

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19660  
Docket Number CL-19773

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: ( (Brotherhood of Railway, Airline and Steamship Clerks,  
( Freight Handlers, Express and Station Employees  
(Missouri Pacific Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7119) that:

1. Carrier violated Rules 4 and 7 of the Clerks' Agreement when, beginning Monday, January 4, 1971, it failed and refused to allow Mrs. Doris M. Parker to exercise her seniority rights over junior employee, who was regularly assigned to position of Material Accountant No. 222.

2. Carrier shall now be required to compensate Mrs. Doris M. Parker for the difference in the rate of pay, amount \$1.05 per day, beginning January 4, 1971 and continuing each subsequent work day thereafter, Monday through Friday, until the violation is corrected.

INION OF BOARD: This is a disqualification-for-position dispute arising under Agreement between the parties, effective September 1, 1952, including revisions as reprinted on November 1, 1959.

On December 30, 1970, after being displaced by seniority, claimant gave notice of displacement of a junior employee on Job #222, Material Accountant, Department of Manager Disbursements Accounting. This notice was returned with an unsigned, handwritten notation stating: "Applicant not qualified. Form 15007 not accepted." Then, on December 31, 1970, claimant gave notice of displacement on Job #257, Balance Discrepancy Clerk, in the same department, which was accepted.

Claimant noted "under protest" on her displacement notice of December 31, 1970 and the dispute came under discussion on or shortly after that date with formal grievance being filed on February 10, 1971. We shall not consider the events which occurred prior to February 10, 1971 because of Carrier's objection that such matters were not the subject of correspondence or discussion of the claim on the property. For the same objection by Petitioner, we shall not consider the letter contained in Carrier's submission written by the Manager of Disbursements Accounting under date of October 22, 1971.

The remainder of the record shows that the parties joined issue on the property on whether Carrier's disqualification of Claimant for Job #222 was a violation of Rule 4 (a) and 7 (b) of the Agreement which read as follows:

"RULE 4 - PROMOTION BASIS

(a) Employees covered by these rules shall be in line for promotion. Promotion, assignments and displacements under these rules shall be based on seniority, fitness and ability: fitness and ability being sufficient, seniority shall prevail.

NOTE 1: The word 'Sufficient' is intended to more clearly establish the prior rights of the senior of two or more employees of the same seniority district having adequate fitness and ability for the position or vacancy sought in the exercise of seniority."

"RULE 7 - FAILURE TO QUALIFY

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(b) Employees awarded bulletined positions, or employees who may exercise their seniority over junior employees, will be allowed 30 calendar days in which to qualify, except as provided for in Section (d) of this rule, and failing, shall retain their seniority rights but may not displace any regular assigned employee."

Petitioner has called attention to several Awards including Award 13196 (Coburn), which involved a disqualification dispute on this same property and between these same parties. The rules considered by this Board in resolving that dispute were substantively the same as Rules 4 (a) and 7 (b) herein and also the claimant was disqualified from taking a position held by a junior employee. Before disqualifying claimant in that dispute Carrier gave him the following specific reasons for its decision:

"Due to your very limited experience in handling of cards and no knowledge, whatsoever, of material and due to this position being a key position to the Acme Card System wherein anyone must have knowledge of all types and classes of Roadway Machines and Equipment. These items are all very expensive when ordered and one must be able to identify the different parts and make regular check on material items."

Notwithstanding this explanation by Carrier, this Board sustained the claim on the grounds that:

"...In this case, the Carrier's right freely to exercise such judgment is fettered by the clear and unambiguous language of Rules 7 (a) and 16 (a). Those rules were violated when claimant was not permitted to demonstrate his fitness and ability to perform the duties of the position he sought...."

Along with the Awards cited by Petitioner, we have also studied the numerous Awards submitted by Carrier on the subject of disqualification. Some of these Awards seem to hold that seniority creates a presumption of qualification so strong that an employee is entitled to a chance to prove his qualifications on the job. Other Awards seem to hold that Carrier's exercise of its prerogative to disqualify an employee creates a presumption of incompetence so strong that the employee must prove his qualifications before he is entitled to a chance on the job. We shall not try to resolve this conflict, but rather, we shall state that our view of the instant dispute is that, in order for Carrier's position to be sustained, we must first find some credible evidence of record which provides a reasonable basis for Carrier's disqualification of claimant for Job #222 on December 30, 1970. If such evidence is found, then in order for Petitioner's position to be sustained, we must find that a preponderance of evidence of record shows that claimant was qualified to perform Job #222 on December 30, 1970.

