

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38049
Docket No. CL-38666
07-3-05-3-91**

The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.

PARTIES TO DISPUTE: (
(Transportation Communications International Union
(CSX Transportation, Inc. (former Seaboard Coast
(Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-13076) that:

- (a) The Carrier violated the CSXT/N Rules Agreement effective June 1, 1999, particularly Rule 4, 5 and 9, when on August 14, 2003, Carrier improperly awarded position 3PKZ-106, Cincy Car Shop, to junior employee D. C. Reed and rejected bids from Claimants, who are all senior to employee Reed.**
- (b) Claimants Spurlock, Hensley and Kordes now be allowed the higher rate between position 3PKZ-106 and their current position, if any, and in addition three hours pay at the pro rata rate beginning August 14, 2003 and to continue each and every work day until Carrier properly awards the position to the senior employee.**
- (c) This claim is being presented in accordance with Rule 45 and should be dismissed.”**

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.

A. Background

On or about January 3, 2003, the Carrier provided written notice to the General Chairman of its intent to establish a Prerequisite Skills Testing policy. This policy, effective April 1, 2003, advised that the Carrier would not be providing prerequisite skill testing for any particular position once the bulletin for that position had closed. Accordingly, consistent with the Carrier's policy, applicants would be required to pass necessary and required proficiency tests prior to the close of a job bulletin and be responsible for ensuring that their test results were noted in their work history. By letter dated February 27, 2003, the Organization protested the Carrier's announced action and by letter dated October 30, 2003, advised the Carrier that it "[d]oes not concur or agree with your prerequisite skill test as we previously advised you in our February 27, 2003 letter that was in response to your January 3, 2003 letter."

On August 6, 2003, the Carrier issued Bulletin No. 142-B advertising Shop Clerk Position No. 3PKZ-106 at the Queens Gate Car Shop in Cincinnati, Ohio, for bid to interested Clerks. The position announcement included a prerequisite typing requirement of 35 correct words per minute ("cwpm"). The bids closed at 4:00 P.M. on Wednesday, August 20, 2003. Following the close of the bid, the Carrier awarded the position to D. C. Reed who it determined was the senior qualified bidder in that that she had a proven typing ability of 46.9 cwpm. It is undisputed that D. C. Reed was junior to all three Claimants. The Carrier maintained that it did not accept the Claimants' bids because their work histories did not indicate "that they had either taken a typing test and passed with a score of 35 cwpm or that they previously held positions requiring typing."

B. Position of the Parties

Carrier's Position: It is the Carrier's position that the Organization failed to demonstrate a violation of any portion of Rules 4, 5 or 9 of the Agreement. Moreover, the Carrier asserts that an employee's entitlement to an advertised position based on seniority is preceded by a determination of sufficient fitness and ability. Because the bulletin made it clear that the proven ability to type a minimum of 35 cwpm was a prerequisite to being awarded the position, the Carrier maintains that it properly awarded the position to D. C. Reed who it determined was the most senior qualified bidder. The Carrier also contends that arbitral precedent supports its fundamental right to establish job requirements, to utilize tests related to job functions that measure relevant skills, and to determine adequate fitness and ability. Accordingly, the Carrier maintains that it properly exercised these inherent management rights in the instant matter.

Organization's Position: It is the Organization's position that while it does not contest the right of the Carrier to administer reasonable skills tests to employees who bid on positions, the Carrier is not at liberty to unilaterally change an established past practice without seeking concurrence from the Organization. Moreover, the Organization asserts that Rule 9 - Time in Which to Qualify, requires the Carrier to afford the senior Claimant 30 days in which to qualify for the bulletined position. Because the Carrier disqualified all senior Claimants, it has, in effect, imposed a requirement that does not exist by Agreement, practice or Rule, in violation of Rule 9. Finally, the Organization argues that even if the Carrier possessed the right to unilaterally change this established practice, it was obligated to advise its employees of the change. The Organization asserts that the "simple letter of notice to the General Chairman, especially when contested, does not constitute such advice."

DISCUSSION

As an initial note, it is well settled by controlling authority that the Board has no power to impose principles of equity or justice. Our responsibility and obligation is to interpret and apply the provisions of the Agreement between the parties as written. Nor are we clothed with any authority to rewrite the Agreement in favor of either side to the dispute, for to do so would deprive them of the bargain struck.

