



Award No. 17192

Docket No. CL-17476

**NATIONAL RAILROAD ADJUSTMENT BOARD**

**THIRD DIVISION**

David H. Brown, Referee

**PARTIES TO DISPUTE:**

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

**THE WESTERN PACIFIC RAILROAD COMPANY**

**STATEMENT OF CLAIM:** Claim of the System Committee of the Brotherhood (GL-6387) that:

(a) The Carrier violated the rules of the Clerks' Agreement when it declined to accept a displacement by Miss Yen Louie on position of Rate and Division Clerk, and

(b) Miss Yen Louie shall now be assigned to position of Rate and Division Clerk in accordance with her declaration of displacement, and

(c) Miss Yen Louie shall be given credit for the time she has been denied the right to occupy the position of Rate and Division Clerk, and

(d) Miss Yen Louie shall be allowed the difference in rate of pay between that earned by her and what she would have received on all days on which she would have received more had she been permitted to assume the position of Rate and Division Clerk pursuant to her declaration of displacement on November 18, 1966.

**EMPLOYEES' STATEMENT OF FACTS:** On October 26, 1966, position of Rate and Division Clerk was advertised in Clerks' Circular No. 66-70 (Employes' Exhibit "1") and rated at \$24.18 per day for employes with less than two years' experience or \$25.93 per day for employes with two years' or more experience in this class of service. Bids thereon closed at 8:20 A.M., November 2, 1966. Miss Shirley Neves, seniority date December 16, 1963, was assigned to this position on November 3, 1966.

Miss Yen Louie, who held the position of Accountant, rated at \$24.31 per day, seniority date April 22, 1946, upon return from vacation leave belatedly bid for the position of Rate and Division Clerk. That bid was not considered by the Carrier.

Miss Louie, through her letter of November 14, 1966, addressed to Mr. N. A. Schoeplein, Manager of Revenue Accounting, requested reason for her non-assignment to position of Rate and Division Clerk. (Employes' Exhibit "2.") Miss Louie, through her letter of November 18, 1966, (Employes' Exhibit "3") declared herself as displacing junior employe Miss Neves on position of Rate and Division Clerk.

which to qualify, and failing, shall retain all their seniority rights and may bid on any bulletined position but may not displace any regularly assigned employe.

An employe who fails to qualify on a temporary vacancy may immediately return to his regular position.

(b) Employes will be given full cooperation of department heads and others in their efforts to qualify.

(c) An employe may not be disqualified before the expiration of thirty (30) working days without a prior hearing being held unless the employe and the Division Chairman or General Chairman waive such hearing.

(d) Employes who are disqualified under this rule on other than temporary vacancies and who have not bid for and been assigned to a bulletined position within thirty (30) days following disqualification, shall thereafter be considered as furloughed and subject to the provisions of paragraphs (b), (c), (d) and (e) of Rule 40.

#### "RULE 50

(f) An employe returning after leave of absence; or when relieved from temporary assignment, official, or excepted position listed in Rule 2, may return to former position provided it has not been abolished or senior employe has not exercised displacement rights thereon, or may upon return or within 10 days thereafter, exercise seniority rights on any position bulletined during such absence. In the event employe's former position has been abolished or senior employe has exercised displacement rights thereon the returning employe will be governed by the provisions of Rule 40 and will have the privilege of exercising seniority rights over junior employes, if such rights are asserted within 10 days after his return. Employes displaced by his return will exercise their seniority in the same manner."

(Exhibits not reproduced)

**OPINION OF BOARD:** When Miss Yen Louie, who held the position of accountant, returned from vacation she discovered that during her absence Carrier had bulletined a position of Rate and Division Clerk and that the successful bidder was an employe junior to her. After Carrier refused to consider a late bid from Miss Louie, she attempted to displace the successful bidder, endeavoring to exercise her right under Rule 50 of the Agreement providing "an employe returning after leave of absence . . . may . . . exercise seniority rights on any position bulletined during such absence."

Carrier rejected her declaration of displacement giving reasons: "To qualify for position of Jr. Rate and Division Clerk the applicant must have successfully completed a course in rate and division class instruction. . . . You did attend the class . . . you failed to pass the qualifying grade of 75% . . . your grade was only 63%."

Employes rely on Rule 29 which provides: "Promotion, assignment and displacements under these rules shall be based on seniority, fitness

and ability; fitness and ability being sufficient, seniority shall prevail. . . .”

We have consistently held that the determination of “fitness and ability” is a managerial prerogative of Carrier which will be sustained unless the action was capricious or arbitrary. Awards 5802 (Carter), 12994 (Hall) and numerous others.

We have further held that Carrier may use examinations or tests as determinative of fitness and ability. Awards 12461 (Dorsey), 15493 (Zumas) and 15626 (McGovern). Again, we impose the circumscription that the test must not be arbitrarily applied.

The record herein will not sustain a charge of bad faith against Carrier. Employees lacking related experience were uniformly required to score at least 75 on the examination. Employees endeavor to show prejudice by citing a subsequent bulletining of a similar position on which occasion Miss Louie was again passed over in favor of a Mr. W. M. Reed, who had not taken the course or test. Mr. Reed was a qualified Rate Clerk. Carrier judged his experience the equivalent of passing the course with a grade of 75. There is no evidence in the record to support an impeachment of this judgment.

**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;

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 not violated.

#### A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST: S. H. Schulty  
Executive Secretary

Dated at Chicago, Illinois, this 28th day of May 1969.