

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31111
Docket No. CL-31532
95-3-93-3-665

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Transportation Communications
(International Union
PARTIES TO DISPUTE: (
(Providence and Worcester Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the
Organization (GL-10992) that:

I. Claim of the System Committee of the TCU (PW009) that:

I, Gregory R. Naughton, do hereby desire to file the following claim for your consideration and decision. The nature of this claim is that the Providence and Worcester Railroad filed to employ a union and a more senior person on a clerical position.

On or about February 3, 1992, the Providence and Worcester Railroad employed a Ms. Carolyn Treakle, who is a temporary employe from the Kelly Temporary Services. My bid was denied on January 24, 1992. Ms. Treakle has been employed for almost 3 months on a union position. This is in direct violation of our collective bargaining agreement. The Providence and Worcester Railroad has been given a reasonable amount of time (30 days) in which to find a qualified person. Since the Providence and Worcester continues to employ a non-union person in this position, I am filing this grievance. Since I am the senior most furloughed person, I should have been awarded this position. Since this awarding was not done according to our contract, I am filing this grievance with you, my last supervisor, and do hereby request a full day's pay for every day she worked and continues to work in this 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 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.

Claimant holds seniority of August 3, 1980, in District I and seniority of February 28, 1983, in District II. When this claim arose, he was furloughed from each District. On January 21, 1992, Claimant bid on an advertised General Clerk Position at the Worcester, Massachusetts, Engine House. His bid was rejected on the grounds that he had been disqualified from this position on May 31, 1989. Claimant had previously appealed that disqualification, and his claim was ultimately denied in Third Division Award 29698.

Claimant filed a claim on April 29, 1992 appealing his rejection for the position at issue in this case. That claim was denied, partially on the basis that Claimant had not, according to Carrier, responded to a January 24, 1992 letter (not made part of this record), in which Carrier had stated it did not consider Claimant to be qualified for the General Clerk position. Carrier further argued that Claimant's failure to respond to that letter constituted agreement with its content. The claim was subsequently appealed to the highest Carrier officer authorized to handle such matters. Following conference on the property, it remained unresolved.

It is the position of the Organization that Carrier violated the agreement with respect to the role of seniority in filling vacancies. Under the agreement rules, Carrier is given a grace period of 30 days to post a vacancy. In the case at hand Carrier exceeded the applicable time frame. Although Claimant had been disqualified nearly three years earlier, the Organization maintains that there is strong indication on the record that he had honed his typing skills--upon which the disqualification rested--and was, therefore, entitled to try again to qualify for the position.

The Carrier maintains that it did not violate the Agreement when it filled the position at issue with an individual other than Claimant. First, the Carrier points out that there is no support in the Agreement for the Organization's position that there is any time limit on how long Carrier has for hiring an employee to fill a position temporarily being worked under contract with an employment agency. Moreover, Carrier insists that it properly denied Claimant's request to fill the Enginehouse Clerk position, since he had not responded to an October 4, 1991 request from Carrier to update information about his job skills. In addition, Claimant failed to respond to the January 24, 1992 letter that Carrier still considered him disqualified, but instead filed the instant claim.

Carrier also notes that the new hires do not have to be fully qualified for a position (Rule 4). However, Rule 7(j) states that a furloughed employee must be qualified to fill a short vacancy or

position. Just being the most senior furloughed employee does not entitle a furloughed employee to fill a vacancy. Accordingly, the instant claim should be denied.

There is, on the record, a direct credibility conflict between what the former Director of Labor Relations says he requested from Claimant regarding updating of his skills file, and Claimant's recollection of the conversation of that date. Even if Claimant did, actually, fail to supply updated information on the date in question, that failure does not necessarily automatically disqualify him from an Enginehouse Clerk position that arose approximately four months later, and nearly three years after his initial disqualification.

Rule 7(j) of the Agreement provides that employees already qualified for a position "shall be used to fill short vacancies and positions pending a permanent assignment." It is uncontroverted on this record that the Kelly Temporary Services employee not only occupied the position at issue for more than 30 days, but it is also uncontroverted that the position was filled permanently by a new full-time employee beginning June 29, 1992. By no stretch of the imagination can such a position be considered short-term or temporary under the provisions of Rule 7(j) of the Agreement. Thus, the applicable Agreement Rule is 7(f):

"7(f) Promotions, assignments and displacements shall be based on seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail. The P&W shall be the sole judge of fitness and ability but shall not act in a capricious, arbitrary or discriminatory manner in the application of this rule."

The crux of the issue in this case, then, is whether Carrier determined that Claimant was disqualified in a manner which might be considered capricious, arbitrary or discriminatory. In light of the amount of time between Claimant's first disqualification and his subsequent bid on the job in question, Carrier's determination that he was still not qualified appears at the least a rush to judgment. In light of Claimant's 15 years of seniority, he was entitled to the opportunity to demonstrate his qualification for the position at issue. This Board is not in a position to determine whether Claimant would, in fact, have been able to qualify for the position, had he been offered the opportunity to do so. There is evidence on the record that after his initial disqualification, he attended a course to improve his typing skills (the source of his disqualification). We are in agreement with Third Division Award 96, which held that Carrier has the responsibility of determining the fitness so long as it acts "in good faith...." Denying a 15 year employee who has evidenced an intent to improve his skills the opportunity to demonstrate that improvement is not acting "in good faith." In light of the foregoing this claim is sustained for the period of time from

February 3 until June 29, 1992, but only for the difference between what Claimant was earning during that period and what he would have earned if he had qualified for the Enginehouse Clerk position.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.