

Award No. 13850
Docket No. CL-14510

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

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

SEABOARD AIR LINE RAILROAD CO.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5467):

(a) That the Carrier violated the Agreement between the Brotherhood and the Carrier when on March 15, 1962, it assigned a position titled Supply Voucher Clerk to a junior employe, Mrs. A. B. Lawrence, thereby excluding senior employe Miss Mary Alice Sykes (hereinafter referred to as Claimant) who submitted a bid for the position in accordance with said Agreement, and

(b) That Carrier shall be required to assign Claimant to the position of Supply Voucher Clerk as of March 15, 1962 and compensate her the difference in the rate of pay between her position and the position of Supply Voucher Clerk for March 15, 1962 and the same for each work day subsequent thereto until she is so assigned.

EMPLOYEES' STATEMENT OF FACTS: Claimant entered Carrier's service on October 26, 1936, as a Typist-Clerk. Before entering Carrier's service, she was graduated from school in 1932 where she had taken commercial subjects. After graduation she was employed by a realty and insurance company in Portsmouth, Virginia, where her duties were clerical and secretarial. Her clerical duties were bookkeeping, handling contracts and leases. She remained with this company until she entered Carrier's service in the Auditor of Revenues office as a Typist-Clerk.

On December 27, 1939, she was awarded the position of Abstract Clerk in the same office after bidding on the position the principal duties being, as advertised:

"Abstracting passenger interline settlements, miscellaneous passenger accounting work. Applicant must be proficient in use of abstracting machine."

mission to do so because he did not have the fitness and ability to function satisfactorily on the position sought. The claim of Clerk Nobles was denied by your Board; however, the record in this case shows (as in the case resulting in Award 8197) that Claimant requested and was given an investigation to determine the question of whether or not he possessed sufficient fitness and ability to perform the duties required. (See page 769, Volume 88 of bound Third Division Awards). Miss Mary Alice Sykes did not, nor did the organization on her behalf, request an investigation under Rule 28, Unjust Treatment, such as was done by the Claimants in Awards 8197 and 9249. Had she elected to request an investigation then she would have had an opportunity to demonstrate her proficiency in the work of the position to which she aspired. She would have had an opportunity to answer questions relating to the basic accounting principles required of the position on which she had bid. Therefore it seems apparent that inasmuch as she did not request an investigation under this rule she had no proof to offer which might have overcome the position of the Auditor of Disbursements that she did not have the experience to qualify for the position of Supply Voucher Clerk.

The correspondence from Miss Sykes or from the petitioning organization on behalf of Miss Sykes should be carefully examined to determine exactly what contention has been made that she had fitness ability, or qualifications to entitle her to promotion to the position sought. In Miss Sykes' letter of March 28, 1962, reference is made to her employment in the Voucher Bureau as a clerk-typist for approximately 2 years and her employment by the Seaboard for approximately 26 years. There is not proof offered or allegation made that she had the requisite fitness and ability for the position of Supply Voucher Clerk. In District Chairman's letter of May 8, 1962, filing the grievance on behalf of Miss Sykes with the Auditor of Disbursements, the statement is made that "— according to information received from her, has a basic knowledge of the duties involved insofar as this position is concerned." That allegation was repeated by being quoted in District Chairman's letter appealing the claim to the Vice President and Comptroller dated July 18, 1962. Finally, the petitioner's General Chairman in appealing the decision of the Vice President and Comptroller to the Director of Personnel in his letter dated October 4, 1962, supported his contention that Miss Sykes was entitled to the position sought by stating "Claimant Sykes has 26 years of seniority and has varied experience in the Auditor of Revenue and Disbursements offices and such experience certainly is sufficient to qualify her to perform the duties of the position in question." Such vague and half-hearted assertions **do not overcome** the position of the Auditor of Disbursements that Miss Sykes **could not qualify** for the position of Supply Voucher Clerk.

