

NATIONAL **RAILROAD** ADJUSTMENT BOARD

THIRD DIVISION

Award **Number 22029**
Docket Number CL-21957

Don Hamilton, Referee

(Brotherhood of Railway, Airline and
(St-hip Clerks, Freight Handlers,
(Express and Station **Employees**

PARTIES TO DISPUTE: (
(The Baltimore **and** Ohio Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
GL-8319, that:

(1) The Carrier violated the Agreement between the parties when **on** August 21, 1975, it assigned the position of Agent, Mt. Vernon, Ohio, to a junior employee, Mr. H. **J.** Gilbert, thereby excluding senior employee Mr. **L.** E. Shroyer (hereinafter referred to as Claimant) **who** submitted a bid for the position in accordance with said Agreement, and

(2) The Carrier shall be required to assign Claimant Shroyer to the position of Agent, Mt. Vernon, Ohio, as of August 21, 1975 and compensate him the difference in the rate of pay between the positions worked and the position of Agent, Mt. Vernon for August 21, 1975 and continuing for each and all work days subsequent thereto until he is so assigned.

OPINION OF BOARD: By bulletin dated August 12, 1975, the position of Agent at Mt. Vernon, Ohio, was advertised for bid. Claimant, with a seniority date of August 12, 1950 made application for the vacant position, but Carrier awarded it to Mr. H. J. Gilbert who had a **seniority** date of September 8, 1951. Petitioner contends in this case that **claimant** possessed sufficient fitness and ability for the position and based on his greater seniority should have been awarded the position and given a trial thereon as provided by **Rules** 30 and 32 of the Agreement.

Carrier on the other hand argues that claimant did not possess the necessary fitness and ability, that he admitted to not being qualified for the position and that the **assignment** of the junior **employee**, who was fully qualified for the position, was proper in the circumstances of this case.

Rule 30 reads:

"Rule 30 - Promotion, Assignments and Displacements.

"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:' The word 'sufficient' is intended to more clearly establish the right of the senior employee to bid in a new position or vacancy, or exercise displacement rights, where two or more employees have adequate fitness and ability."

Rule 32 reads:

"Rule 32 - Failure to Qualify and Disqualification.

"(a) Employees, after being awarded bulletined positions or permitted to exercise 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 exercise displacement rights.

"(b) Employees disqualified from positions after having held **same** for more than thirty (30) working days may exercise displacement rights in accordance with Rule 38.

"(c) Removal from a position account failure to qualify within thirty (30) working days under paragraph (a), or removal **account** disqualification after thirty (30) working days under paragraph (b), shall be accomplished by written notice to the employee and hearing **and** investigation shall be held, if requested, within five (5) days from date of removal **and** written decision shall be rendered within **ten** (10) days from date of hearing. The employee or representative, dissatisfied with the decision shall have the right to appeal **within** sixty (60) days in accordance with the procedure outlined in Rule 47.

"(d) **Employees** will be given full cooperation of supervisors and employees in their efforts to qualify for positions.

"(e) An employee who fails to qualify, or is disqualified from a temporary vacancy may **immediately** return to his former position."

We do **not** read **Rule** 30 as a strict seniority rule. Rather it is limited by the application of fitness **and** ability.

Neither do we interpret Rule 32 as argued by petitioner. By its very language this Rule applies only "after being awarded bulletined positions or permitted to exercise displacement rights." Such is *not the case* here. Reliance upon this rule by petitioner is therefore misplaced.

It is well established by the Awards of this Board that Carrier has the prerogative to determine fitness and ability, **and**, when such a determination has been made, this Board will not disturb it unless it appears that the Carrier was arbitrary or capricious in its determination. See Award No. 21328 and those cited therein. When, as here, Carrier determines that the claimant lacks sufficient fitness and ability, the burden is then upon petitioner to establish Carrier's **'error** by substantive evidence.

From our examination of the record in this case, petitioner has failed to meet this burden. There is **no** evidence that refutes claimant's **own** statements relative to his lack of qualifications. There is *no* showing that *Carrier's actions* were arbitrary, capricious, biased or in any way defective. Therefore, Carrier's determination must stand 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;

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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. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 28th day of April 19'78.

