NATIONAL RAILROAD ADJUSTMENT BOARD

Form 1 THIRD DIVISION Award No. 29712

Docket No. CL-29664

93-3-91-3-10

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International
(Union
(
(National Railroad Passenger Corporation
((AMTRAK)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10533) that:

(Carrier's File Nos. TCU-TC-3239, TCU-TC-3375, TCU-TC-3376, TCU-TC-3246, TCU-TC-340Z/Organization's File Nos. 393-D9-048, 393-E90-918, 393-E90-914, 393-D9-092, 393-D9-064)

CLAIM NO. 1:

1. Carrier violated and continues to violate Rules #5, #6, #7, and #8 and other related rules of the Agreement, when on April 19, 1989, it issued an Interoffice memo concerning an Aptitude Test, which in actuality changes the qualifications of a TPMS position. The memo forces all present and future employees, attempting to work a TPMS position, to submit to an Aptitude test, in order to remain qualified in the capacity of TPMS Clerk.

2. Carrier shall now, based on their arbitrary and capricious actions, remove the requirements of an Aptitude test, and not reinstate the need for a keystroke test, in connection with the TPMS position.

CLAIM NO. 2:

1. Carrier violated the Agreement specifically Rule 5, 6, 8, 10 and others when it failed or refused to award Claimant, Mr. Kelson McKinney Jr. the position of TPMS Clerk and instead awarded the position to junior employee, Ms. Yvonne Touchtone.

2. Claimant should be awarded and assigned to said position, and he should be compensated as follows:

(a) The rate of pay between TPMS Clerk and any position held subsequently until he is placed on the position of TPMS Clerk.

(b) On any day that position of TPMS Clerk is scheduled to work and Claimant does not work, Claimant should be paid (8) eight hours pro-rata the rate of TPMS Clerk.

(c) On any date which is a rest day of position of TPMS Clerk and Claimant works, Claimant shall be compensated at the overtime rate of pay.

(d) On any date Claimant performs hours outside the hours of the position of TPMS Clerk, Claimant should be compensated the overtime rate of pay of TPMS Clerk.

(e) Claimant should be compensated travel and mileage for every day Claimant works at a location different than Miami.

CLAIM NO. 3:

1. Carrier violated the Agreement specifically Rules 5, 6, 8, 10 and others when it failed or refused to award Claimant, Ms. Lenide Pierre-Antoine the position of TPMS Clerk and instead did not award the position, due to having no successful applicant.

2. Claimant should be awarded and assigned to said position, and she should be compensated as follows:

(a) The rate of pay between TPMS Clerk and any position held subsequently until she is placed on the position of TPMS Clerk.

(b) On any day that position of TPMS Clerk is scheduled to work and Claimant does not work, Claimant should be paid (8) eight hours pro-rata the rate of TPMS Clerk.

(c) On any date which is a rest day of position of TPMS Clerk and Claimant works, Claimant shall be compensated at the overtime rate of pay.

(d) On any date Claimant performs hours outside the hours of the position of TPMS Clerk, Claimant should be compensated the overtime rate of pay of TPMS Clerk.

(e) Claimant should be compensated travel and mileage for every day Claimant works at a location different than Miami.

CLAIM NO. 4:

1. Carrier violated Rule 5, 6, 7, and other related rules of the Agreement, when on August 7, 1989, Carrier notified Claimant Baranko, she had failed the Carrier's unilaterally implemented Aptitude Test, and as a result, could not retest for ninety (90) days. This action leaves Claimant in a status of non-assignment to any position.

2. Carrier shall now compensate Claimant eight (8) hours for each work day lost, commencing August 7, 1989, and continuing until this matter is resolved.

CLAIM NO. 5:

1. Carrier violated Rule #2, #5, #7, #8 and other related rules of the Agreement, when, Carrier unilaterally altered the qualifications of TPMS position, adding the need of an Aptitude test, and as a result, failed to offer Claimant Vincent any vacancies in the category of TPMS.

2. Carrier shall now compensate Claimant, eight (8) hours at the pro-rata rate of TPMS, commencing sixty days back, from February 5, 1990, and continuing, each time a junior employee was worked as a TPMS Clerk, in lieu of Claimant Vincent.

