NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21579
THIRD DIVISION Docket Number CL-21434

William G. Caples, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(The Western Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7968) that:

(a) The Western Pacific Railroad Company violated Rules 29 and 30(a) of the Agreement when it failed and refused to assign employe Mary Maciel to Car Order Clerk Position Z4099 but, instead, awarded it to junior employe V. K. Shealey, and;

(b) The Western Pacific Railroad Company shall now be required to allow Mary Maciel one day's pay at rate of Position Z4099 beginning on November 14, 1973 and continuing each day thereafter until she is assigned to the position.

OPINION OF BOARD: On November 6, 1973 a vacancy on Position NO. Z4099, Car Order Clerk, in the Customer Service Center, Operating Department., was advertised, with a detailed description of the job duties. The Claimant, with a seniority date of April 18, 1963 bid for the position listing the positions in which she had performed for the Carrier:

"Docket Clerk
Assistant Rate Clerk
Statistical Clerk
Industrial Clerk
Ticket Clerk
Car Tracing Clerk
Res-tion Clerk"

On November 13, 1973 the position was awarded to an employe with less seniority than the Claimant. Claimant, by letter to Carrier dated November 14, 1973, requested an explanation for her non assignment, stating:

> "Under Rule 30 of the Clerks' Agreement witii Western Pacific I have 30 working days in which to qualify for the aforementioned position. As a senior bidder, I reserve this right over a junior employee who was assigned to this position, No. Z-4099, per Clerks Circular No. 144-73,

"dated November 13, 1973.

Under Rule 29, I, as a senior employee, respectful& request an explanation for my non-assignment."

The Carrier's reply stated in part:

"The position . . . was assigned to a Junior employee who was fully qualified. . . .

Under HRAC Rule 29 it is clearly proper to assign a Junior employee who is qualified in preference to a Senior employee who is not qualified.

Second paragraph to your letter refers to Rule 30. This rule has no application until after provisions of Rule 29 are considered and clerks are actually assigned."

The issue before the Board is not new to these parties involving the limit of the vesting by seniority in the right to a job. The parties on the property and before the Board in their very well-argued written and oral presentations set forth their separate interpretations of Rules 29 and 30 which under the current contract states:

"PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS

Rule 29. Employes 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. When an employe junior to other applicants is assigned to a bulletined position, the senior employers making application will be advised the reason for their non-assignment if they request such information in writing and file it within 15 days from date of assignment.

MOTE: The word 'sufficient' is intended more clearly to establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

(Underlining in above quotation is the Board's)

"FAILURE TO QUALIFY

Rule 30. (as Revised 9/16/65)

(a) Rmployes entitled to bulletined positions or exercising displacement rights will be allowed thirty (30) working days in which to qualify, and failing, shall retain all their seniority rights and may bid on any bulletined position but may not displace any regularly assigned employe.

An employe who fails to qualify on a temporary vacancy may immediately return to his regular position.

(b) Employes will be given full cooperation of department heads and others in their efforts to qualify.

(c) An employe may not be disqualified before the expiration of thirty (30) working days without a prior hearing being held unless the employe and the Division Chairman or General Chairmanwaive suchhearing.

(d) Employes who are disqualified under this rule on other than temporary vacancies and who have not bid for and been assigned to a bulletined position within thirty (30) days following disqualification, shall thereafter be considered as furloughed and subject to the provisions of paragraphs (b), (c), (d) and (e) of Rule 40."

It is a general rule of contract interpretation that a contract must be read as a whole and to fully grasp the meaning of Rules 29 and 30 it is the Board's opinion they must be read together; thus the Board disagrees with the assertion made by Carrier that Rule 30 has no application until after the provisions of Rule 29 are considered and clerks are actually assigned. Better that Rule 29 be first fully followed, and a careful evaluation be made that fitness and ability are sufficient, so that from all available information a reasonable man could objectively judge the probability that au applicant could or could not perform an assignment adequately. That is the test. Various means can be used in meeting the test.

Thus the Board is in accord with the judgment in Third Division Award 17192, when it said:

"We have consistently held that the determination of 'fitness and ability' is a managerial prerogative of Carrier which will be sustained unless the action was capricious or

"arbitrary. Awards 5802 (Carter), 12994 (Hall) and numerous others."

But in dealing with an employe's destiny, as before stated, a rule of reason must prevail, and capriciousness or arbitrariness is forbidden.

The Board is also in accord with Award 17192 that:

"We have further held that Carrier may use examinations or tests as determinative of fitness and ability. Awards 12461 (Dorsey), 15493 (Zumas) and 15626 (McGovern). Again, we impose the circumscription that the test must not be arbitrarily applied."

There was no objective evidence in the record that Claimant failed to have sufficient fitness or ability to fill a job which Claimant asserted and believed she could fill and for which she cited previous work experience as the basis for that belief. The action of the Carrier from the record was arbitrary as there is no evidence to support the action which placed the junior employe in the job.

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 Employes involved in this dispute are respectively Carrier and Employes 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 involvedherein; and

The Agreement was violated.

A W A R D

That the Carrier be required to allow Claimant the difference in earnings between what she actually earned from November 14, 1973 until Rules 29 and 30 are complied with and what she would have earned in Position No. Z4099, Car Order Clerk, during such period.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 17th day of June 1977.