

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20561
Docket Number CL-20533

David P. Twomey, Referee

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

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood
(GL-7432) that:

1. Carrier violated the Clerks' Rules Agreement, in particular Rules 7 and 16, when it arbitrarily and capriciously refused to assign Mrs. Margaret Lincoln to the position of Investigator-Senior No. 498. (Carrier's file 280-732)

2. Carrier shall now be required to compensate Mrs. Lincoln for the difference in rate of pay, amount \$7.97 per day, beginning April 14, 1972, and continuing each subsequent work day thereafter, Monday through Friday, until the violation is corrected.

OPINION OF BOARD: The Claimant was the only bidder on the position of No. 498 Investigator-Senior in the office of the General Claim Freight Agent in Palestine, Texas. She had twenty-seven years of employment relations with the Carrier, fifteen years of which was on furlough status. Her seniority date in her present district is October 8, 1971. Position 498 was bulletined on March 13, 1972. The Carrier declined to assign the Claimant to Position 498, for the reasons: that she had never been assigned a position which would prepare her to perform the duties of Position 498; that she did not have the fitness and ability to perform the duties of Investigator-Senior; and that she was offered a test to demonstrate her fitness and ability, which she declined, and which the Carrier considered as further evidence that the Claimant did not have the requisite fitness and ability for the position. The Carrier assigned one Mr. T. F. Newman, a new employee to the position.

The pertinent provisions of the Agreement are:

"RULE 7. PROMOTIONS, ASSIGNMENTS AND DISPLACEMENTS
(a) Employes covered by these rules shall be in line for promotion. Promotions, assignments, and displacements under these rules shall be based on seniority, fitness, and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that seniority shall not apply in filling the positions

"named in Paragraph (c) of this rule. (In filling positions listed in Paragraph (c) of this rule preference shall be given to employes coming under the provisions of this agreement.)

(b) The word 'sufficient' is intended to more clearly establish the right of the senior employe to bid in a new position or vacancy where two (2) or more employes have adequate fitness and ability."

"RULE 16. TIME IN WHICH TO QUALIFY

(a) Employes awarded bulletined positions, or those exercising displacement rights, will be allowed thirty (30) days in which to qualify, and, failing shall retain all their seniority and may displace youngest employe in his group.

(b) Employes will be given full cooperation of other employes in their efforts to qualify."

Awards 13196 (Coburn) and 19660 (Blackwell) involved disputes of the same general nature on the very same property and between the same parties. In 13196 the Award held:

"Under well established and accepted principles this Board will ordinarily refuse to interfere with carrier management's exercise of discretion or judgment in determining the fitness, ability and general qualifications of an employe, absent any applicable agreement provision restricting such action, or where there is credible evidence of arbitrary or capricious carrier conduct. In this case, 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 to obtain by the exercise of his contractual seniority"

In Award 19660, the Board set out a procedure concerning burden of proof in such cases. Based on 19660, 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 the Claimant. If such evidence is found, then in order for the Organization's position to be sustained, we must find that a preponderance of the evidence of record shows that the Claimant was qualified to perform the position. (See also 12931 (McGovern) on burdens of proof.)

The first reason given by the Carrier for declining to assign Claimant was that she had never been assigned a position which would prepare her to perform the duties of Investigator-Senior No. 498. Rules 7(a) and 16(a) contemplate that the Claimant have reasonable fitness and ability--potential--to learn and perform the duties of the position, to be demonstrated by a thirty day trial period under proper supervision. These rules do not require prior experience, otherwise there would be no need for the 30 day qualification period. Further, Carrier did not require of Mr. Newman, the new employee assigned Position 498, that he have served in a position that would prepare him to perform the duties of Position 498.

Another reason given for declining to assign Claimant, which reason is enmeshed in the Carrier's first reason, is that Claimant does not have the fitness and ability to perform the duties of Investigator-Senior Position No. 498. This is just an assertion on the part of the Carrier. Carrier submits no probative evidence to back up its assertion, other than that it offered the Claimant a test, which she declined to take.

Concerning the test upon which Carrier relies as evidence of a reasonable basis for Carrier's refusal to assign Position 498 to Claimant, the Claimant was the only person selected out and asked to take a test before going on to an Investigator position. Indeed, whenever the test in question was utilized, it was utilized only after the employees required to take the test had been on such a position for 30 days or more. To have requested the Claimant to be the only person to have to take the test without 30 days experience in the position is patently unfair; and certainly cannot be utilized to demonstrate her lack of fitness and ability to perform the duties of Investigator-Senior Position No. 498.

The Carrier has not sustained its initial burden of proof, and therefore we will 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.

Award Number 20561
Docket Number CL-20533

Page 4

A W A R D

Claim sustained subject to appropriate adjustment in the difference in rate of pay per day from July 5, 1972, on which date Claimant was assigned to the higher rated Record Clerk position.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 13th day of December 1974.