

Award No. 12394

Docket No. CL-12121

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Clerks' Rules Agreement, effective May 1, 1942, except as amended, particularly Rules 2-A-2 (a), 2-A-3, 2-A-7 and 3-C-1, when it denied Mae A. Lynch the right to exercise her seniority in displacing a junior employe in the Office of the Auditor of Expenditures, under the jurisdiction of the Comptroller, Philadelphia, Pennsylvania.

(b) Mae A. Lynch be compensated for all monetary loss suffered beginning March 18, 1958, and until April 21, 1958, on which date she was finally permitted to exercise her seniority to the position of Key Punch Work Distributor. [Docket 573]

EMPLOYEES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representatives of the class or craft of employes in which the Claimant in this case held a position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various rules thereof may be referred to herein from time to time without quoting in full.

Claimant Mae A. Lynch held a regular advertised clerical position in the Office of the Auditor of Expenditures, a sub-department under the jurisdiction of the Comptroller. The Claimant has a seniority date of June 1, 1950, on the Seniority Roster of the Auditor of Expenditures Seniority District, Philadelphia, Pennsylvania.

CONCLUSION

The Carrier has established that no violation of the Agreement occurred by reason of denying the Claimant access to the position in question.

Therefore, the Carrier respectfully submits that your Honorable Board deny the claim of the Employees in this matter.

(Exhibits not reproduced.)

OPINION OF BOARD: While Claimant was on leave of absence her position was abolished. She sought to exercise seniority and bump a junior employe in the position of Key Punch Operator, Work Distributor. When this was not allowed by the Carrier, she elected to post the position, under protest, from March 18 to April 21, 1958 when she again requested assignment to the position and it was granted.

The duties of the position consisted in the operation of a card punch and verifier machine and related clerical work, an area in which Claimant never worked. She was offered an opportunity to take an examination to determine her qualifications but she declined to do so.

The basic rule involved in this dispute follows:

"2-A-2. (a) In the assignment of employes to positions subject to the application of the provisions of Rules 2-A-1 and 3-C-1, fitness and ability being sufficient, seniority shall govern."
(Emphasis ours.)

Claimant contends that she had sufficient fitness and ability and should have been given the opportunity to qualify in accordance with Rule 2-A-3 (a) and (d) which reads as follows:

"Rule 2-A-3

"(a) An employe awarded a bulletined position or vacancy, or otherwise obtaining a position in the exercise of seniority, and failing to qualify within thirty days may exercise seniority under Rule 3-C-1. (Emphasis ours.)"

"(d) Employes will be given full cooperation of the department heads and others in their effort to qualify."

Claimant contends that she proved she had the necessary fitness and ability when the Carrier awarded her the position after twenty days of posting, well within the thirty day time limit in which to qualify.

We do not agree. Carrier's actions must be judged as of the time when Claimant was refused the position, rather than when she was granted it after posting. The question is not whether in fact she was able to qualify within the time limit, but whether the Carrier was obliged to permit her to try to qualify at the time she was refused the position. This, in turn, is based upon whether Carrier properly judged her as not having sufficient fitness and ability for the position.

Whether or not one qualifies for a position is not the same as being fit and able. One who has been judged fit and able may not qualify for a position, a fact which the parties recognized in writing Rule 2-A-3, which requires that the employe awarded a position, and hence judged fit and able, must qualify in thirty days. Likewise, one who is not judged fit and able, as here, may yet qualify.

The rules require that the applicant be sufficiently fit and able at the time of applying for a position. This Board has held that fitness and ability are not the same as experience. Award 3139.

Since fitness and ability have been held not to mean that one must have demonstrated ability in the past by having had experience or that one must be able to demonstrate ability in the future by qualifying, the only fitness or ability must be that which is inherent at the time of application, according to the judgment of the Carrier.

The burden is upon the Petitioner to prove that Carrier acted arbitrarily and capriciously in exercising its judgment. Petitioner has not sustained that burden. Carrier, on the other hand, based its judgment on the fact that Claimant had no training as a card punch operator on an IBM machine and stated Claimant declined to take a test which would have helped Carrier evaluate her fitness and ability.

The Petitioner has argued, in effect, that Carrier is obliged to give on-the-job training to applicants. There is no rule which supports this nor any prior practice. On the contrary, the record discloses other instances in which senior employees were judged not fit or able when they refused to take, or failed to pass, examinations relating to basic knowledge as to the operation of the machine involved.

The Petitioner argued that in Award 5233 and 5234 the Carrier took an opposite position in saying, "The only way the Claimant's fitness and ability could be demonstrated was through his applying for and trying out one of these positions."

Those cases are distinguishable in that the positions did not involve ability to operate a machine.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

The the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 Agreement.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 10th day of April 1964.