400

Irwin M. **Lieberman**, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood,
GL-7986, that:

1. Carrier violated the Clerks' Rules Agreement, in particular, Rules 4, 6, 7, when it arbitrarily and **capriciously** refused to assign Gary L. **Gunnels** to **position of** Investigator-Senior No. 31, and/or position of Investigator-Senior No. 496 (Carrier's file 280-804).

2. Carrier **shall** now be required to compensate Mr. Gunnels for eight (8) hours' pay at the rate applicable to the position of **Investigator-Senior No. 31** and/or the position of **Investigator-Senior No. 496**, beginning Thursday, June 27, 1974, and continuing each subsequent work day, Monday through Friday thereafter, in addition to any other compensation **earned** or received, until the violation **is corrected** by assigning Mr. Gunnels to one of the aforementioned positions.

3. Carrier shall be required to establish a seniority date of June 27, 1974, for Mr. Gunnels in Seniority District **No. 31**.

OPINION OF BOARD: Claimant, with a **seniority date** of October 17, 1973, was assigned to the Extra **Board** at Palestine, Texas. From that date until the date of the incidents herein he had worked as an extra or relief agent and operator (including agent at various "Star" Agencies) throughout the District. There Was **no** criticism with respect to the quality of his work.

On June 20, 1974 Carrier **issued** two bulletins advertising the positions of No. 31 Investigator-Senior and No. 496 Investigator-Senior, in the General Freight Claim Office, District 31 at Palestine, Texas. The **major duties** of both positions were identical and were spelled out in the bulletins as follows:

"**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."

The bidding was to be closed at the end of the work day on June 24th. Claimant bid on both positions on June 23, 1974. He was instructed by the Assistant General Freight Claim Agent to appear at the Freight Claim Office by 5:00 P.M. on June 25, 1974 to take a test, or be disqualified for the positions in question. Claimant attempted to be relieved from his duties in order to take the test but was not relieved by the responsible Carrier official. Carrier issued bulletins on June 27, 1974 that no qualified bids had been received and on the following day issued assignment notices indicating that two new employees had been assigned to the two vacancies. On July 1, 1974 in response to an inquiry by Petitioner, Mr. Miller, the General Freight Claim Agent indicated that Claimant was not assigned to the positions:

"...by reason of the fact that he did not avail himself of the opportunity to demonstrate his fitness and ability by taking written test which was offered him."

It is noted that Claimant was offered the opportunity to take the test, which he availed himself of, and did take the test on July 1, 1974. He was never given the results of the test. He requested an "unjust treatment" investigation which took place on July 17th.

The most significant rules dealing with this dispute are as follows:

"Rule 4

PROMOTION BASIS

(a) Employees 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."

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"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."

* * *

"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.

(f) The provisions of this Rule **7** contemplate that no **employee** will be permitted to disqualify himself. **The** provisions of this rule do not **apply** when **employees** are denied bulletined positions or refused the right to exercise seniority over junior employees. (See Section (b), Rule **4.**)"

Carrier states that the dispute in essence turns on a very **simple** question: whether Carrier's decision **not** to **assign** Claimant to either of the two positions may **be** characterized as arbitrary and capricious. Carrier **argues** that (1) Claimant did not have the **knowledge**, training, experience or ability to perform the duties of the position; and (2) the rules do not require the assignment of an unqualified employee to a position and permit him to train while occupying that position.

There are a host of authorities cited by both parties to this dispute. However, the case is a classic fitness and ability matter which turns primarily on the facts of record. We concur with the position taken by Carrier (**and** by this **Board in many** prior disputes) that:

- "(1) The decision **as to the fitness** and ability of an **employee to fill a position is a function** of the Carrier.
- (2) The decision of the Carrier will not be disturbed by the **Board** unless there is a clear showing in the record that the **decision** was arbitrary and capricious and/or **a complete abuse** of discretion.
- (3) **Once** the determination is made and then contested by the employee or his representative, the burden of proving that he possessed the fitness and ability, and that the Carrier's decision was faulty for the reasons mentioned in the second principle, rests with the petitioner."