3. Carrier shall now compensate Claimant the difference in wages between a TPMS Clerk, and the position assigned to Claimant, commencing sixty days back from February 5, 1990 and continuing, each time a junior employee was assigned the position of TPMS, and Claimant was assigned to a lower rated position."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The instant Claims allege violation by the Carrier of a number of contractual Rules, as noted, but particularly provisions of Rules 5 and 8 which address fitness and ability to hold a position. The Carrier argues that its new TPMS test measures fitness and ability to hold this position. The Organization argues that the test measures what is tantamount to qualifications for the TPMS job.

Prior to examining the evidence in this case, the Board must put the issue here at bar in its proper context. The distinction between "fitness and ability" and "qualifications" is of considerable importance in this industry. When the Carrier looks to fitness and ability of current employees, it looks to seasoned workers who are major assets and who have the potential to switch to lateral jobs, or who can upgrade to more complex jobs in a reasonably quick time frame. Such employees, in turn, do not have to be qualified to hold a position to which they bid, by seniority, under the protection of their Agreement: they need only to have the reasonable potential to do the job as outlined by Rule 5. Rule

8, gives them 30 days in which to qualify. Employees, in turn, may have an obvious interest in changing jobs, upgrading their skills, and ultimately rising to higher pay grades. Both sides of the equation win when the requirements of Carriers, and needs and aspirations of employees, are mutually fulfilled by employees going (i.e. bidding) from job to job by means of the avenue of fitness and ability. Both the Carrier and the Organization realized this when they negotiated fitness and ability provisions in the Agreement. The provisions provide, among other things, a means by which both the Carrier and employees can deal with change. In this context, the issue before the Board is whether the TPMS test introduced by the Carrier in April 1989 measures fitness and ability, which is the potential to qualify for the position during the time frame outlined in Rule 8, or whether the test measures qualifications which are immediately needed to do the job? There is no dispute here that the Carrier has the right to determine fitness and ability as Rule 5 explicitly and unambiguously states. But the Organization argues, in filing the instant Claims, that the new test did not measure that. Rather, it measured qualifications. If so, according to the sense of the five Claims in this Docket, the test in question is an inappropriate type of test to be administered under the provisions of Rules 5 and 8 of the Agreement.

The Manager of Test Development, who is the psychologist who was assigned to develop the test, calls the test an "aptitude test." This evidently is why the April 19, 1989 Memo calls it a "TPMS Aptitude Test." At face value, the terminology of "aptitude" and "fitness and ability" are fairly synonymous. But is that what this test measures? To answer that the Board must look to evidence provided by the psychologist who was assigned to develop the test, and to the arguments developed by the Carrier in denying the instant Claims dealing with the TPMS test. The test itself was never provided to the Organization. Nor is the test included in the record before the Board. According to an affidavit cited below:

> "All tests are scored by computer in Philadelphia. Test results are only released to the appropriate person in the personnel offices. All test results are maintained in secure, locked files."

In an affidavit signed on June 18, 1990, the Carrier's Manager of Test Development and Computer-Based Training, who is an industrial psychologist, explains how the test was developed. It started when she was asked by the "Passenger Services Department to assess the current requirements for the TPMS Clerk qualification." To do this assessment, this Carrier officer conducted interviews and observations in Chicago, Washington and New York. The purpose of

this was to "...break the TPMS position down into the individual tasks and duties required to do the job." She identified 70 separate tasks, which were then empirically rated along different variables: time spent on them and priority of importance. The psychologist then identified knowledges, skills and abilities (KSAs) needed to perform the tasks. By doing all this the Carrier's psychologist was performing a common job audit, skill assessment procedure. After identifying the KSAs of the TPMS position, a battery of tests were selected from those of a consulting firm and put together as a test. What was this test meant to measure? The Board can only conclude that the resultant test did not measure "aptitude" at all. Rather, it measured all of the major prerequisite skills, or qualifications needed to perform the tasks and functions of the TPMS job. The test did not measure fitness and ability. The test measured qualifications. This conclusion is confirmed by the Carrier's industrial psychologist herself who states the following in her affidavit:

> "This information (which went into developing the test) was used to determine the qualification requirements for the TPMS position...." (Emphasis added)

And again, the affidavit states:

> "For the tests to be effective in identifying qualified candidates, the test questions must be protected from disclosure...." (Emphasis added)

