

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30953
Docket No. CL-31183
95-3-93-3-237

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications
(International Union
(
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood (GL-10949) that:

- a) Carrier violated Rules 4, 9, 10 and 18, January 12, 1987 Memorandum Agreement and others of the Clerks' General Agreement when it failed and/or refused to properly award Position CE-7 [to Mr. D. G. Mauney].
- b) Carrier now compensate claimant [Mauney] 8 hours pay at the monthly rate of \$2825.61 for each day beginning January 28, 1987 until claim is settled in its entirety.
- c) Carrier remove Ms. Jeanette B. Basham from Position CE-7, located on District Roster No. 6 and award Position CE-7 to claimant.
- d) Carrier now compensate claimant [Mauney] all moving expenses incurred to move him from Richmond, Virginia to Huntington, West Virginia in accordance with Article 6 of the Clerks' General Agreement."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 waived right of appearance at hearing thereon.

This case involves a reasonably straightforward application of the fitness, ability and qualification principles which have been reviewed on countless occasions by Section 3 Boards of Adjustment. It is stipulated by the parties that the position in question is a partially excepted position. This means that Position CE-7 is not subject to the provisions of Rule 4 and Rule 18(b) of the Agreement. These two Rules are applicable to the promotion, assignment, displacement and force reduction provisions of the Agreement. This further means, as the Organization acknowledged in its ex-parte Submission, that "... there is no dispute that Carrier has the right to appoint applicants to a 'B' position such as Position CE-7 without regard to seniority."

The beginnings of this dispute are found in a reorganization/consolidation Agreement dated January 12, 1987, which, among other things, provided for the transfer of Position CE-7 from Richmond, Virginia, in Seniority District No. 5 to Huntington, West Virginia, in Seniority District No. 6. There is no challenge here to the overall provisions of the transfer/coordination/reorganization Agreement per se. In the implementation of the Agreement, the incumbent of Position CE-7 at Richmond elected not to transfer to Huntington. Therefore, a bulletin notice was posted to the employees of Seniority District No. 5 advertising the CE-7 position as it was to exist at Huntington in Seniority District No. 6. Claimant, who was assigned to Position C-152 at Richmond, submitted the only application which was received from the employees in Seniority District No. 5 for Position CE-7. After reviewing Claimant's application and experience background and after conducting three separate personal interviews with Claimant, Carrier determined that he did not possess the necessary fitness and ability for assignment to Position CE-7. It thereupon denied his request for the position. Position CE-7 was subsequently assigned to a clerical employee from Seniority District No. 6 who had less seniority than did the Claimant.

The pertinent application provisions of the January 12, 1987, Implementing Agreement provides as follows:

"MEMORANDUM AGREEMENT EFFECTIVE JANUARY 12, 1987

1. In view of the Carrier's desire to transfer, coordinate and otherwise reorganize certain clerical and related functions currently performed in the Rail Audit Department on Baltimore General Office District Roster No. 3 and in the Engineering Department in Richmond, Virginia on District No. 5 Roster, with similar and related work performed in the Engineering Department on West Virginia Division No. 6, on Western Division District Roster No. 7, on Ohio Division District Roster No. 8, on Northern Division (West) District No. 9 and on Northern Division (East) District Roster No. 10, it is agreed:

2. That the Carrier will establish Regional Accounting offices effective January 12, 1987, in each of the remaining Division Headquarters operations. These offices will be established to administer and control all disbursement on-line accounting and input of data. In connection with this matter, certain clerical and related work currently performed in the Rail Audit Department on Baltimore General Office District Roster No. 3, at Cincinnati, Ohio, Cumberland, Maryland and Baltimore, Maryland, and in the Engineering Department in Richmond, Virginia on District No. 5 Roster will be transferred and consolidated with similar and related work currently performed in the Engineering Department on West Virginia Division District No. 6, Western Division District Roster No. 7, on Ohio Division District Roster No. 8, on Northern Division (West) District No. 9 and on Northern Division (East) District Roster No. 10.

* * * * *

5. That the following positions will be allocated, retained, reclassified and/or re-rated as indicated:

Present Location	Present Title/ Position No.	Current Rate (Excl. COLA)	New Location	New Title/ Pos. No.	New Rate (Excl. COLA)
Richmond, Virginia	Asst. Chief Clerk CE-7	\$2,643.94	Huntington, W. VA	Chief Admin. Clerk CE-7 (Engr.)	\$2,802.73
Huntington, W. VA	Asst. Chief Clerk (Engr.) CE-29	\$2,643.94	Huntington, W. VA	Admin. Accountant CE-29	\$2,900.00
Huntington, W. VA	Accountant C-769	\$ 113.51	Huntington, W. VA	Engr. Accountant C-769	\$2,496.95
Huntington, W. VA	Accountant C-770	\$ 113.51	Huntington, W. VA	Engr. Accountant C-770	\$2,496.95

If the incumbent of Position CE-29, Asst. Chief Clerk at Huntington, elects to take Position CE-29, Administrative Accountant at Huntington, then Position C-769, Engineering Accountant at Huntington will be allocated to an employee regularly assigned to a position in the Richmond Terminal on District 5 Roster and Position C-770, Engineering Accountant will be allocated to an employee regularly assigned to a position in Huntington on District 6 Roster.

