

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, that the carrier violated the Clerks' Agreement:

(1) When on June 26, 1947 it assigned Mrs. Sylvia Vandaveer to new position created by Bulletin No. 45 in the office of Manager of Telephone and Telegraph Department, and failed and refused to consider the proper application made by Irene Smith, the senior applicant, and

(2) That Irene Smith be assigned to the position described in Bulletin No. 45 and compensated for all monetary loss suffered as result of this and subsequent action.

EMPLOYEES' STATEMENT OF FACTS: In April, 1947, Miss Irene Smith, the claimant in this case, indicated her desire to work in the PBX office by bidding for position of Relief Exchange Operator covered by advertisement bulletin No. 43 and protested the assigning of that position April 28, 1947, to a junior employe, but at no time between April 29, and June 23, 1947, was Miss Smith requested or permitted to work in the Exchange to familiarize herself with the duties of such position as were junior employes.

Under date of June 23, 1947, the carrier on standard form Bulletin No. 45 (copy attached as Employes' Exhibit "A") advertised new position of Office Girl created in the U. D. Telegraph Office, hours 4:00 P. M. to Midnight, rate \$6.04 per day, rest day Thursday, involving two (2) hours relief work daily on the PBX board.

Miss Smith, the senior applicant for new position covered by advertisement bulletin No. 45 (Employes' Exhibit "A") supplied copy of her application to the Local Chairman as required by the agreement, and copy is attached as Employes' Exhibit "B". Employe, Mrs. Sylvia Vandaveer, who is junior to Miss Smith, did not supply copy of her application to the Local Chairman as required by the agreement, but was awarded the position on standard form assignment bulletin issued June 26, 1947, copy attached as Employee's Exhibit "C".

Clerk Smith protested the assignment of junior employe Vandaveer to the Manager of Telephone and Telegraph Department, and receiving no reply turned the matter over to the Local Chairman who wrote the Manager of the Telephone and Telegraph Department under date of July 9, 1947, copy of that letter being attached as Employee's Exhibit "D".

a three week full-time training period before passing judgment upon qualifications of applicants for positions.

The claimant made one attempt to qualify for switchboard work. She made very little progress as testified by her fellow workers at the hearing of July 22, 1947 and, of her own volition, gave up trying to qualify. Nothing more was heard from her regarding switchboard work until she made application for a position requiring that knowledge almost three years later. Both the Local and General Chairmen were advised several months ago that if she will pursue the same course required of all other employees in qualifying for switchboard work and qualify, applications after that time from her for positions having that requirement will be recognized to the extent of her seniority. **However, to the present time she has not availed herself of that opportunity.** Our actions in this case were in accord with the provisions of the effective agreement as interpreted by the many Awards we have cited and the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim requires a review of the action of the Carrier in denying the Claimant, Irene Smith, an assignment to the position of office girl in the Carrier's telephone exchange at St. Louis, Missouri, bulletined on June 23, 1947, and assigned on June 26, 1947, to a junior employe.

The basic claim is grounded upon Rule 7 of the current Clerks' Agreement which states:

"Employes 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 being sufficient, seniority shall prevail.

NOTE: The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two or more employes have adequate fitness and ability."

Other rules involved are:

Rule 9, which reads:

"Employes awarded bulletined positions or those exercising displacement rights will be allowed a reasonable time, not more than thirty (30) working days, in which to qualify and, failing, shall retain all their seniority rights, may bid on any bulletined position, but may not displace any regularly assigned employe.

Employes will be given full cooperation of department heads and others in their efforts to qualify.

When it is definitely determined, through hearing if desired, that the employe cannot qualify, he may be removed before expiration of thirty (30) working days. An employe who fails to qualify on a temporary vacancy may immediately return to his regular position."

Rule 11, applicable portions of which state:

"All new positions and vacancies (except those of less than thirty (30) days duration) will be promptly bulletined in agreed upon places accessible to all employes affected, * * *. Employes desiring such positions will within five (5) days (unless a shorter period of time has been agreed upon) of date of posting of the bulletin, file their applications with the official whose name is signed to the bulletin, sending copy to the Local Chairman. A bulletin of assignment, designating the successful applicant, shall immediately be posted for a period of five (5) days at all places where the

position was bulletined. Copies of all bulletins and assignments will be mailed to the General Chairman."

The Carrier recognizes Claimant's seniority but bases its refusal to assign her the position in question, concededly requiring telephone operators' work including switchboard operation, upon the premise she had not only failed and refused to qualify herself for such position but also that she was in fact not qualified to assume its duties.