The record of handling on the property contains many references to Carrier's having offered claimant an opportunity to take a test which she refused. Indeed this proffer of a test to claimant seems to have been the central fact in Carrier's justification during handling on the property. Had the test been offered prior to Carrier's disqualification of claimant, her refusal might have given rise to an inference in support of Carrier's disqualification of claimant on December 30, 1970. However, the proffer of a test was not made until after the dispute arose and appears to have been a complete afterthought on the part of Carrier. In these circumstances, the offer of a test and its declination does not create any inferences for or against either party.

We also have scrutinized the facts concerning the claimant's prior work in the Department of Manager Disbursements Accounting. In a February 10, 1971 letter Division Chairman Wening stated that claimant had been assigned to several positions in the Department of Manager Disbursements in which Job #222 was located, whereas the junior employee, whom claimant was not permitted to displace, had never been previously assigned to any position in Manager Disbursements when she was assigned to Job #222. In responding to this information in a May 7, 1971 letter, Mr. O. B. Sayers, Director of Labor Relations, stated that:

"...Mrs. Parker had never been assigned in the materials section of the Disbursements Accounting Office and the duties of the positions she had previously worked were completely unrelated to the duties of Job No. 222, Material Accountant. She did not possess sufficient fitness and ability to satisfactorily perform the duties of the position sought and she was not permitted to displace on that position."

Viewed in the light most favorable to Carrier, this exchange between the parties, at the most, proves that the claimant's experience on other assignments in Disbursements Accounting and her lack of experience on Job #222 were neither qualifying nor disqualifying factors in Carrier's judgment that she was not qualified for Job #222. The material does not give any hint of what the specific factors were that caused Carrier to judge her unqualified.

The one remaining item of evidence is a May 4, 1971 letter which is attached to the May 7, 1971 letter of the Director of Labor Relations. The May 4 letter, written by supervisory authority over Job #249, Accounts Payable Clerks, described in a reasonable degree of detail the deficiencies in claimant's performance on Job #249; in referring to the facts in the May 4 letter, the May 7 letter of the Director of Labor Relations states that Job #249 requires less knowledge and experience than Job #222 and that "in all likelihood it will be necessary that she also be disqualified" from Job #249. While we recognize that Carrier submitted the May 4 letter as indirect evidence that claimant was not qualified for Job #222, the letter, for a number of reasons, does not sustain Carrier's action. The first and principal reason is that claimant's disqualification or prospective disqualification from Job #249 is not in issue before this Board. Her disqualification from Job #222 is in issue here and, for that reason alone, the letter which speaks about Job #249 does not provide a reasonable basis for Carrier's disqualifying claimant for Job #222. Further, there is a missing link in this evidence in that the facts in the letter concerning claimant's performance on Job #249 are not connected or correlated with how she would have or might have performed on Job #222. The Director of Labor Relations' statement that Job #249 requires less knowledge and experience than Job #222 is an assertion which falls short of providing the missing link. Moreover, despite the reference in the letter concerning the "likelihood" of claimant being disqualified from Job #249, the letter evidences that on the date of its writing claimant in fact had the status of the qualified occupant of Job #249. Thus, instead of portraying what Carrier regarded as an unqualified employee, the letter described a poorly performing employee, who was the subject of considerations to disqualify her, but who was nonetheless qualified for Job #249 at the time of these considerations. If so much poor performance was tolerable on Job #249 without disqualification proceedings having been instituted, it was all the more incumbent upon Carrier to indicate the poor performance or other factors which disqualified claimant for Job #222.

In sum, claimant had held assignments in the Department of Manager Disbursements Accounting before this dispute arose. However, the Carrier did not submit evidence from Claimant's superiors in that department to indicate how her prior performance and/or other matters disqualified her for Job # 222 of that department. Instead the Carrier chose to rest on its statement "Applicant not qualified", its proffer of a test which was declined, and the non-germane letter of May 4, 1971; in making this choice the Carrier failed to show a reasonable basis for disqualifying claimant from Job #222. Accordingly, we find that Carrier's action was arbitrary and capricious and we shall sustain the claim.

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 Employee involved in this dispute are respectively Carrier and Employee 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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

E. A. Killum  
Executive Secretary

Dated at Chicago, Illinois, this 23rd day of March 1973.