Based on the fundamental principles that have been established by your Board in many previous cases of this nature and inasmuch as neither the Claimant nor the petitioning organization acting on her behalf has offered any proof whatsoever to overcome the position of the Auditor of Disbursements that Miss Sykes did not have the fitness and ability for the position of Supply Voucher Clerk as required by Rule 9 of the agreement, the claim should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 5, 1962, Carrier bulletined a vacancy in the position of Supply Voucher Clerk in the Voucher Bureau. After bids were received, Carrier assigned the position to an employee with less seniority than Claimant. Claimant requested of the Auditor of Disbursements the reason for

her rejection. The Auditor replied that Claimant's application had been denied "principally for the reason that you have had no experience in the handling and accounting for agents rental bills and leased rail and material accounts." His letter concluded: "In view of your inexperience in such matters I feel confident you could not qualify for the position." Employees thereupon filed a grievance on behalf of Claimant under Rules 9, 10 and 16.

There is no dispute in this case about the recognized right of Carrier, under Rule 9, to make the initial determination of the sufficiency of the fitness and ability of applicants. The primary dispute is whether Carrier's determination was unreasonable and an abuse of discretion.

Employees contend that Carrier's determination was arbitrary and capricious. Employees argue: 1. that the determination made by Carrier was not of the sufficiency of Claimant's fitness and ability but of her experience in one part of the work of the position, and thus was not the determination required of Carrier by Rule 9; 2. that, although Claimant's record in the possession of Carrier showed that Claimant was sufficiently fit and able, Carrier improperly selected a junior applicant on the basis of the junior's superior experience instead of selecting Claimant on the basis of her superior seniority; 3. that the duties for which Carrier found Claimant's experience inadequate were not principal or preponderant duties of the position because they were not listed as such in the bulletin even though only three of the four such duties permitted to be listed by Rule 10 were listed; and 4. that Claimant should not have been disqualified by Carrier because Rule 16 "establishes the right of an employee to twenty-five working days in which to qualify for a position."

Rule 16 on its face relates to employees who have been awarded bulletined positions and employees who have exercised displacement rights; no evidence was introduced to show that the Rule intends that either of these two categories includes all employees who apply for bulletined positions. We do not agree with Employees' argument numbered 4, above that Rule 16 establishes a right for every applicant to a twenty-five day trial period.

We find no evidence that the bulletin failed to list, as required by Rule 10, "not more than four principal and/or preponderant duties sufficient to identify position." It is not necessary for us to determine whether the duties detailed in Auditor's April 4th letter were principal or preponderant duties, clearly implied in the duties which were listed in the bulletin, or were, in fact, additional to the duties listed in the bulletin. Even if those duties had been listed separately in the bulletin, finding by Carrier of an applicant's actual experience in performing those or similar duties would not have to be the prerequisite to determining that an applicant had sufficient fitness and ability "to raise a reasonable probability that he would be able to perform all the duties of the position within a reasonable time." (Award 5348 — Robertson.) To require evidence of prior performance of the same or even of similar duties to find the potential meant to be found in "sufficient fitness and ability" is an arbitrary requirement unless there is positive proof that without such experience an applicant could not reasonably be expected, with full cooperation of others, to qualify within a reasonable time. No such proof is in evidence here.

Employees charge and Carrier denies that Carrier made its determination to award the position to the junior applicant rather than the Claimant because by comparison the junior employee's experience on a portion of the duties of the position was superior to the Claimant's. It is not necessary for us to resolve this difference: even if the Carrier had merely noted the comparison without giving it any weight in making its initial determination, the evidence

is clear that in making the determination that Claimant did not possess sufficient fitness and ability, Carrier applied the single standard of experience in handling and accounting for agents' rental bills and leased and material accounts — "a standard for which the Rules make no provision and which if enforced would completely destroy promotional rights and nullify seniority as a factor in promotion 'where two or more employes have adequate fitness and ability.'" (Award 8197 — Wolff.)

Carrier argues that the facts in Award 8197 are clearly distinguishable from those in this case in that Claimant in that case, unlike Claimant in this case, requested an investigation after Carrier initially rejected him. However, the claim was sustained in Award 8197 on the basis of the reasoning cited above; the factual difference does not nullify the applicability here of our reasoning in Award 8197, which was between the same parties as this case. We find that Carrier's determination that Claimant did not possess sufficient fitness and ability was unreasonable and arbitrary and an abuse of its discretion.

