

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20241
Docket Number CL-20413

Joseph Lazar, Referee

PARTIES TO DISPUTE:

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and
(Station Employees
(
(Reading Company
(Richardson Dilworth and Andrew L. Lewis, Jr.,
Trustees

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
((GL-7398) that:

(a) The Carrier violated the Agreement when it refused to agree on the filling of the Position of Account Clerk covered by Bulletin No. 4060 in the Auditor of Disbursements Office, and on January 11, 1973, arbitrarily assigned a junior employee to the position.

(b) Joan Powers, the senior applicant, be assigned to the position covered by Bulletin No. 4060, and she and all other employees adversely affected be compensated for all wage losses retroactive to June 11, 1973.

OPINION OF BOARD: On January 3, 1973, the position of Accounts Clerk, position No. 1, Negotiated List #3, in the Auditor of Disbursements Office, Seniority District No. 4, was bulletined. There were fifteen applicants for the position. The Claimant was the senior applicant with a District No. 4 seniority date of January 2, 1943. The next applicant in seniority order was F. Wood; however, she was awarded another position for which she applied and she accepted same. The next applicant in seniority order was Eleanor Reider, who had a District No. 4 seniority date of August 28, 1944. The bulletin in question (#4060) expired on January 5, 1973, and the position was awarded to Eleanor Reider on January 11, 1973. The Clerks' Organization contends that the appointment was in violation of the current agreement.

The position to be filled was designated as an excepted position. The applicable provision of the Agreement, Rule 1, Scope, Exceptions, Section 2(d), reads:

"The employees and positions listed on Negotiated List No. 3 shall be subject to the rules of this agreement, except that vacancies on such positions, when bulletined, shall be filled by mutual agreement between the Management and Division Chairman or their representatives."

The employees contend that Reider was not agreed upon and that Claimant had sufficient fitness and ability, and being senior to Reider should have been appointed to the position.

The major portion of the duties of the position, approximately 70% according to the Carrier, covers assigned duties which require a knowledge of railroad expense accounts such as: 1) miscellaneous accrual and reversal entries; 2) labor forecast and related detail; 3) consolidated entry and related details; and 4) handling of utility bills. Approximately 20% of the remaining duties consist of handling undelivered pay checks and related duties covering stop orders on paychecks and vouchers, processing wage assignments and maintaining associated records. The remaining 10% of the assignment consists of routine type assignments and accounts. According to the Carrier, an applicant to be considered even remotely qualified to perform the above referred to functions of the assignment should at least have had some exposure to the Auditor of Disbursements accounting procedures and should have had some experience on positions closely related or an integral part of their accounting system and some knowledge or experience in the handling of the duties.

The record shows that Claimant never worked in the Auditor of Disbursements Department, and it is the Carrier's contention that Claimant lacked the ability and fitness to qualify for the position. The Organization, on the other hand, states that "the Claimant has sufficient fitness and ability to perform the duties of the Account Clerk Position; and the Carrier has never disputed this fact." To this, the Carrier replies that the Organization and the Claimant "never presented any facts that would indicate that she possessed even the barest of qualifications needed to perform at least the slightest phase of the assignment" and have not met "the burden of proof". The Carrier points out that the Claimant's service record was reviewed with the Organization and that it discloses that Claimant graduated high school in 1942 and that her training and courses taken were limited to the operation of business machines and that she had no training in accounting skills. On our review of the record, we find that the management, in exercising its initial responsibility for determining the qualifications for the position in question, was not arbitrary or unreasonable, and the management's decision that Claimant's qualifications were not satisfactory is not opposed by evidence in behalf of Claimant which would establish a reasonable probability that she would be able to perform all the duties of the position within a reasonable time. See Awards Nos. 19762 (Blackwell), 11768 (Engelstein), 10424 (Dolnick), 5348 (Robertson), 8197 (Wolff).

But even assuming that Claimant had sufficient ability and fitness to fill the position as the employees contend, we are of the opinion that an affirmative award cannot be made. In Award No. 2491 (Carter), involving a similar claim and an agreement provision reading "Rules of Agreement of March 1, 1939, apply to these positions, except Rule 42, Bulletin. Vacancies will not be bulletined, but will be filled after agreement between the head of department and the representatives.", the Board declared:

"The position in question was an appointive one to be made after agreement by the head of the department and the representatives of the employees. This is in direct conflict with and supersedes the seniority provisions of the agreement. It does not appear that a failure to agree upon an appointee was contemplated as no procedure for filling the position was provided when such a situation arose. We are convinced therefore that no basis for claim exists unless an employee agreed upon was denied the position or unless prejudice, favoritism or bad faith is shown.

"Under this interpretation of the rule, the question of sufficient fitness and ability and the incidental questions pertaining to seniority of employees not appointed is pertinent only in determining whether prejudice, favoritism or bad faith was present. Conferences were held in an attempt to agree upon an employee for the position without success. It appears to us that these conferences were instigated and participated in by the carrier in good faith and without such prejudice or favoritism as would discredit the action taken.

"It must be borne in mind that the carrier is primarily charged with the efficient and safe operation of its railroad. In its managerial capacity, it is charged with the selection of competent employees. Except where it has limited itself by contract, the right of selection is wholly within the discretion of the management. Effective management cannot tolerate a situation where a failure to agree, such as we have here, could indefinitely hinder or delay the work assigned to important positions. Certainly it is not the province of this Board to fill such positions when the parties fail to agree. Such a procedure could result in tremendous harm. It is just as well settled that the employees do not have the right ex parte to dictate who shall occupy the position. A rule of necessity requires that the carrier shall have the right to fill the position under such circumstances

"and unless it appears that the appointment was the result of prejudice, favoritism or bad faith, we cannot say that the contract has been violated.

"It may be as we have indicated that the contract did not contemplate a situation arising such as we have here and for that reason provisions governing such a situation were not included. But we cannot supply that which the parties have not put in the agreement. We can only interpret the contract as it is and treat that as reserved to the carrier which is not granted to the employees by the agreement."

We have carefully reviewed the record, in the light of Award No. 2491, to determine whether prejudice, favoritism, or bad faith was shown in the action taken by the Carrier in the instant case. The record shows that the position in question was not filled by the Carrier until six days after the bulletin had expired, and that during this time there were at least five discussions between the Management and the representatives of the employees. The Carrier states, "In all of the above discussions, the Organization's sole request was to have the senior applicant (Powers) awarded the position." Also, the Carrier states; "The Organization conveniently fails to make mention of the fact that during the handling of this matter, i.e., prior to the awarding of the position, which involved direct discussions with the Division Chairman and the General Chairman, that they were made well aware of the fact that Carrier's first choice of all the applicants was Mr. Joseph A. Golosky. He was, in Carrier's opinion, the most qualified of all the applicants and the Organization was so apprised of our views and intentions. Needless to say that the Organization flatly rejected Carrier's consideration of Mr. Golosky, and they steadfastly and adamantly stated their position in that, they would consider one and only one applicant for the assignment, and that being the claimant based solely upon her seniority." It appears clear to us that the conferences were instigated and participated in by the Carrier in good faith and without such prejudice or favoritism as would discredit the action taken.

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;

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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:

A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1974.