Preliminary to consideration of the factual situation presented by the record it will be well to briefly restate and reaffirm certain fundamental principles heretofore announced by this Division, each and all of which are pertinent and applicable in the determination of that phase of the instant claim pertaining to the rights of the parties under Rule 7 and, in particular, portions thereof stating in substance that seniority shall prevail if fitness and ability are sufficient, and are likewise necessary and required to the end this Division will not fall into the error of substituting its judgment for that of Carrier officials and thereby usurp powers properly belonging to them. Summarizing, those principles can be stated thus: In its consideration of claims involving fitness and ability for a position, this Division of the National Railroad Adjustment Board will not substitute its judgment for that of the Carrier or disturb its action, (1) if it appears such action was taken in good faith and with due regard for both the letter and the spirit of the Agreement; (2) except in those instances where such action is so fraught with bias and prejudice or with manifest intent to circumvent the Agreement as to lead to the conclusion its conduct with respect thereto was arbitrary, capricious and unreasonable; (3) if it appears there was just and reasonable basis for such action; and (4) if it appears from the record the evidence supporting such action was substantial even though there was other evidence of such character reasonable minds might differ as to the construction to be placed upon all the evidence when considered in its entirety.

Many decisions of this Division support the foregoing principles. For just a few of the more recent ones, see Awards Nos. 2350, 2692, 3057, 3151, 3273 and 3573.

Another principle, almost equally well recognized, is, that once fitness and ability of an employe have been found by the Carrier to be wanting, the burden of overcoming that decision by substantial and competent proof rests upon the employe (Awards 2031, 2491, 3273).

Each case where the issue of fitness and ability is in question is necessarily dependent for decision upon its own particular facts. No two cases are the same. Hence, from a factual standpoint such cases are of no value as precedents and nothing is to be gained by a detailed statement of their facts so long as the record has been read and analyzed.

In this case the record clearly reveals that both before and after assigning the position in question to the junior employe the Carrier gave consideration to Claimant's fitness and ability to hold it and other positions of similar character. Conceding for purposes most favorable to Claimant, there was evidence at both hearings on which the minds of reasonable men might differ, we are convinced, after carefully reviewing the record, the conclusion reached by the Carrier on each occasion to the effect the Claimant was not qualified to hold a position in the telephone exchange was supported by substantial competent testimony. We are not inclined to labor the evidence but were we required to do so would probably be forced to conclude that she was not only unqualified but failed and refused to attempt to become qualified. We find nothing in the record evidencing that the Carrier's conclusions as to Claimant's status or its refusal to assign her the position based upon her lack of ability to perform its duties were the result of fraud, arbitrariness, capriciousness, or unreasonableness. Of a certainty Claimant failed to establish any such conduct by proof as she was required to do in order to permit this Division to hold the Carrier's action with respect to her should be disturbed.

The Claimant insists Rule 9 was violated for failure to give her time to qualify. Assuming, as she contends, but without deciding the question whether she was exercising displacement rights and therefore within the scope of its terms, we do not think the rule is applicable where, prior to the event on which her present claim is based, the Carrier had refused to assign her to a position requiring work somewhat similar in nature and character on the specific ground her services in the telephone exchange did not indicate she had the necessary fitness and ability, referred to in Rule 7, to satisfactorily perform the duties of a telephone operator and when, as here, action in refusing to assign her to the position was taken with full knowledge of such facts, and based upon them.

Finally, Claimant insists Rule 11 of the Agreement was violated by failure of the present incumbent of the position, not the Carrier, to send a copy of her bid to her Organization Chairman. We think we would be justified in refusing to consider this contention on the ground the basis of Claim 1 is failure and refusal to assign Claimant, not the erroneous assignment of the present holder of the position but we are not inclined to do so.

Neither are we inclined to discuss, since it is not here, the merits of the controversial issue discussed in Awards 902, 903, and 1136 of this Division, on which Claimant relies as supporting the last stated contention. It suffices to say that an examination of those Awards reveals an entirely different question was involved and that what is there held does not lend support to her position.

We think under the facts of this case there are sound reasons for rejecting Claimant's position Rule 11 was violated in the respect mentioned and that therefore she is entitled to the compensation of the position. Those reasons will be stated as briefly as possible and are, (1) if the Agreement was violated in the particular mentioned, it was the employe's violation, not the Carrier's. (2) The clause of the rule in question is directory, not mandatory, so far as the Carrier is concerned and no penalty is imposed for its violation. (3) Under the holding of this Award, the question raised is moot as to Claimant and need not be determined.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That in the situation disclosed by the record the Carrier violated no rule of the Agreement and its action in refusing to assign Claimant the position in question on the ground she was not qualified to fill it will not be disturbed.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 9th day of August, 1948.