A. Meaning, Application and Interplay of Rules 4 and 9

Rule 9 provides, in relevant part, that:

“(a)(1) An employee awarded a bulletined position will be allowed thirty (30) days in which to qualify and failing to qualify shall within seven (7) calendar days return to his former position or forfeit all seniority.”

It is significant that Rule 9 is prefaced with the understanding that an employee has been awarded a bulletined position. Therefore, before Rule 9 comes into play, an employee must first have been awarded a bulletined position. Rule 4 - Qualifications for Bulletined Positions or Vacancies reads, in relevant part, as follows:

“(a) Assignment and displacement rights to advertised positions or vacancies under these rules, 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 right of senior employee to the position or vacancy where two (2) or more employees have adequate fitness and ability.

(b) Where the words ‘qualified employee’ are used in the Agreement, they shall mean that an employee has sufficient fitness and ability as those terms are defined in paragraph (a) above.

(c) Employees required to take a written intelligence test as a prerequisite for employment shall not be required to take this particular test a second time, including persons transferring from the scope of one agreement to another.”

It is clear that Rule 4 represents a sufficient fitness and ability clause which provides that the senior employee will be given preference where he/she possesses sufficient fitness and ability to perform the essential functions of the job. Given the fact that this claim is non-disciplinary in nature, and keeping in mind that it is the Carrier who designed the mechanism with which to evaluate the candidates, analysis of the facts of this case shall be pursuant to a shifting burden approach. Using this procedure, it is the Organization's burden in the first instance to demonstrate that the Claimants were qualified to perform the Shop Clerk position at issue. If the Organization meets its burden, the Carrier must then establish, through substantial evidence, that it was not arbitrary, capricious, or discriminatory in its selection of the junior employee, here Clerk D. C. Reed. In making this analysis, note is taken of the well-established fact that the Board is not at liberty to substitute its judgment for the judgment of the Carrier in matters in which the Rules leave the judgment to the Carrier.

As an initial matter, there has been no contention by the Organization that the Carrier's policy was not reasonably related to the job at issue, or amounted to a subterfuge designed to impermissibly bypass the Carrier's obligation to select the most senior qualified candidate. Accordingly, there is nothing in the record that demonstrates that the Carrier's prerequisite skills testing policy amounted to an arbitrary, capricious, or discriminatory act. In addition, in the instant matter, other than assertions that the Claimants may have been qualified, the Board finds nothing in the record that establishes that the Claimants demonstrated, prior to the close of the bid process, that they were able to correctly type 35 words per minute as required by the Carrier's Prerequisite Skills Testing policy. Accordingly, the Organization has been unable to meet its burden in demonstrating that any of the senior Claimants was qualified. Hence, none of the Claimants were qualified bidders.

Next, in addressing the Organization's assertion that Rule 9 required the Carrier to permit the most senior Claimant 30 days to qualify for the Shop Clerk position, the Board respectfully disagrees. In this regard, well established arbitration precedent provides that in the absence of clear and concise language, the line between practices that are binding and those that are not are generally drawn on the basis of whether the matter involves methods of operation or direction of the work force, or whether it involves a "benefit" of peculiar personal value to

employees. In this regard, Arbitrators are most hesitant to permit unwritten past practice or methods of doing things to restrict the exercise of legitimate functions of management. However, where, as here, Management seeks to depart from such a practices, it is obligated to provide timely and written notice to the Organization in order to appraise it of such intended action. The Board notes that such notice was provided to the Organization on January 3, 2003, when the Carrier notified the Organization in writing of its intent to establish its Prerequisite Skills Testing policy. In addition, it is also noteworthy that the position advertisement included the prerequisite typing requirement of 35 correct words per minute, thereby apprising each candidate of the skills requirement associated with the Shop Clerk position.

For the reasons noted and discussed above, the Board concludes that the Organization has not provided a basis for overturning the Carrier's implementation of its Prerequisite Skills Testing policy or its determination that the Claimants lacked the fitness and ability to perform the Shop Clerk position at issue. Accordingly, the claim is 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 25th day of January 2007.