If, however, the incumbent of Position CE-29 elects not to take Position CE-29, then CE-29 will be allocated to employees regularly assigned to a position in Richmond Terminal on District 5 Roster. Positions C-769 and C-770 will then be allocated to an employee regularly assigned to a position in Huntington on District 6 Seniority Roster."

The Implementing Agreement was augmented by a series of side letters. Of concern in this dispute is Side Letter No. 6 which provides as follows:

"In order to clarify the intent of Section 5 of this agreement this confirms our understanding that the following positions at Huntington, West Virginia are to be awarded by allocating one partially excepted and one rank and file position to employees regularly assigned to a position in the Richmond Terminal on District No. 5 Roster. The remaining two positions are then to be allocated to employees regularly assigned to a position in Huntington on District No. 6 Roster.

Positions to be Allocated and Awarded

Position Title	No.	Monthly Rate (Ex. COLA)
Chief Admin. Clerk (Engr.)	CE-7	\$2,802.73
Admin. Accountant	CE-29	\$2,900.00
Engineering Accountant	C-769	\$2,496.95
Engineering Accountant	C-770	\$2,496.95"

Also of interest in our determinations here is Side Letter No. 8 which provides as follows:

"This confirms our understanding and agreement during the negotiations relative to this agreement that any successful applicant for the positions allocated in Section 5 of this Memorandum Agreement to Richmond employees will be entitled to the moving expense provisions in Article VI of the Employee Protective Agreement. Additionally, it is understood that those employees transferring to Huntington pursuant to this Memorandum Agreement will have their seniority transferred from Virginia Division District No. 5 Roster and dovetailed onto West Virginia Division District No. 6 Roster."

From the record of this case, it is clear that Positions CE-7 and C-769 were initially to be made available to the employees of Richmond Seniority District No. 5. Positions CE-29 and C-770 were initially to be made available to employees of Huntington Seniority District No. 6. The language of the Implementing Agreement and its attendant side letters clearly provides that the positions and work from Seniority District No. 5 were to be "transferred and consolidated with similar and related work currently performed in . . . District No. 6" and that any Seniority District No. 5 employee who was a successful applicant for a position allocated to Seniority District No. 5 would "have their seniority transferred from Virginia Division District No. 5 Roster and dovetailed onto West Virginia Division District No. 6 Roster." As it turned out in this case, there were no employees from Seniority District No. 5 who became successful applicants for either of the two positions which had been initially allocated to Seniority District No. 5 and both positions were eventually filled by employees from Seniority District No. 6.

Because Claimant, the only applicant from Seniority District No. 5 for Position CE-7, was not placed on that position, the Organization initiated a claim on his behalf alleging that Carrier was in violation of Rules 4, 9, 10, 18 and the January 12, 1987 Memorandum Agreement. The initial claim letter stated as follows:

"We primarily rely on Rule 4 and January 12, 1987 Memorandum Agreement in support of this claim."

In an accompanying letter, the Organization requested that Claimant be given a test to demonstrate his fitness and ability for the position in accordance with the provisions of Rule 4(b) of the Agreement. There is nothing to be found in the on-property record of the case to support or otherwise amplify the Organization's position relative to the applicability of Rules 9, 10 or 18 in this case.

However, before the Board, the Organization advanced a multiplicity of additional Rule citations, arguments and contentions which were not previously advanced during the on-property handling of the dispute. They acknowledged that Rule 4 was not applicable to Position CE-7 and that Carrier had the right to appoint an employee to the position ". . . without regard to seniority." It then advanced the premise that inasmuch as Claimant was the only applicant from Seniority District No. 5 for the position, "Carrier was bound by the terms of the Memorandum Agreement to appoint him to the position . . . because the position was allocated to Seniority District No. 5." It further argued that Claimant was entitled to testing or to be otherwise permitted to demonstrate his fitness and ability during a training or qualifying period in accordance with the provisions of Rules 9 and 10. These Rules read, in pertinent parts, as follows:

"RULE 9 - PERIOD ALLOWED IN WHICH TO QUALIFY

(a) Employees entitled to bulletined positions will be allowed thirty (30) working days in which to qualify, except when it is plainly seen within less than thirty (30) working days that they cannot qualify they may be removed from the position by mutual agreement between the Management and the Clerks' Local Committee

* * *

(f) Employees will be given full cooperation of department heads and others in their efforts to qualify.

