

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24268
Docket Number CL-24225

Martin F. **Scheinman**, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Missouri-Kansas-Texas Railroad Company

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood (GL-9469)
that:

(1) Carrier **violated** Clerks' Agreement **DP-451**, including but not limited to Rules 6 and 16, when on January 17, **1980**, it arbitrarily refused to assign Clerk Mary Lou French as senior applicant to the advertised vacancy on Steno Clerk position, Sales and Service Department, Houston, Texas.

(2) Carrier shall now be required to assign Claimant to the Position of Steno-Clerk, Sales and Service Department, Houston, Texas, that was advertised **in** vacancy bulletin No. 60, Seniority District No. 7, dated December 27, 1979.

OPINION OF BOARD: This claim arises from Carrier's failure to assign Claimant, M. L. French, **to the** position of Steno Clerk at Carrier's Houston, Texas Sales and Service Office in January **1980**. **On December 27, 1979**, Carrier issued vacancy bulletin **No. 60** wherein it advertised the position of Steno Clerk. Opposite the General Description of Duties, Carrier listed:

"Shorthand **100-120 WPM**, typing **75-80 WPM**, filing, handling correspondence, compiling reports and other assigned duties."

Two **employees** bid for the position - Claimant and Clerk P. A. Fehlker. Fehlker took a typing and shorthand test on January **14, 1980**. Claimant, account of illness, was not able to take the test until January 17, **1980**. Both applicants failed the test.

On January 16, **1980**, **Carrier** awarded the position to Fehlker, effective January 17, **1980**.

On January 18, 1980, Claimant requested the reasons why she was denied the position. **On January 25, 1980**, Carrier **informed** Claimant that her typing and shorthand speeds were below the minimums set forth in Carrier's bulletin. Thus, Carrier had concluded that **Claimant** did not have the sufficient fitness and ability to fill the Steno Clerk position.

As a result of Carrier's actions, the Organization filed this claim. It alleged that Carrier's failure to award the Steno Clerk **position** to Claimant violated the Agreement, particularly Rules 6, 16 and **34**. Those Rules, in relevant part, provide:

"RULE 6 - PROMOTION, ASSIGNMENTS AND DISPLACEMENTS

Employees covered by these rules shall be in line for **promotion**. Promotion, assignments and displacements will be based upon seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail. The appointing officer shall be the judge of fitness and ability, subject to appeal as provided in Rule 34."

"RULE 16 - TIME IN WHICH TO QUALIFY

(a) **Employees** awarded bulletined positions or exercising displacements rights till be allowed sixty (60) working days in which to qualify and failing, shall retain all their seniority rights, may not displace any regularly assigned employee, except in the position from which the employee was advanced even though such position may then be held by a senior employee."

"RULE 34 - UNJUST TREATMENT

An employee who considers himself unjustly treated **otherwise** than covered by these rules, shall have the same right of investigation, appeal **and** representation as **provided** in Rule 27, 28, **29**, 30 and 31, if written request which sets forth the **employee's** complaint is made to his **immediate** superior **within** sixty (60) days of cause of **complaint**."

The Organization contends that since neither Claimant nor Fehlker passed the qualifying test, their ability and fitness for the position were equal. Therefore, the Organization **insists** that as between these **two** applicants seniority should prevail and Claimant should be awarded the position. It notes that at a hearing on March 14, **1980**, Carrier asserted that Fehlker received the position because she was "more qualified" than Claimant. However, the Organization maintains that nothing in the Agreement permits Carrier to award a position to a **"more** qualified" candidate. According to the Organization, Rule 6 clearly provides that where fitness and ability are sufficient, the senior applicant must be awarded the job.

The Organization argues that where the fitness and ability of all applicants **are** insufficient then Carrier should also award the position to the senior applicant, if it fills it at all. Otherwise, in the Organization's view, Carrier could simply set unreasonably high standards for any new position and then fill it with a junior applicant, in violation of the **time** honored principle of seniority.

In addition, the Organization argues that **since neither applicant** met the standards set forth in Carrier's Bulletin No. 60, the senior applicant - Claimant - should have been given the position and allowed sixty days to improve her speed and accuracy. **In** the Organization's view, this is the purpose of Rule 16(a) which provides for a sixty day trial **period** during which **employees** will be given the opportunity to qualify for the new positions.

