

Award Number 13351

Docket No. CL-13903

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Lloyd H. Bailer, Referee

PARTIES TO DISPUTE:

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

**THE PITTSBURGH & WEST VIRGINIA
RAILWAY COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of The Brotherhood (GL-5268) that:

1. Carrier violated the Clerks' Agreement, particularly Rules 22, 26, 33 and Memorandum of Agreement dated September 12, 1961, when on September 25, 1961 it assigned M. E. Sullivan (number 141 on the seniority roster) to the position of Tariff Compilation Clerk instead of J. F. Mastandrea (number 114 on the seniority roster).

2. Mr. J. F. Mastandrea shall now be compensated the difference in his rate of pay and that of the Tariff Compilation Clerks Position for September 25, 1961, and each working day thereafter until the violation of the Agreement is corrected.

EMPLOYEES' STATEMENT OF FACTS: There is in existence on this property a Rates and Divisions Department of the Traffic Office staffed by the following positions; subject to various provisions of our Agreement:

- | | |
|------------------------------------|-----------------------------|
| 1. Chief Clerk—Rates | 6. Reconsignment Clerk |
| 2. Chief Clerk—Divisions | 7. Tariff Compilation Clerk |
| 3. Assistant Chief Clerk—Rates | 8. Tariff File Clerk |
| 4. Assistant Chief Clerk—Divisions | 9. File Clerk |
| 5. Rate Clerk | |

On September 12, 1961 the positions of Tariff File Clerk and Tariff Compilation Clerk were removed from a partially excepted status and advertised in accordance with existing rules by virtue of Memorandum of Agreement signed September 12, 1961.

Mr. Mastandrea, number 114 on the seniority roster, and Mr. Sullivan, number 141 on the seniority roster, applied for the advertised position in accordance with the existing rules. Employees Exhibit "B", "C", and "D".

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ment of the Carrier will not be questioned without a showing of abuse. No abuse was shown or argued on the property.

The Claim should be denied.

OPINION OF BOARD: It is contended in this claim that Carrier violated the basic Agreement and the Memorandum of Agreement dated September 12, 1961, by selecting an employe with less seniority than Claimant Mastandrea to fill the advertised position of Tariff Compilation Clerk in the Rates and Division Department of Carrier's Traffic Office. Carrier denies any violation.

Prior to September 12, 1961, the Rates and Divisions Department positions of Tariff File Clerk and Tariff Compilation Clerk were excepted from the Agreement to the extent that these positions were not subject to the advertising rules, and the occupants thereof could not be displaced by employes with greater seniority. Claimant Mastandrea was assigned as Tariff File Clerk and M. E. Sullivan was assigned as Tariff Compilation Clerk at that time. Sullivan had held the latter position from April 1, 1958 until he entered Military Service and in 1961 he displaced another employe from this position upon returning from the service. Immediately prior to becoming a Tariff Compilation Clerk in 1958 Sullivan worked six months as a Tariff File Clerk. Claimant Mastandrea had been assigned as a Tariff File Clerk since November 16, 1960. For approximately 5½ months prior thereto he worked as a File Clerk in the Traffic Office. He previously worked in the Transportation Department for almost seven years, first as a Caller and then as a Checker.

The Memorandum of Agreement which the parties signed on September 12, 1961 provided in Section 6 that the positions of Secretary (Maintenance of Way), Tariff File Clerk (Traffic—Rates) and Tariff Compilation Clerk (Traffic—Rates) were removed from their partially excepted status and "will be advertised". Pursuant to this provision the subject Tariff Compilation Clerk position was advertised and three employes bid for the position—Claimant Mastandrea, M. E. Sullivan and J. W. Zarvis. Carrier interviewed these applicants and gave them a written test. The Carrier thereafter selected Sullivan as the successful bidder, although Zarvis possessed the greatest seniority and Mastandrea was the next most senior of the three men. No formal claim was filed by Zarvis.

Rule 26(b) of the basic Agreement declares:

"Employes covered by this Agreement shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal."

Rule 33(a) states:

"Employes entitled to advertised positions shall be allowed thirty (30) working days, with full opportunity in which to qualify, and failing, shall retain all their seniority rights, may bid on any advertised positions, but shall not displace any regularly assigned employe."

The Organization contends that the September 12, 1961 Memorandum of Agreement was executed only after the parties reached an understanding that the positions placed under the advertising rules would be so advertised as to assure that senior employes were not furloughed while junior employes worked. Carrier denies that such an understanding was arrived at. We are of the view

that we must apply the Memorandum of Agreement as written. It is the clear intent of Section 6 of this instrument that the positions therein cited shall be advertised and filled in accordance with the procedure set forth in the basic Agreement.

Since under the express language of Rule 26(b) it is the proper function of the Carrier to judge an employee's fitness and ability for a position to which promotion is sought, the Carrier may require a test to assist it in determining fitness and ability. (Award 4918) We do not agree with the Organization's contention that the use of tests was a prejudicial act of the Carrier because tests had not been given to employees being considered for the Tariff Compilation Clerk position when it was partially excepted from the Agreement. Tests previously had been administered to applicants for various other positions covered by the Agreement.

The evidence presented does not support the conclusion that Carrier's selection of Sullivan as the successful applicant, instead of Claimant Mastandrea, was made in bad faith, or was arbitrary or capricious. The test given to all three applicants was related to the requirements of the position and was not otherwise unreasonable. Claimant's performance on this test was unsatisfactory, whereas Sullivan displayed sufficient fitness and ability. Since claimant's fitness and ability for the position was properly judged to be insufficient, his greater seniority (as compared with Sullivan) could not prevail per Rule 26(b). Inasmuch as claimant was not entitled to the advertised position, the thirty day qualifying period provided in Rull 33 (a) did not apply to him.

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

That the parties waived oral hearings;

That 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 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 26th day of February 1965.