NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21773
THIRD DMSION Docket Number CL-21366

Robert M. O'Brien, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7924) that:

1. Carrier violated Rules 3, 4, 7, 18 and related rules of the Clerks' Agreement when it arbitrarily and capriciously refused to assign Mrs. Helen M. Nickles to the position of Assistant Data Processing Coordinator No. 28, in lieu of a junior employe, in the Office of Manager Car Accounting, St. Louis, Missouri (Carrier's file 205-4896)

2. Carrier shall now be required to compensate Mrs. Helen M. Nickles for the difference in rate of pay, amount $2.51 per day, beginning Wednesday, January 16, 1974, and continuing for each subsequent work day thereafter, Monday through Friday, until the violation is corrected by assigning Mrs. Nickles to the aforementioned position.

OPINION OF BOARD: On January 8, 1974, Carrier issued bulletin No. CA-1 advertising position of Assistant Data Processing Coordinator No. 28. This was a newly established position. Claimant, who at that time was regularly assigned to position of General Clerk, Job. No. 22, in Carrier's General Accounting Office, St. Louis, Missouri, submitted a bid for this position. She has an established seniority date of January 6, 1943. However, Carrier issued Assignment Notice CA-l dated January 14, 1974 assigning a junior employee to the position. 'Petitioner filed the instant claim asserting that when the Carrier failed to award the position in question to Claimant, admittedly the senior applicant; they thereby violated Rules 3, 4, 7 and 18 of the applicable Agreement between the parties.

The Petitioner has submitted extensive arguments in support of their position that Carrier violated the parties' Agreement when they refused to award Claimant the position of Assistant Data Processing Coordinator. This Board has carefully considered all the arguments proffered by the Petitioner. However, it is our considered opinion that the claim lacks contractual support and must be denied as a result.

Petitioner initially asserts that Rule 18(k) was violated when Claimant was not accorded an investigation at which investigation she could proffer evidence to support her contention that she was qualified for the position in question. Rule 18(k) provides, in clear and unambiguous language, that any employee who considers himself unjustly treated shall have the right to an investigation, provided that written request is made to his/her immediate supervisor within seven (7) days of the cause for complaint. The facts evidence, that on January 14, 1974, Carrier issued Assignment Notice CA-1 assigning employee J. Shearer to the position of Assistant Data Processing Coordinator. This, of course, gave rise to the Claimant's complaint, and as mandated by Rule 18(k), she was required to request an investigation within seven days thereof, that is, by January 21, 1974. However, she failed to submit her request until January 23, 1974 obviously beyond the prescribed seven-day period. Accordingly, her request for an investigation, we find, was not timely filed as required by Rule 18(k).

The Petitioner further asserts that Rule 7 was violated when Claimant was not allowed to demonstrate her fitness and ability for the position by being given the opportunity to work said position. However, Rule 7 does not require the Carrier to give Claimant an opportunity to work the position in order to qualify thereon. Rule 7(b) provides that employees who have been awarded bulletined positions will be allowed 30 calendar days in which to qualify. However, Rule 7(d) specifically provides that the provisions of this rule do not apply when employees are denied bulletined positions. Nothing could be clearer. When employees are not awarded bulletined positions, Carrier is not required to allow them 30 days in which-to qualify. Award Nos. 20787 and 20788 of this Division clearly support this application of Rule 7. And insofar as Award Nos. 20787 and 20788 conflict with the holdings of Award Nos.. 20561, 20658 et. al., relied on by Petitioner, this Board considers the former Awards patently more persuasive.

It is axiomatic that Rule 4 requires that a senior applicant is entitled to a bulletined position provided that he/she has sufficient fitness and ability for the position. We agree with Petitioner that if the senior applicant-can demonstrate that he/she possesses sufficient fitness and ability-for a position, then Carrier is required, by virtue of Rule 4, to award the position to the senior applicant. However, it has been well established in this industry that whether an employee possesses sufficient fitness and ability is a matter for the Carrier to determine, and such determination once made will be upheld by this Board unless it is shown that Carrier has acted in an arbitrary, capricious or discriminatory manner. Once the Carrier determined that Claimant lacked sufficient fitness and ability for the position of Assistant Data Processing Coordinator, the burden shifted to the Petitioner to produce evidence of probative value that

Claimant was indeed qualified for the position. It is our considered opinion that Petitioner has failed to sustain that burden imposed upon them.

Based on Claimant's prior training and experience, Carrier determined that she lacked sufficient fitness and ability for the position she bid on. Nonetheless, she was given the opportunity to take a test. Claimant scored 37½% on the test. However, Carrier considered 75% a passing score. There is no evidence in the record that the test was unfairly constituted or administered in an unreasonable manner. And the test appeared to be related to the duties of the position in question. This Board can discern no proscription in the Agreement to the Carrier administering such a test. Moreover, the results of the test merely corroborated Carrier's previous determination that Claimant lacked sufficient fitness and ability to satisfactorily work the position in question.

This Board is not persuaded that the Petitioner has rebutted Carrier's determination relative to Claimant's lack of sufficient fitness and ability by the introduction of evidence of probative value. Accordingly, Carrier's decision must stand and the claim must be denied as a result.

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 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 31st day of October 1977.