The latter statement of policy by the Carrier also led to considerable controversy between the parties with the Organization complaining that it never had a chance to study the test, and the Carrier stating that confidentiality was needed. But these are tangential, evidentiary matters to this case. The test itself clearly measured qualifications. It did not measure only fitness and ability. In a number of the Claims filed the Organization member filing the Claim appears to believe that the test was an aptitude test because the Carrier continued to call it that and the Organization grapples with the issue of exactly what kind of test is at stake. This happened in Claim No. 2. Therein the Vice General Chairman who filed that Claim at Miami, Florida, argued:

> "Since this is an aptitude test, rather than a test, then there should be no individual that fails the test...yet, Claimant was informed that (he) did not pass the test."

In that Claim the Vice General Chairman also argues that the test, since she thought it was an aptitude test, was "generalized...which

in no way shows an individual's aptitude toward the TPMS position...." In fact, the test measured a variety of quite specific skills needed for the position which were derived from a close empirical analysis of the TPMS position. It was possible to fail the test because the cut-off mark for passing the test had even been empirically derived by the procedures used in developing the test by the psychologist. On this point she states in her affidavit that:

> "These tests were piloted on a group of incumbent TPMS Clerks. Their scores were used to set the cut scores for future applicants."

The conclusion by the Board that the test measured qualifications is corroborated by the arguments offered by the Carrier on the property. For example, in the February 13, 1990 denial of Claim No. 5, the District Manager in Seattle states to the Vice General Chairman at Los Angeles, after quoting Rule 8, that:

> "The TPMS job is a job that require(s) a special skill to successfully complete the duties of the job. It is necessary for employees to perform the job when they are assigned rather than having 30 days to qualify." (Emphasis added)

Such rationale reduces the fitness and ability Rule, as the Organization argues correctly before the Board, to a qualifications Rule. Lastly, the confirmation of the Carrier's misunderstanding of the distinction between fitness and ability, on the one hand, and qualifications, on the other, is found in the Submission by the Carrier to this Board. In citing Award 134 of Public Law Board No. 2296 the Carrier seeks support for the proposition that "...the company's prerogative to use a test to determine qualifications has been settled on the property...." (Emphasis added) This misunderstanding is compounded by arbitral precedent cited by the Carrier which deals with qualifications, and not fitness and ability of employees (Second Division Award 7376; Third Division Awards 15002, 15493; Fourth Division Awards 3960, 4093 inter alia.). Second Division Award 7376 is significant in this respect. Therein the Board concluded:

> "Determination of an employee's qualifications relates to a candidate's present qualifications at the time a vacancy exists and applicants bid or are entitled to consideration for such vacancy." (Emphasis added)

This Award goes on to say that "qualified" does not "...mean ability to qualify after further learning and experience on the job...it means possessing the required knowledge, ability, skill, or experience at the time an applicant bids for (a) job...." See also Fourth Division Award 4093 which likewise misses the mark when it holds that: "(i)t is well established that (the) Carrier has the right and sole discretion to make determinations with respect to qualifications...." Lastly, the Carrier argues that Third Division Award 12461 supports its position when it concludes that "...(a)ptitude tests are now widely used throughout industry." Such precedent assumes that the test at bar in this case is an aptitude test. The Board has concluded otherwise herein.

The Carrier is correct when it argues that it need not consult the Organization when determining fitness and ability. But that is not at issue here since the test in question did not measure only fitness and ability. The Carrier also argues that the position had responsibilities and functions added to it since it was first bulletined. That has no bearing on the ruling here by the Board since that issue addressed only the functions, and concomitant qualifications, associated with the position. The Carrier was in violation of Rules 5 and 8 of the Agreement when it required employees to take the TPMS Aptitude Test after April 19, 1989, when they applied for a TPMS position. The claims are sustained to the extent set forth below.

Claim No. 1 requests what amounts to injunctive relief which this Board has no authority to grant (See Second Division Awards 6160, 6746, 10708, 10954). The Board will only underscore that the instant Award establishes the precedent that the Carrier is in violation of Rules 5 and 8 each time it requires an applicant to a TPMS position to take the TPMS Aptitude Test.

