# Award No. 9190
# Docket No. CL-8713

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

Harold M. Weston, Referee

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**PARTIES TO DISPUTE:**

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

**NEW YORK CENTRAL RAILROAD—Southern District (Formerly: Cleveland, Cincinnati, Chicago & St. Louis Ry.—Peoria & Eastern Railway.)**

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

(a) Carrier violated the rules of the current Clerks' Agreement when it failed to consider application for bulletined vacancy on another roster by a furloughed employe before hiring a non-employe as required by Rule 9 of the rules and working conditions agreement.

(b) That Mrs. B. Inez Arnold, the employe involved, be compensated for net wage loss, $1.18 per day, from March 31, 1955.

EMPLOYES' STATEMENT OF FACTS: Mrs. B. Inez Arnold was employed in the Stores Department of the Peoria & Eastern Railway (operated by the New York Central Railroad Company) on December 18, 1944 and was furloughed on November 30, 1954 due to reduction in force.

Mr. Mack E. Merz, Clerk to the General Foreman, Locomotive Department at Urbana, Illinois, was assigned vacation dates March 4 to March 25, 1955, and Mrs. Arnold was to be used as the vacation worker. She started to work on the position, Clerk to the General Foreman, on March 15, 1955. However, she was released from the Locomotive Department to fill a temporary vacancy in the Stores Department, after working one day in the Locomotive Department. The vacancy in the Stores Department was occasioned by the sudden illness of Clerk, Mr. Harry Glawe.

Upon completion of his vacation Mr. Mack E. Merz tendered formal resignation terminating his employment relationship with the Carrier and the vacancy thus created was bulletined, March 28, 1955, to all employes in the Locomotive Department seniority district at Urbana, Illinois. On March 31, 1955, Mrs. Arnold filed application with Mr. G. C. McFarland, General Fore-

3. RULES OF GOVERNING SCHEDULE AND AWARDS OF NATIONAL RAILROAD ADJUSTMENT BOARD SUPPORT POSITION OF THE CARRIER.

Rule 36—previously quoted—governs Working Conditions for Women employes—by which the Carrier is bound—and states, in brief, that the working conditions must be "fitted" for a woman. In this instance, the Carrier has shown that the position desired by Mrs. Arnold is definitely **not** suited for one of the gentler sex.

Rule 2 of the Agreement, also previously referred to, has to do with Seniority and Promotion—and states that **Management** shall be the judge as to "fitness and ability". There is no question about the claimant being "able" to do the work—she could—likewise, there is no question as to claimant being "fitted" for the work—she is **not!** There was naught of the capricious and the decision on part of Management was **not** arbitrarily taken without due consideration. Full thought prefaced the decision and every consideration was accorded Mrs. Arnold as guaranteed her under the rules.

Rule 9, on which the organization takes its stand, merely provides that a furloughed employe may bid on vacancies, and **"if properly qualified"**, will be given due consideration. Mrs. Arnold was given due consideration and found **not** to be properly qualified. There was no violation of this Rule as the organization contends.

Awards of the Third Division support the position of Management, witness:

Awards 3273, 4466, 4485 and 5006 hold ". . . that fitness and ability in the first instance is a matter which rests in the sound discretion of the carrier. . . ."

Further weight is given this position by the decision of the Board in an even more recent Third Division Award 7037, wherein it ruled: "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."

**CONCLUSION**

Carrier has conclusively shown that the claimant had no inherent right to the position sought, and that managerial prerogative was exercised without any evidence of capricious or discriminatory handling in this case, and inasmuch as the rules of the effective agreement have not been violated, but rather support the position of the Carrier, the present claim is wholly without merit and should be denied or dismissed.

(Exhibits not reproduced.)

**OPINION OF BOARD:** The Claimant, a female employe with a seniority date of December 18, 1944, in the Carrier's Stores Department at Urbana, Illinois, was furloughed on November 30, 1954, due to a reduction in force. She was subsequently called to fill a vacancy of Clerk to the General Foreman, Locomotive Department, a separate seniority district, and worked one day, either March 14 or 15, 1955, in that position. On the

following day, she was called back to her own seniority district, the Stores Department, to fill a temporary vacancy of Clerk, due to illness of the regular incumbent.

