

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32165
Docket No. CL-32638
97-3-95-3-569**

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: (
(Northern Indiana Commuter Transportation District**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization (GL-11182) that:

- 1. Carrier violated the effective agreement when it failed to recognize the seniority, fitness and ability of Ms. Annie Campbell in the assignment of the position of Chief Clerk - Mechanical/Stores on August 8, 1994, and assigned said position to the junior most applicant.**
- 2. Carrier shall now compensate Ms. Campbell for the difference in pay between the above referred to position and that of the position she occupies for August 8, 1994, and for each and every day thereafter until the violation is corrected."**

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 were given due notice of hearing thereon.

During the summer of 1994, the incumbent Chief Clerk of the Mechanical Department announced her intention to retire. The position was posted and bids were received from several employees, including Claimant and a junior employee. The junior employee was selected for the position even though Claimant was senior to her. When Claimant requested an explanation for the District's selection, she received a response from Carrier on August 14, 1994. That response read in pertinent part as follows:

"... [The junior employee] qualified as a person with a disability under the terms of the Americans with Disabilities Act (ADA). Section 102 of the ADA requires an employer to offer a disabled employee reasonable accommodation for their disability. Section 101(9) of the ADA defines reasonable accommodation as including the right of reassignment to a vacant position.

A job evaluation of various clerical positions was performed by a medical professional and the essential functions were balanced against [the junior employee's] abilities. It was determined that [the junior employee] could perform work as a ticket agent or a clerk, including the vacant position within the mechanical department. Since she did not have the seniority required to hold a position as a ticket agent or clerk at any other location, she was assigned to the only available vacant position for which she qualified.

Under Rule 8 of our agreement, the District has the right to determine, irrespective of seniority, the person who shall fill the mechanical department clerical position. More importantly, the District's obligations under the contract are overshadowed by compliance with the ADA in assigning [the junior employee] to the vacant position. . . ."

Rule 8, referred to in the Carrier's correspondence with Claimant, reads as follows:

"RULE 8

Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements 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 employee to bid on a new position or vacancy where two or more employees have adequate fitness and ability.

In filling the following positions, the Carrier may apply the provisions of this rule in reverse order, i.e., fitness and ability and seniority. An employee awarded one of these positions may not be displaced therefrom by a senior employee except upon approval by the Carrier:

* * *

Maintenance of Equipment: Chief Clerk

* * *

It is the position of the Organization that the employee awarded the position in question was not the more fit and able employee, and, thus did not fall under the exemption provided Carrier by Rule 8 (*supra*). Specifically, the Organization asserts that the employee awarded the position had never worked in that position prior to her assignment. Moreover, the Organization maintains that the ADA cannot be used as an excuse to disregard the clear language of the Agreement.

The Carrier maintains that Claimant was not the more fit and able employee. While she had worked as a Steno Clerk, she had not worked the position in question. By contrast, the employee awarded the position had filled in for the prior Chief Clerk Mechanical Stores department on many occasions during the summer of 1994.

Evidence presented on the record indicates that Claimant had worked in the department at issue, but no evidence was presented to indicate that she had performed the duties of Chief Clerk at that time. Moreover, it is undisputed that Claimant had not been assigned to the department since 1990. The employee awarded the position had experience "filling in" for the prior incumbent and had performed those duties satisfactorily. In light of the foregoing, the Board does not find that the Carrier violated

either the letter or spirit of Rule 8 when it appointed an employee other than Claimant to the position in question. Accordingly, the instant claim must be denied.

AWARD

Claim denied.

ORDER

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 13th day of August 1997.