

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23063  
Docket Number CL-22948

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
{ Freight Handlers, Express and Station Employees  
(St. Louis-San Francisco Railway Company

STATEMENT OF CLAIM: Claim Of the System Committee of the Brotherhood  
(GL-8818) that :

1. Carrier violated the agreement between the parties, especially Rules 3, 7, 8 and 21 when it failed and refused to use extra list employee E. L. Langston on a vacancy in the Engineering Department on each date of August 21, 22 and 23, 1978.

2. Account violation of Rules 3, 7, 8 and 21 of the current effective agreement, extra Clerk E. L. Langston shall now be allowed the difference she received for each date of August 21, 22 and 23, 1978, and the rate of the vacancy to which her seniority entitled her. The amounts are \$8.59 for August 21, \$5.40 for August 22 and \$8.59 for August 23, 1978.

OPINION OF BOA!!: At the time of this dispute, Claimant, E. L. Langston, was assigned to the Clerk's Extra List in Carrier's General Office Building in Springfield, Missouri. This Extra Board List is maintained to fill vacancies of regular assigned employees due to vacations, illnesses, etc. On August 21 - 23, 1978, a vacancy existed in the Assistant Chief Clerk position located in the Engineering Department of the General Office Building. Carrier filled this vacancy with an extra list employee junior to Claimant.

The Organization claim that Carrier's action in using a junior employee to protect the vacancy violated the Agreement. The Organization's argument is primarily based on Rule 7 which states:

"PROMOTION BASIS

Rule 7. Employees covered by these rules shall be in line for promotion. Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, seniority shall not apply to positions listed in Rule 1, Exceptions (a), (b), (c) and (e).

NOTE: The word "sufficient" is intended **to more clearly establish** the right of the **senior employe where two or more employes** have adequate fitness and ability."

**Carrier**, on the other hand, argues that it did not violate the Agreement. As a **preliminary matter**, **Carrier asserts that the claim should be dismissed** since **Claimant** did not exhaust her **contractual** remedy under Rule 32 of the **Clerk's Agreement**. In **Carrier's** view, since neither **Claimant** or the Organization **asked** for an "Unfair Hearing" the claim should be dismissed.

As to the merits, **Carrier** contends that **Claimant** lacked the requisite fitness **and** ability to perform the work of the Assistant Chief Clerk position. It insists that **Claimant's** record during the days she had worked the position in the past demonstrates that she could not satisfactorily perform the duties of the position.

Rule 32 states:

**"UNJUST TREATMENT**

Rule 32. An **employe** who considers **himself** otherwise unjustly treated shall have the same **right of hearing** and appeal as provided above if written request is **made** to his **immediate** superior within fifteen days of the cause for complaint."

A reading of this Rule convinces us that **Carrier's** argument that the Organization's failure to request such a hearing requires dismissing **the charge**, is without merit. **This** is not the meaning **contemplated** by the parties when they agreed to Rule 32. While we do agree that a Rule 32 hearing may well be of assistance in developing the facts of whether an **employe** has been unjustly treated, we must reject any **contention** that resort to **such** a hearing is a condition **precedent** to application to this Board. That is, the failure to seek a Rule 32 hearing **cannot** be construed as a failure to exhaust the **internal procedure** barring resort to this Board. For us to so find would require us to rewrite Rule 49, The Grievance Procedure. **This**, of course, we **are** neither inclined or **empowered** to do.

The failure of a claimant to avail himself of the opportunity provided by Rule 32 may, in proper cases, make it impossible for the claimant to establish the facts necessary to show that he had the requisite fitness and ability. However, such an evidentiary deficiency cannot be viewed as a jurisdictional defect requiring this Board to dismiss a claim.

Thus, the real issue is whether Carrier's failure to assign Claimant to the vacancy violated Rule 7. That is, did Claimant possess the requisite fitness and ability to perform the assignment when it was awarded.

Carrier argued both on the property and in its submissions to this Board that Claimant was not able to perform the job duties. It insisted that Claimant demonstrated her deficiencies during the twenty days she covered the position. Specifically, Carrier maintained that Claimant did the payroll and distribution reports incorrectly and was not able to take the necessary dictation. These deficiencies had to be con-ected when the incumbent returned.

This Board had repeatedly and consistently held that Carrier's determination as to an employe's fitness and ability for a position under a Seniority rule such as Rule 7 will not be overturned unless the Organization establishes that Carrier's judgment was arbitrary, capricious or unreasonable. See Awards 22892, 21328, 20878, 20631, 17612, and 17489. Here, there is absolutely no evidence that Carrier acted in an arbitrary, capricious or unreasonable fashion. On the contrary, Carrier's determination was based on an observation of Claimant during the time she occupied the position. There is no basis for overturning its assessment. As such, we will dismiss the claim in its entirety.

**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;

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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 14th day of November 1980.

