

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25917  
Docket Number CL-24097

Herbert Fishgold, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employes  
(  
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood  
(GL-9448) that:

(a) Carrier violated the rules of the current Clerks' Agreement at Los Angeles, California, commencing March 20, 1980 when it wrongfully disqualified Mrs. D. Stinnett from Position No. 6178, Data Entry Clerk, and

(b) Claimant Stinnett shall now be returned to Position No. 6178, Data Entry Clerk, and compensated eight (8) hours' pay at the pro rata rate of \$69.8146 for each work day Claimant is wrongfully withheld from Position 6178, in addition to any other compensation Claimant may have received, including interest payable at the prevailing rate, as a result of such violation of Agreement rules."

OPINION OF BOARD: Claimant was assigned to Carrier's Data Entry Position No. 6178 on March 18, 1980. She had previously worked in similar positions for Carrier. Claimant reported to the position on March 19, 1980. On that date, the Carrier twice administered to Claimant a speed test on the data entry device which she would use in the position. Satisfactory time to complete the test was three minutes. On Claimant's first attempt, she completed the test in six minutes. On her second try, she finished in four minutes. Following her second attempt and despite her improvement, the Carrier refused to allow her to take the test again and, forthwith, disqualified her from the position.

The Organization filed a claim, which the parties were unable to resolve through the steps of the grievance process, and it was brought before this Board.

The applicable Agreement provides, in relevant part, that:

"RULE 8 - PROMOTIONS  
ASSIGNMENTS, DISPLACEMENTS

"\* \* \* ... [A]ssignments ... under these rules shall be based on seniority, fitness and ability; fitness and ability being equal, seniority shall prevail."

**"RULE 9 - QUALIFYING**

"9A. Employees with sufficient fitness and ability will, when bidding on bulletined positions ... be allowed 45 working days in which to qualify ...."

"9B. When it is decided, following informal hearing with employee involved, that the employee is not qualified for the position to which assigned, he may be removed therefrom before the expiration of 45 working days. \* \* \* The right of appeal from management's decision is recognized."

"9C. Cooperation will be given employees by all concerned in their efforts to qualify. \* \* \*"

"Note: The word 'sufficient' is intended to more clearly establish the prior rights of two or more qualified employees having adequate fitness and ability for the position or vacancy sought in the exercise of seniority."

The Organization asserts that Carrier's assignment of Claimant to the position constitutes its recognition that Claimant possessed sufficient skill and ability to perform the duties of the position. The Organization argues that, by its terms, the Agreement gives employees assigned to a position 45 working days within which to qualify and requires that the Carrier give such employees its full cooperation. Since neither the qualifying time nor the cooperation was forthcoming, asserts the Organization, the Claim should be sustained.

The Carrier argues that Claimant's inability to complete its standard, uniformly administered test warranted its conclusion that she lacked the necessary qualifications for the position and that she was properly disqualified under Rule 9B of the Agreement without waiting.

Possession of adequate fitness and ability to perform a job is, self-evidently, a standard different from being immediately qualified to perform it. The Board has previously defined fitness and ability in Third Division Award 5348:

"Fitness and ability ... does not mean that the applicant is immediately qualified to step in and assume the duties of the position without guidance or assistance. It means that the applicant must have the training, experience, and character to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time."

By assigning Claimant to the position under the procedures established by Rule 8 of the Agreement, the Carrier deemed Claimant to have sufficient fitness and ability. The Carrier makes no assertion of misrepresentation or excusable error in the assignment of Claimant which would justify it treating Claimant as not properly assigned.

Once Carrier assigned Claimant to the position, Rule 9 required that she be given 45 working days to qualify for it. It further required the Carrier's cooperation in the qualification process. Rule 9C would give the Carrier the right to shortcut that process, subject to review, if it could show an assignee to be unqualified. However, the Board concludes that the Carrier's burden in such a situation would be to show that there was no reasonable probability that Claimant would be able to perform all the duties of the position within a reasonable time. The Carrier made no such assertion before the Board; nor do the underlying facts suggest that Carrier could sustain such a burden.

Further, although the Board makes no attempt herein to define the extent of cooperation required of the Carrier under Rule 9C of the Agreement, we conclude that the Carrier's conduct described herein, consisting of administration of two tests on the same day, followed by immediate disqualification, did not meet its obligation.

Awards 21119 and others relied on by Carrier as establishing its right to use tests to determine skill and ability are inapposite. Under the procedures of the applicable Agreement, the Carrier's determination of fitness and ability is made prior to its assignment of an employee to a position. Similarly, the awards relied on by the Carrier for the proposition that management properly determines qualifications are distinguished from the instant case because the Agreement here applicable provides for a qualification period, which the Board had concluded the Carrier improperly refused to allow, and for the Carrier's cooperation in the qualification process, which it improperly withheld. Accordingly, the claim must be, and it hereby is, sustained.

With respect to remedy, the Carrier argues that, since the facility in which the position existed closed on June 1, 1981, the claim is moot. The Board disagrees. While the closing of the facility and the apparent abolishment of the position would end any continuing liability for the Carrier's improper disqualification of Claimant, the award to Claimant of compensation in accordance with the claim for the period March 20, 1981, until the position was abolished on or before May 31, 1981, is proper. The Organization's request for interest is, however, denied as inconsistent with Board precedent.

That the Carrier violated the applicable Agreement by failing to make Claimant whole for pay for time lost, less interim earnings, from the date of its wrongful disqualification of her until the position was abolished in connection with the closing of the facility. No interest on the lost pay will be awarded.

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.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.