Claim No. 2 deals with Claimant Kelson McKinney Jr. who was not awarded the position of TPMS Clerk at the Miami Commissary on January 17, 1990, because he had not passed the TPMS Aptitude Test. The Carrier awarded the position to a Clerk junior to Mr. McKinney by Bulletin No. 90-03-M. The Claimant shall be paid the difference between the rate of the position he has held, if any, and that of TPMS Clerk from January 17, 1990, until the date of this Award.

Claim No. 3 deals with Bulletin No. 90-08-M issued by the Carrier at Miami, Florida, on February 21, 1990. The Claimant, Ms. Lenide Pierre-Antoine, bid on the position and was told she had not passed the TPMS Aptitude Test. Absent other successful bidders, the position remained unfilled. The Claimant shall be paid the difference between the rate of the position of Crew Assignment/ Stat. Clerk, if any, and that of TPMS Clerk from February 28, 1990, until the date of this Award. Claimant "...was a transfer into the

position of Crew Assignment/Stat. Clerk when (the TPMS position advertised on February 21,1990) went without a successful bidder" according to the Claim. February 28, 1990, is a reasonable date for the Claimant to have begun work in the TPMS position at Miami since it took the Carrier seven days from bulletining the position, to filling it, in Miami, under the facts of Claim No. 2.

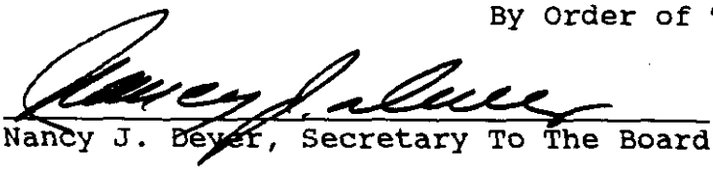
Claim No. 4 deals with Claimant Ramona Baranko who was returned to duty, after an injury, with lifting restrictions in Seattle, Washington. On July 21, 1989, she took the TPMS Aptitude Test after bidding on a bulletin for a TPMS Clerk position. On August 7, 1989, she was advised that she had failed the test. She was told she could retake the test in 90 days, but she remained unassigned since she was not eligible for any other assignment because of her medical restriction. The record shows that the Claimant did take the Aptitude Test again in November 1989, apparently passed it, but elected to remain unassigned. The Board rules that it would not be unreasonable to pay the Claimant, in view of the Agreement violation and the facts of this Claim, the rate she would have received as TPMS Clerk for 90 days after the date of August 7, 1989, minus the rate for any other position, if any, she might have accepted during that time frame.

Claim No. 5 deals with Claimant David Vincent who worked short vacancies as a TPMS Clerk prior to taking the TPMS Aptitude Test and failing it on May 10, 1989. According to the Claim, thereafter the Claimant either "sat idle or was assigned to lower rated positions" while "junior employees were assigned to the position of TPMS." The record does not state when the Claimant was advised that he had not passed the test, although after the date of May 10, 1989, he was no "...longer allowed to fill the position of TPMS Clerk." The Claimant shall be paid the difference between the rate of the positions to which he was assigned, and that of TPMS Clerk, from the date of May 10, 1989, until the date of this Award.

A W A R D

Claims sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever, Secretary To The Board

Dated at Chicago, Illinois, this 16th day of July 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 29712, DOCKET CL-29664
(Referee Suntrup)

We dissent to the finding that the TPMS test was a test of "qualification" and not an "aptitude" test. The decision is neither based on the facts in the record, nor on the arguments presented.

The Organization in its Submission before the Board argued that the "Carrier has made no showing that the test is in any way related to the job." The Majority ruled against this argument by finding that the "test measures what is tantamount to qualifications for the TPMS job" and "it measured qualifications."

The Majority erred by relying on matter not found in the record. The Award makes a semantical distinction between "fitness and ability" and "qualification" for the industry. No such information was properly before the Board. The parties were not given the opportunity to address this matter and to bring any such discussion into context with the Agreement. It should be noted that neither party argued that the test measured qualifications. Neither party suggested that passing the test meant one was qualified. On the contrary,, the Organization argued the test was not related to the job. The Carrier presented evidence, which included expert testimony, that the test measured abilities.

There are significant other incongruities in the Award and the record before the Board. We conclude that the Award is based on arguments neither raised by the parties, nor handled in accordance

with this Board's requirements. It exceeds the scope of the Board's jurisdiction.

M. C. Lesnik

M. W. Fingerhut

R. L. Hicks

P. V. Varga

J. E. Yost