

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21385  
Docket Number CL-21131

James C. McBrearty, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship  
( **Clerks, Freight Handlers, Express and Station**  
( **Empleves**  
(  
(Chicago, **Milwaukee**, St. Paul and Pacific  
( **Railroad Company**

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood  
(GL-7838)that :

1. Carrier **violated** and continues to violate the Clerks' Rules Agreement in Seniority District No. **55** when it unjustly treated employe Karen A. **Volkman** by failing to **award** her Secretary Position **23630** and in lieu thereof awarded the position to a junior. **employee:**

2. Carrier shall **now** be required to **assign** employe K. A. **Volkman** to Secretary Position No. **23630** and give her a **seniority'** date in District No. **55** as of April 8, 1974.

3. Carrier shall now be required to compensate employe K. A. **Volkman** the difference in rate of pay of Position 23630 and that of the position assigned to for each **workday** retroactive to April 8, 1974, and for all subsequent days until the violation is **corrected**, including continuing payment if the position is assigned permanently to the junior employe.

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

OPINION OF BOARD: Claimant is **regularly** assigned to Stenographer **Position** No. **50240** in the **Material** Division, Seniority **District** No. **118**, where she holds a clerical seniority date of **March 16, 1970**.

In its Bulletin No. 1, dated March **18, 1974**, Carrier advertised a vacancy on Secretary Position 23630 in District No. **55** due to a maternity leave. Carrier determined that a shorthand speed of at least **80 WPM** was required to perform the duties of this position. Claimant and four others submitted applications. **All** were given a shorthand test,

and three of the five passed the test. **The** position was awarded to the senior of the three who **passed**.

Although **Claimant** failed the test, she asserts that she should have been assigned to this temporary vacancy, because she was **senior** to the individual who **was** assigned.

Petitioner cites the following rules as being applicable to the instant case:

"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 8 -- 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**. He will be considered furloughed as of date of disqualification **and if** he desires to protect his seniority rights he must comply with the provisions of Rule **12(b)**.

(b) An **employee** voluntarily relinquishing his **permanent position** cannot displace a regularly assigned **employee** but **will** be considered furloughed as of date of relinquishment and, if he desires to protect his seniority rights, must **comply** With the provisions of Rule **12(b)**.

"The provisions of this Rule 8(b) apply only during the thirty (30) working day qualification period 'referred to in Rule 8(a) or in a case where the physical condition of an employe so changes as to make him physically unable to continue on the assignment. Exceptions may be made in meritorious cases.

\* \* \* \* \*

RULE: -- FILING APPLICATIONS --  
OTHER SENIORITY DISTRICTS

Employes filing applications for positions bulletined on other seniority districts will, if they possess sufficient fitness and ability, be given preference on a seniority basis over non employes and/or employes not covered by these rules."

The Board finds that under Rule 7, an employe is not entitled to a position unless such employe has sufficient fitness and ability to fill the position. In this regard, the Board has consistently held that Carrier may use tests or examinations as being determinative of fitness and ability (Awards 18875, 18774, 18462, 17192, 15626, 14040, 7037, 5025, 5006, 4918 and 3273).

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Furthermore, under the consistent decisions of this Board, Carrier's decision as to fitness and ability cannot be disturbed unless proved to have been made arbitrarily or capriciously. Such burden of proof rests squarely on the Claimant. (Awards 21246, 21243, 21119, 21009, 20964, 20569, 20361 19404 and 19129).

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Claimant has not met this burden. A thorough and extensive review of the complete record developed on the property, as well as the arguments of the parties, reveals that Carrier's decision not to accept Claimant's application for the position was based on the fact that Claimant could not pass a speed test of 80 WPM. Consequently, Carrier's decision was neither arbitrary nor capricious, and 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 28th day of January '1977.

