

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35470  
Docket No. CL-35854  
01-3-99-3-787**

The Third Division consisted of the regular members and in addition Referee **Andrée Y. McKissick** when award was rendered.

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Organization (CL-12485) that:**

**The Carrier acted in an arbitrary and capricious manner and in violation of Rules 5 and 8 (a, c) of the Agreement, when on May 7, 1993, it failed to award position PSD081.93 to Ms. Connie Hess, and instead awarded it to a junior person, Ms. C. Williams.**

**The Carrier shall now compensate Ms. Connie Hess for Saturdays and Sundays at the rate of time and one-half. Compensation shall continue until resolved,**

**The Carrier shall now compensate Ms. Hess at 8 hours pro rata rate of pay for Statistical Clerk for Monday through Fridays. Compensation shall continue until resolved.”**

**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.

The Organization alleges that the Carrier violated Rule 5 and Rule 8 of the Agreement, and in pertinent part, reads as follows:

**“RULE 5 – PROMOTIONS. ASSIGNMENTS AND DISPLACEMENTS**

Employees covered by these rules shall be in line for promotion. Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail.

NOTE: The word “sufficient” is intended to more clearly establish the prior right of the senior employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

The company shall be the judge of fitness and ability, but shall not act in a capricious, arbitrary and discriminatory manner in the application of this rule. Alleged violations of this obligation may be appealed in accordance with Rule 25 (Grievances).

**RULE 8 – FAILURE TO QUALIFY**

- (a) Employees awarded bulletined positions or exercising displacement rights will be allowed thirty (30) calendar days in which to qualify and failing to qualify may exercise seniority under Rule 10. The thirty (30) calendar days may be extended by agreement between the appropriate organization representative and the proper corporation official.
- (b) Employees will be given full cooperation of the department heads and others in their effort to qualify.”

The Organization contends that the Carrier acted in an arbitrary and capricious manner when it failed to award the position of Statistical Clerk position to Claimant Hess. It further argues, the Carrier violated Rules 5 and 8 (a, c) of the Agreement, by awarding said position to a junior person, C. Williams. In addition, the Organization points out that a similar dispute was settled by the Carrier when another claimant scored only 59 words per minute (wpm), instead of the required 60 wpm, on December 8, 1993. (Union Exhibit II at

pages 3 – 6) Lastly, the Organization concludes that the Carrier's bulletin, advertising said position, dated July 3, 1996, was posted requiring proficiency to be only 80% of the 50 wpm. (Union Exhibit II at page 11) Thus, the Organization points out that the Claimant reached this standard of proficiency and should be awarded said position.

The Carrier counters the Organization's assertions by contending that the Carrier has the exclusive right to establish qualifications for any position. The Carrier argues that the Claimant failed on three separate occasions to score 50 wpm or better on the typing exam. In sum, it is the position of the Carrier, that a close score of 48 wpm is not 50 wpm, the passing score. Based on the above, the Carrier maintains that their assessment to deny the claim was fair and proper.

The Board finds that this claim must be sustained for the following reasons. First, evidence reveals the posted bulletin, advertising said position, clearly states that the typing proficiency "must be at least 80% of 50 wpm requirement." Based on this requirement, the Claimant would qualify at 48 wpm. Second, the record reflects that certification of her typing proficiency was submitted on March 6, 1993. Supervisor Chapman confirms the fact that she has been a good worker for more than seven months. Third, evidence of disparate treatment, as noted by the earlier settlement, is dispositive that the Carrier acted in an arbitrary and capricious manner when it denied this claim.

**AWARD**

Claim sustained.

**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 22nd day of May, 2001.