On March 28, 1955, the regularly assigned Clerk to the General Foreman, Locomotive Department, resigned and the permanent vacancy in that position was thereupon bulletined by the Carrier. Claimant, who was then filling the temporary Clerk vacancy in the Stores Department, filed application for the bulletined position of Clerk to the General Foreman. She was unsuccessful in that bid, although no other applications were received from employes and a new employe was hired to fill that bulletined position on April 18, 1955. On the same day, Claimant was assigned a bulletined position in the Stores Department that had been vacated on March 29, 1955 and for which she had applied to protect her seniority in that district.

It is the Petitioner's contention that the Carrier violated their Agreement by awarding the Locomotive Department position to a new employe, in the face of Claimant's application and seniority. It maintains that even though Claimant's seniority rights were in a district other than that in which the Locomotive Department position was located, she was entitled to preference over non-employes and should have been awarded the position. Specifically, it points to Rule 9 of the Agreement which states:

> "When employes are laid off on account of reduction in force they may file application for positions bulletined on other seniority districts or on other rosters, and will, if properly qualified, be given preference over non-employes."

It will be noted that two conditions must be satisfied before Rule 9 may be applied, namely, that Claimant, at the time she filed her application for the bulletined position, must have been "laid off on account of reduction in force" and (2) "properly qualified."

With respect to the latter point, the parties are agreed that Claimant was able to perform the work involved. There is therefore no question regarding the Claimant's ability. The Carrier nevertheless insists that by reason of her sex, she is not suited to the position since it is located in the Locomotive Department where women normally do not work and some of its duties would require her to move into areas where the presence of a woman would be embarrassing and inappropriate. It refers to Rule 2 of the Agreement which provides that in making promotions, fitness will be considered, in addition to ability and seniority, and that management is the judge of qualifications subject to appeal. Also cited is Rule 36, which prohibits management from assigning women employes to positions where the working conditions are not fitted to their needs.

In order properly to determine the question presented by the facts of this case, it is necessary to balance the respective interests of the parties. On one hand, we must be alert to prevent unfair discrimination against employes because of their sex. On the other, it is important that we respect management's right to fill positions with employes who will not be limited in performing some of the duties of those positions.

In the present case, we do not have a situation where a female employe is being denied a promotion only because the new work will require her to move into areas that are physically defective or unsafe. Cf. Award 770. Nor is the work in question located in a general office building and in a department in which women are regularly employed. Also cf. Award 770. The problem here, as we see it and omitting some of Carrier's claims which in line with Award 770 we can not accept, is that the position denied Claimant is in a department where women do not normally work and requires some duties that would not be fit for women to perform. While it may be that, in actual fact and practice, the position under consideration does not truly raise these problems, the paper record on which our decision must be based does not negate these limitations. We do not believe, therefore, that this is an appropriate case in which to upset established management practice and its discretion in filling promotions. This is not to say that on a sufficiently clear and developed record, Claimant's reasoning and position would not prevail. All we hold in this case is that to reverse management's decision as to fitness and to permit a female employe to be placed against Carrier's will in a department where women have not regularly been employed during normal times allegedly because they will by reason of their sex be unsuited to at least some of the duties of that department, the Claimant must affirmatively establish more than a mere suspicion of unfair discrimination and overcome evidence that by her assignment to the position in controversy she will not limit the Carrier in its operations.

Under all the circumstances, we are not satisfied that the record developed on the property establishes that the complained of managerial action was an abuse of Carrier's discretion to determine fitness. See Awards 8196, 7184 and 3160.

In view of our holding, it is unnecessary to consider the further question of whether or not Claimant was in a "laid off" status, as required by Rule 9.

There is no merit in Claimant's additional contention that Carrier's compromise offer constitutes an admission of an Agreement violation. This point requires no extended discussion. It is well settled that an offer of compromise is not competent evidence or an admission against interest. See Awards 2283, 2863 and 7023.

We will accordingly deny the claim.

**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 Carrier did not violate the controlling Agreement by rejecting Claimant's bid for the position in question.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 18th day of January, 1960.