* * *

(h) If doubt exists as to the fitness and ability of an applicant to qualify for a vacancy, the proper Officer will confer with the Local Chairman in an effort to dispose of the matter if possible."

"RULE 10 - TRAINING

(a) 1. Any employee entitled to or displacing on a bulletined position who, in the judgment of his immediate supervisor, is not qualified for the position may be required to train thereon before being permitted to take over the assignment. Such training will be for a reasonable length of time, but not to exceed eight (8) weeks or other established training periods. The employees required to train will be allowed compensation at the rate of the position on which seniority has been exercised during the training period. Training will be limited to regular working hours of the position on which training is required."

The Organization contended that Claimant had previously been used as a temporary replacement on Position CE-7 at Richmond without complaint or criticism by Carrier. This, it said, showed that Claimant possessed fitness and ability for Position CE-7. The Organization further insisted that an endorsement which had been submitted by a former incumbent of Position CE-7 supported its position in this regard. It argued that in time he could have become qualified for the position.

Carrier's position in this case was succinct and two-fold. It argued both on the property and before the Board that, in its judgment following three separate interviews by Management representatives, it was determined that "he would not be able to qualify on the position in a reasonable amount of time." It further argued that inasmuch as Position CE-7 was a partially excepted position, Carrier had the unilateral right to award it without regard to seniority.

The determination of fitness, ability and qualifications for any position is within the sole discretion of Management. This is a well established principle in railroad labor relations. The Awards of Section 3, Railway Labor Act Boards of Adjustment in this regard are legion. In this case, the selection situation is simplified by the fact Carrier possessed, by agreement of the parties, the sole right of selection for appointment to the position without regard to seniority. The initial allocation of the position to employees from Seniority District No. 5 as set forth in the Implementing/Coordination Agreement did not, either by specific language or by inference, remove or otherwise impede Carrier's right to award the position without regard to seniority. This right is found in the Memorandum Agreement which was effective July 12, 1976, and which was not amended or abrogated by the Coordination Agreement of January 12, 1987. Boards of Adjustment have properly held that a Rule permitting the filling of a position without regard to seniority is a special rule, and that in applying other rules or agreements the Board must give effect to the obvious intentions of the parties in adopting a process which give the Carrier control over the filling of such positions. The fact that Claimant was the only applicant from Seniority District No. 5 who sought the excepted position does not adversely impact on this principle.

As for the fitness and ability determination process which was used in this instance, the Board does not find in the on-property record of the case any probative evidence to support a conclusion that Carrier acted in an arbitrary or capricious manner in reaching its determination that Claimant would not be able to qualify for the position within a reasonable amount of time. Even though seniority, per se, is not a controlling factor in this situation, this Board has recognized and repeatedly upheld the premise that "the current possession of fitness and ability is an indispensable requisite that must be met before seniority rights become dominant." (Third Division Award 16480)

Even if the Board were to accept either the statement from the former incumbent of Position CE-7 or the unidentified statement signed by Donald G. Hartley and datelined "Nashville, TN, 1/21/87" at face value, the Board would still be unable to substitute its judgment for that of the Carrier in its determination that Claimant did not possess, at the time of his application and interviews, sufficient fitness and ability to qualify for Position CE-7 as it existed at Huntington, West Virginia. The fact that Claimant may have performed well on prior assignments, that he was conscientious and capable in carrying out tasks assigned to him, that he was a self-starter and had on occasion filled in on Position CE-7 at Richmond does not provide assurance of present fitness and ability for the newly coordinated position at Huntington. The Board is reminded here of the opinion expressed by the Board in Third Division Award 5966, to wit:

"In this present instance the Claimant appears to have a good record in the positions that he has held in the past and in the one he now holds. He also has given the Carrier many years of faithful service. For these things he is certainly to be commended. However, these things alone do not necessarily qualify him for the position in question."

The Board acknowledges that reasonable minds could well differ concerning a review of Claimant's experience when making an initial determination of his fitness and ability for the position in question. However, it is not our role to make such initial determinations of fitness and ability. This role belongs to the Carrier and the Board is not permitted to substitute its judgment for that of the Carrier unless it is proven by competent probative evidence that its initial determination was arbitrary or capricious. Regardless of what determination we might have made had it been ours to make in the first instance, we are unable to find a showing in this record which proves that Carrier's actions was so egregious that it must be set aside under our limited authority. Therefore, the claim is denied.

AWARD

Claim denied.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of June 1995.