It is our considered judgment, **based** on the entire record, that in this **case** the decision of **Carrier** was **arbitrary** and capricious and must be reversed. Further, from the testimony of **Petitioner** at the investigatory hearing, there is the presumption that Claimant was qualified for the position. These hypotheses must be examined.

The manner in which **this** bid **was** handled was far from exemplary. It seems quite **strange** to deny 8 position **based** on lack of an examination, when the employee was not released by **Carrier** to take the test. The test, which was administered after the fact, was **never** reviewed, in terms of its content or results during the handling on the property and **therefore, based** on well established doctrine **may** not be considered in the resolution of this dispute. **Further**, with respect to the test, there **was** never **any** statement that it was uniformly required of applicants for this position or that there had been any **standards** developed with respect to the scoring of the instrument. In short, although **Carrier** is certainly entitled to administer tests to ascertain skills or ability, in this case there **was** absolutely no indication that the test was objective, appropriate or applied in a non discriminatory fashion.

Petitioner demonstrated **at** the hearing, without rebuttal, that **Claimant** had the educational background, railroad experience and clerical experience and responsibility to cope with the positions, particularly in comparison with the two completely new **employees** who had no **railroad** experience whatever. Even though **we** are herein concerned solely with the fitness and ability of Claimant, it is interesting to note that **Carrier** refused to supply any information **at** the **hearing**, though **specifically** requested, concerning the **qualifications** of the two new **employees** who were assigned to the **positions**. Dealing with a **critical** area of "fitness and **ability**", **Petitioner** questioned Mr. Miller at the hearing **with** respect to his investigation of **those qualities** and **attributes** of **Claimant**. **Miller** indicated that he had not even checked with Claimant's supervisor as to his work record or ability in the position he had held with **Carrier** for **8½** months. In short, there was no evidence for his conclusion, other than a judgment by Mr. Miller that Claimant's background was in some unspecified way deficient.

Carrier argues that Claimant admitted at the hearing that he would require time on the job in order to perform satisfactorily and that admission is sufficient to disqualify him; further that Claimant admitted he was unqualified. The record does not bear out **Carrier's** contention. Claimant specifically on **several occasions** testified that he had the fitness and ability to perform the position, but needed the thirty **day** qualification period to perform adequately. It is noted that Mr. Miller testified as follows:

"Q. Mr. Miller, has each and every employee that has been assigned to 8 **Claim Investigator** position in your Office been fully qualified to set down **and handle** claims on their first **day** they were on the position.

"A. In my judgment **each** investigator that we **have** assigned has had the prerequisite fitness and ability to perform the duties of the position within the **30** days period **given** sufficient supervision and instruction."

We see nothing inconsistent in **Claimant's** responses in the light of Mr. **Miller's testimony**.

In **summary**, we find that: there were no specific qualifications for the job in the bulletins (8s distinct from those specified in Award 21246); on a **prima facie basis Claimant had** the requisite experience and ability; there was no evidence **whatever** relating to Claimant's alleged deficiencies for the position; there **was** nothing detracting from Claimant's fitness developed by his **testimony** at the investigation; and we have absolutely no information about the two new **employees** who were selected to fill the two vacancies. **The** test, as indicated heretofore, may not be considered in the evaluation of Claimant's fitness and ability. As we said in Award No. 20702, and it is equally applicable in this case:

"...**Carrier's** stated reason for its decision not to **promote** Claimant **was** but **a** bare assertion without adequate evidentiary support...**Petitioner's past** record created a presumption of fitness and ability for the position and that presumption has not been rebutted by Carrier."

The conclusion is **inescapable: Carrier's** actions **in** this matter must be characterized 8s arbitrary **and capricious**.

With respect to the remedy **requested** by Petitioner, we do not **agree** with the monetary **aspect**. Claimant was damaged by Carrier's actions and must **be made** whole for that breach, but **more** than that sum &es not seem appropriate in this **case**. Therefore, we shall award **Claimant** the difference between his actual **earnings** and what he would have earned had he been qualified to occupy the position of **Claims-Investigator-Senior**, until such date as he is placed in one of the two positions.

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** violated.

A W A R D

Claim sustained except that Paragraph **2** is modified as indicated in the Opinion above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 30th day of **November** 1976.