Finally, the Organization contends that Claimant was **unjustly** treated when she was denied the Steno Clerk position. The **Organization** points out that Fehlker was awarded the job on January **16, 1980** before Claimant even **took** the qualifying exam. **The** Organization views this as indicating that Carrier intended to give Fehlker the position from the very beginning, thereby denying Claimant a fair opportunity to demonstrate her qualifications for the job. In addition, the Organization notes that H. M. Harris, Carrier's Sales Manager, failed to correct numerous errors made by Fehlker during her examination. If Harris had spotted these errors, he would have had to conclude that the fitness and ability of both applicants were, in fact, equal and that Claimant, as the **senior** applicant, should have been awarded the job.

For these reasons, the Organization asks that the claim be sustained. It seeks the assignment of Claimant to the position of Steno Clerk as advertised in Bulletin No. 60, dated December 27, **1979**.

Carrier, **on** the other hand, contends that it **was** under no obligation to assign **Claimant** to the Steno Clerk position. It argues that under Rule 6, seniority governs only when fitness and ability are "sufficient". Since Claimant failed the exam, her fitness was not sufficient. Thus, Carrier concludes it did not have to award the position to Claimant under Rule 6.

In addition, Carrier insists that the sixty day trial period in Rule **16(a)** is given only to successful bidders for vacancies. **Since** Claimant was denied the Steno-Clerk position, Rule 16(a) simply does not apply to her.

Finally, Carrier maintains that it treated Claimant fairly in this instance. It allowed her to take the exam even though she was ill when it was first scheduled. It gave her **time** to practice on the typewriter to be used. It allowed her to change chairs when she complained that the first one was **un-**comfortable.

Thus, in Carrier's view, it was neither arbitrary nor capricious when it denied her **the** position of Steno Clerk. Accordingly, it asks that the **claim** be denied.

Central to this dispute is the requirement of Rule 6 that seniority shall prevail where "ability and fitness (are) sufficient". This language is clear **and unambiguous**. Its meaning is manifest. It requires **that** sufficient ability and fitness **are** prerequisites to be ascertained before seniority can prevail. As our Board concluded in Award No. **20916** (quoting Award No. **16480**):

"This Board has been petitioned to interpret and apply rules identical or similar to Rule 6 **in** a great **number** of disputes. In essence we have held in such cases that (1) the current possession of fitness and ability is an **indispensible request** that must be met before seniority rights become dominant."
(Emphasis supplied)

Here, Claimant clearly did not have the sufficient fitness and ability, as evidenced by her poor score on the typing and shorthand test. Thus, she simply may not invoke the seniority provisions of Rule 6.

While **Claimant** is not entitled, to the Steno-Clerk position under the clear **language** of Rule 6, we are constrained to **comment** on **Carrier's** sharp practice of denying a **senior** bidder a position where bidders do not possess sufficient fitness and **ability**. The intent of Rule 6 is to protect Carrier from senior unqualified applicants where junior qualified applicants exist. **Here**, however, both applicants were unqualified. Thus, while **Claimant** did not have sufficient ability so as to exercise her seniority rights, Carrier engaged **in** a sharp practice when it chose the junior applicant who like Claimant, was also unqualified. Surely, this is not the preferred procedure.

Nevertheless, this Board is restricted to interpreting the clear language of Rule 6. That language is specific and unambiguous. Under it Claimant may not invoke its seniority provision since she did not possess the sufficient fitness and ability required for the position.

In addition, Claimant is not entitled to a sixty day trial period as such is contemplated by Rule 16(a). That rule applies only to "**employees** (who are) awarded bulletined **positions**", and not to unsuccessful applicants for them. We have previously concluded that Rules **similar** to Rule 16(a) do not guarantee applicants a trial period to **improve** their skills so as to meet the **minimum** qualifications for a bulletined position. Rather, it is the Claimant's ability at the **time** he or she seeks the position that governs. See Award Nos. 21119, 18651.

Additionally, we conclude that Carrier did not treat Claimant unjustly in this case. **Her** exam was rescheduled to take into account her illness. The record reveals that Claimant was given an opportunity to practice on the type-writer and to change her seat before beginning the test. Even if the lighting conditions were not perfect, there is nothing in the record to suggest that Carrier acted **in** an arbitrary or capricious manner towards the Claimant. Accordingly, Carrier's actions did not violate the Agreement in this instance and the claim is 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: Acting Executive Secretary
National Railroad Adjustment Board

By  _____
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 23rd day of March 1983.