Award No. 8181
Docket No. CL-7880

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Howard A. Johnson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY (Gulf District)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that—

(a) The Carrier violated the Clerks' Agreement when it did not permit or refused Wanda L. O'Dell, senior bidder, the right to occupy the position of File Clerk No. 1251, Seniority District No. 7, office of Freight Claim Agent, Palestine, Texas.

(b) Claim that the Carrier be required to assign Wanda L. O'Dell the position of File Clerk No. 1251 and pay all monetary losses sustained.

EMPLOYES' STATEMENT OF FACTS: Bulletin No. 2, May 5, 1955, Seniority District No. 7, was issued advertising vacancy on File Clerk position No. 1251, office of Freight Claim Agent, Palestine, Texas.

Mr. Carl Kirk, Freight Claim Agent, advised the General Chairman no bids were received and asked if it was his desire to issue an Organization bulletin.

The General Chairman issued Organization Bulletin No. 18, dated May 12, 1955.

The Assistant General Chairmen on May 17, 1955, advised the Freight Claim Agent that applications from two employes in Seniority District No. 15 were received.

The Freight Claim Agent disregarded the two applications from Seniority District No. 15 and issued his bulletin No. 2-A, May 27, 1955, assigning James V. Mullenax, a new employe.

The Assistant General Chairman on May 31, 1955, file G-690, protested the assignment and asked that Bulletin No. 2-A be cancelled and Wanda L. O'Dell be assigned.

Under date of June 1, 1955, file 128, the Freight Claim Agent declined to cancel bulletin and assign Wanda L. O'Dell.

2031, 2491, 3273, 3469, 4040 and 5147 of this Division in support thereof."

We think your Honorable Board has, through the medium of various awards, including 1147, 2031, 3273, 3887, 4040, 4370, 4785, 4813, 5802, 7024, 7025, 7037, established principles along the following lines with respect to determining fitness and ability:

The Board will not substitute its judgment for that of the Carrier or disturb the Carrier's action

(1) if it appears such action was taken in good faith and with due regard for both the letter and 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;

(4) if it appears from the record the evidence supporting such action was substantial even though there was other evidence of such a character reasonable minds might differ as to the construction to be placed upon all of the evidence when considered in its entirety.

Also in Awards 3273, 4466, 4585 and 5006 there was stated the principle that the Carrier has the right in the first instance to determine the fitness and ability of employes; and, in 1147, 2031, 2491, 3273, 3469, 4040, 5147 and 5417, that once fitness and ability of an employe have been found wanting, the burden of overcoming that decision by substantial and competent proof rests upon the employe.

Award 7037 covers a case, similar to the one here, where employes holding seniority and working in one seniority district made application for two positions in another seniority district. The Carrier found that the employes making application did not have the necessary fitness and ability, declined to award them the positions and awarded them to two non-employes. The Employes contended that the two employes holding seniority with the Carrier should have been given the positions. Your Board denied the contentions and claims of the Employes, stating:

"Whether an employe has sufficient fitness and ability to fill a position is usually a matter of judgment and the exercise of such judgment is a prerogative of the management. We have regularly held that unless it has exercised that judgment in an arbitrary, capricious or discriminatory manner, we will not substitute our judgment for that of the Management."

Based upon the record in this case, which we believe adequately supports the Carrier's handling of the situation here involved, it is the position of Carrier that your Board should, as it previously has in the many awards cited hereinabove, deny the Employes' contentions and claim.

The substance of matters contained herein has been the subject of discussion in conference and/or correspondence between the parties.

(Exhibits not reproduced)

OPINION OF BOARD: Claimant Wanda L. O'Dell, a telegraph office messenger, was the senior bidder for a regularly bulletined position of file clerk in Seniority Diistrict 7, but the position was given to James V. Mullenax, a new employe.

The applicable rules of the Agreement are 7 and 9, which provide as follows:

> Rule 7: "(a) 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, * * *
>
> "(b) 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 (2) or more employes have adequate fitness and ability."
>
> Rule 9: "(d) Should there be no application for the position or vacancy * * * from employes in the seniority district where the position or vacancy exists, the General Chairman shall be notified and he will forward the information to all officers as grouped below. Should there be no application from employes in a particular group the position shall be filled from employes making application from other groups in accordance with Rule 7."

In this instance there was no application from an employe in Seniority District 7 or from the seven other seniority districts in Group 2, but the applications of claimant and another employe junior to her came from Seniority District 15 in Group 4, as permitted by the final provision of Rule 9 (d) supra.

Rule 7 is unambiguous. Its clear intent is that an employe's right of promotion to any position for which he has "fitness and ability" depends upon seniority alone in spite of the possibly superior "fitness and ability" of an employe junior to him. The rule can have no other meaning. "Fitness and ability being **sufficient**, seniority shall prevail." His fitness and ability need not be greater than, or even equal to, that of junior applicants; his fitness and ability need be merely sufficient for the purpose. On the other hand, if he has not fitness and ability for the position (or, to follow more closely the words of the rule, if his fitness and ability are not sufficient,) his service, however long, will not qualify him for it.

It is well established that the determination of fitness and ability of an employe for a position is a managerial prerogative. But that point is not before us; for management did not find that claimant lacked sufficient fitness and ability for the position; it found that Mullenax's fitness and ability for that position were greater, and that he was also fitted for still higher positions.

The facts are not in dispute. The bulletin announcing Mr. Mullenax's assignment to the position stated as its reason: "No bids being received from qualified employes in designated seniority district."

In reply to the General Chairman's protest, the Carrier's Freight Claim Agent wrote him that the assignment was not made "with any desire or intention to circumvent the provisions of the agreement" but that "the better class positions in this office such as investigators, censors and adjustors require the possession of qualifications that are superior and far more exacting than those required of a file clerk, mail clerk or typist clerk;" that "therefore, in filling this position, the applicant's qualifications should not be considered from the standpoint of his or her ability to fill the position of file clerk alone but rather whether the applicant possesses qualifications that would justify unlimited advancement." He added that Mullenax was a high school and college graduate, could read Latin, was of superior qualifications and capable of unlimited advancement, and that "we should be privileged to exercise the managerial prerogative of determining and employing the best qualified of the applicants."

On appeal the General Chairman was informed by V. A. Gordon, Assistant General Manager, that "while it may be true that Mrs. O'Dell may have

the necessary qualifications for the position of file clerk, it was evident that she does not have the necessary qualifications for subsequent advancement to more responsible positions in the Freight Claim Department."

In the Carrier's submission it was pointed out that "because of her limited qualifications claimant could reasonably be expected to advance" to only one position higher than the file clerk position, since the next ones required typing ability, which she lacked. That statement may not exactly admit her "sufficient fitness and ability" for the file clerk's position, but it certainly does not constitute a finding of their insufficiency.

As the above quotations show, the Carrier did not question applicant's fitness and ability for the immediate position. Its action was based upon two contentions: First, that management should have the prerogative to consider qualifications for possible promotions to higher positions than the one immediately vacant; second, that it should have the prerogative of choosing the best qualified of applicants for a position.

However, the Agreement provides otherwise and must govern. Since the applicant's fitness and ability are unquestionably sufficient for the position, she is entitled to it by seniority, regardless of the junior employe's better qualifications for that or higher rated positions.

On the question of fitness and ability for future promotion, see Award No. 62, made by this Division without a referee.

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 the agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 17th day of December, 1957.