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 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13850, DOCKET CL-14510

(Referee Daniel House)

Award 13850 is erroneous; is not supported by the rules of the agreement or by the record before the Division, and is contrary to many prior awards of this Division concerning the qualifications of employees.

Claimant was not awarded the position because it was the considered judgment of the officer in charge and of claimant's supervisors that she did not have sufficient qualifications, training, and experience so as to create a reasonable probability of her being able to qualify for the position. The officer

in charge so advised claimant when she wrote him requesting the reason for his rejecting her application, as provided in Rule 10(f) — "when an employee junior to other bidders is assigned to a bulletined position the senior employees making bid will upon written request, if filed within fifteen (15) days from date of assignment, be advised in writing the reason for their non-assignment."

Claimant did not challenge the accuracy of the Auditor's reason for non-assignment, nor did she or the employee's representative request an investigation under Rule 28 — "Unjust Treatment." Had such investigation been requested, claimant would have had full opportunity to offer any substantial and competent proof which may have existed to overcome the decision of the officer in charge. Instead, claim was progressed alleging that the Auditor's decision was arbitrary and that carrier had violated Rules 10 and 16 in refusing to award claimant the position and allow her twenty-five working days in which to qualify.

This Division has consistently held that in the first instance the employer must be the judge of the fitness and ability of an employee if there is nothing in the rules of the parties' agreement abrogating it. (6829, 6143, 5603, 4918, 2350, 2031); that once fitness and ability of an employee have been found by the carrier to be lacking, the burden rests upon the claimant to overcome that decision by substantial and competent proof (6829, 5147, 4040, 3469, 3272, 2031, 1147); and unless it can be shown by the employee that the carrier was arbitrary or capricious in reaching its decision, or that the carrier's action was an abuse of discretion, the Board will not substitute its judgment for that of the carrier.

Although the majority correctly held that Rule 16, on its face, relates only to employees who have been awarded bulletined positions, we respectfully point out that on the basis of that conclusion the claim should have been denied, since it clearly rejected petitioner's primary contention that Rule 16 affords the senior applicant the right to be assigned and be allowed twenty-five working days in which to qualify. Moreover, the record is barren of any proof that claimant did possess sufficient fitness and ability to perform the accounting work (approximately 100 hours per month) required on the position within a reasonable time after assignment, or that the Auditor's judgment of claimant's qualifications was unreasonable or arbitrary or an abuse of discretion.

For the reasons stated, we respectfully dissent.

R. A. DeRossett
W. F. Euker
C. H. Manoogian
G. L. Naylor
W. M. Roberts

**LABOR MEMBER'S ANSWER TO CARRIER MEMBERS'
DISSENT TO AWARD 13850, DOCKET CL-14510**

The Dissenters obviously misconstrued Award 13850 or failed to recognize, as stated therein, that "Carrier applied the single standard of experience" which was clearly shown and supported in the record. That alone makes Carrier's determination unreasonable and arbitrary and an abuse of discretion.

Moreover, it was not until the last stage of handling, and obviously after the Carrier's highest officer recognized the error of the initial reason given, that an attempt was made to bring Claimant's case within facts similar to those involved in the cases cited in the dissent. That, of course, was much too late and failed, as it properly should, for it was not an attempt to right a wrong but rather an attempt to perpetuate a wrong. At any rate, whether the Referee considered it as do I, it failed, and it should have failed, for manufactured "facts" should not be allowed to obscure or change the actual facts.

"Experience" as clearly shown in the prior Award on this property as well as Awards 5637, 7024, 7091, 7645, 11768 and others, is just not the proper criteria to be applied as a means of defeating seniority. Furthermore, there was ample reason to believe that Claimant's immediate supervisor applied other improper criteria in rejecting Claimant's application. His statement in the record to the effect that he "would not want Claimant on several jobs" indicates a disposition to ignore the rules—or subordinate them to his desires. Needless to say, personal preferences—or prejudices—of local officers are not proper guides and should not hamper the free exercise of seniority.

Without reliance on more of the record than is shown in the Opinion, Award 13850, being based on the facts of record, prior Awards, and Rules relied on, is quite correct. The dissent does not detract from the soundness thereof.

D. E. Watkins

Labor Member — 10-28-65