

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 25246

Docket Number CL-25238

Marty E. **Zusman**, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station **Employees**

PARTIES TO DISPUTE: (

(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (**GL-9780**) that:

1) Carrier violated the Clerks' Rules Agreement at **Bensenville**, Illinois, when it failed and/or refused to award and assign Employee C. P. **Castillo** Extra Gang Timekeeper Position No. 73580 on March 31, 1982, and instead awarded such position to a junior employee.

2) Carrier further violated the Clerks' Rules Agreement when it failed and/or refused to respond to Employee Castillo within the prescribed time limits of Rule **22(b)**.

3) Carrier shall now be required to compensate Employee C. P. Castillo all time lost, including overtime payments, for the period April 1, 1982 to and including August 1, 1982.

OPINION OF BOARD: This is a fitness and ability dispute in which Claimant Castillo alleges unjust treatment in Carrier award to **junior employee** of a bulletined position. On March 17, 1982, Carrier advertised position of Extra **Gang** Timekeeper which Claimant bid on the following day. On March 31, 1982, Carrier assigned said Position to a junior employee (seniority date of December 12, 1979) and Claimant (**with** seniority date of April 9, 1973) requested **an** explanation of his failure to be **awarded Position**. In the record as handled on property this dispute eventuated in an unjust treatment hearing on May 4, 1982. Following the hearing, on May 21, 1982, Superintendent J. W. Stuckey wrote to Claimant indicating a decision of declination. The Organization maintained by letter of May 25, 1982 that Carrier's failure to respond within ten (**10**) days after completion of the investigation violated Rule 22 and therefore by default the Claimant should receive said Position and compensation. Further appeal resulted in an agreement between the parties on July 23, 1982 to place Claimant in Position without prejudice and allow the Claim to proceed. Subsequently claim was filed on August 23, 1982, declined by letter of September 20, 1982 and failing to reach agreement is now properly before the National Railroad Adjustment Board.

Central to the issue in part 1 of the Claim before this Board is whether the Carrier appropriately carried out the Agreement provisions of Rules 7 and 8 when it found the Claimant lacked the qualifications for the Position of Extra Gang Timekeeper. Those Rules in pertinent part state the following:

"RULE 7 - PROMOTION

Employees covered by these rules shall be in line for promotion. Promotion 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 employe to the new position or vacancy where two or more **employees** have adequate fitness and ability.'

"RULE 8 - TIME IN WHICH TO QUALIFY

(a) When an employe bids for and is assigned to a permanent vacancy or new position he will be allowed thirty (30) working days in which to qualify and will be given full cooperation of department **heads** and others in his efforts to do so. However, this will not prohibit **an** employe being removed prior to thirty (30) working days when manifestly incompetent." [All of Rule part (a) is not referenced here.]

In the mind of this Board the interpretation of Rule 7 is to give preference to seniority as qualified by NOTE (*supra*), and the phrase "**fitness and ability being sufficient**". Consistent with Rule 8, the Claimant must possess sufficient fitness and ability to make reasonable Carrier expectation that the employe could qualify within thirty (30) days in properly carrying out the bulletined position. The final decision on qualifications clearly rests with the Carrier and as such, the Carrier exercised its authority within the **Agreement**, subject to the appeal process. Carrier determined that Claimant lacked *sufficient" fitness and ability to qualify and it is therefore the burden of the Organization to substantiate that Carrier lacked Agreement support for its actions.

In the instant case, during the investigative hearing of May 4, 1982 wherein the fitness of the Claimant was considered, Carrier clearly indicated that past experience of the junior employe was a major factor in its decision. Mr. Barrett (**who** was involved in the selection of the junior employe) indicated the junior employe had the fitness and ability since "she held the position last year--well the previous year, same capacity'. Also, he responded in the affirmative to the question "**Do** you feel that past experience as a timekeeper, an **extra** gang timekeeper better qualifies a person for an extra **gang** timekeeper position than one that does other types of timekeeping". In addition, Carrier indicated that Claimant had little if any knowledge of the forms used for the Extra Gang including the Work Report, Progress Report, Report of Equipment used and **numerous** other forms. Carrier decision was that the Claimant lacked adequate fitness and ability to perform the bulletined position.

A review of the transcript of the hearing shows that Claimant indicated that he had "five years experience in Time Revising and payroll". Claimant was certainly not new to working with forms as he stated that he "worked with various forms of timekeeping, T & E and clerical, some having job numbers, position numbers, some cost accounting involved, injury reports. personal reports". In fact, he had not worked the numerous forms required of the bulletined position of Extra Gang Timekeeper, but the record as developed on property does not provide any tests or other probative evidence to substantiate that he was lacking in the ability to do so.

The record before this Board shows that the Claimant may not have been the best qualified, but past Awards have ruled that the burden of proof lies with the Organization to demonstrate that Claimant was "adequate" since the Rule does not mandate that the position go to the best qualified (Third Division Award 23047). In the instant case, Claimant had nearly five years experience in forms of timekeeping. In addition, it was never established that Claimant's past training and experience were clearly superfluous to the bulletined position. The Board finds that Claimant has gone well beyond mere assertions of ability and provided a record of years of experience which were never shown to be inadequate to suggest, that if given the opportunity, he lacked the sufficient fitness and ability to qualify within the time established by Rule 8 for the position of Extra Gang Timekeeper.

The Board takes serious note that the Carrier is in the best position to "determine the 'fitness and ability' of an employee for a particular position" (Third Division Award 20724), but further notes that the record as developed on property does not substantiate Carrier's arguments in this case. This Board believes the Carrier acted arbitrarily when it denied Claimant this position and did not allow him to attempt to qualify. This position is consistent with numerous Awards of the Third Division of the National Railroad Adjustment Board (21579, 21802, 23047). As such, the Organization has met its burden of proof in the instant case and part 1 of the Claim is sustained. With respect to part 2 of the Claim, we have carefully read the controlling Agreement, reviewed the record and find that Carrier violated Rule 22(b) when it failed to respond within ten (10) days and therefore we will also sustain that part of the Claim. As for part 3 of the Claim, it is therefore also sustained.

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 violated.

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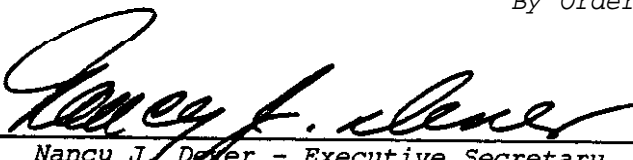
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Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1985.

