

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21107
Docket Number GL-21201

James C. McBrearty, Referee

(Brotherhood of Railway, Airline and Steamship Clerks,
(Freight Handlers, Express and Station Employees
PARTIES TO DISPUTE: (
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, GL-7819, that:

1. The Carrier violated, and continues to violate, the rules of the Clerks' Agreement when it denied Helen F. Grunke the Class "A" Accountant position, Customer Accounting Center Office, General Office, St. Paul, Minnesota.
2. The Carrier shall now be required to place Helen F. Grunke on the Class "A" Accountant position, and reimburse her for any loss of wages resulting from her being denied the right to exercise seniority on the Class "A" Accountant position.

OPINION OF BOARD: Claimant commenced employment with Carrier on August 9, 1962. Thereafter, she worked in many different positions, the last one of which being a clerk in the BNAFI (Burlington Northern Air Freight), where she remained until, as a result of a Carrier operational change, BNAFI was transferred to Los Angeles, thereby making Claimant a free agent.

When Claimant became aware of the fact that she was a free agent and as such would have to exercise seniority, she attempted to exercise seniority rights by displacing a junior employe on a position as Class "A" Accountant, Customer Accounting Center, St. Paul General Office Building.

Claimant's written request for the Class "A" Accountant position was rejected by Carrier; the determining factor being her failure to successfully pass a written test.

On February 26, 1974, Claimant wrote to Carrier requesting a hearing under the provisions of Clerks' Agreement Rule 58, entitled, "Grievances". A hearing was then held on March 6, 1974. As a result of this hearing, Carrier issued a decision on March 21, 1974, sustaining the original decision to reject Claimant's request for the Class "A" Accountant position.

Claimant and Carrier have held conferences, but have been unable to reach a solution resolving the dispute. Hence, this claim has been referred to the Board.

Carrier has raised certain procedural objections concerning the Claimant's method of prosecuting the claim, and the parties have debated that question at length. However, our disposition of this dispute on its merits makes it unnecessary to rule on the procedural question.

In urging that the claim be sustained, Claimant has cited the following two (2) Rules:

Rule 7. Promotion.

Employees covered by these rules shall be in line for promotion. Promotion shall be based on seniority, fitness and ability; fitness and ability being sufficient, seniority shall prevail, except, however, that this provision shall not apply to excepted positions.

NOTE: The word "sufficient" is intended to more clearly establish the right of the senior clerk or employee to bid in a new position or vacancy where two or more employees have adequate fitness and ability.

Rule 2. Non-Discrimination.

The parties to this agreement pledge that there will be no discrimination against any employee because of race, color, creed, national origin or sex. This obligation to not discriminate in employment includes, but is not limited to placement, upgrading, transfer, demotion, rates of pay or other forms of compensation, selection for training including apprenticeship, lay-off or termination.

In regard to Rule 7, Claimant argues that "fitness and ability" means Claimant need only possess potential to be able to perform the duties of the position within reasonable time.

Now, it is true that Awards 14762, 13850, 8197, and 5348 have held that it is not necessary for an applicant to be immediately qualified to assume all the duties of a position without some assistance or training, or at least a break-in or trial period. However, there must be a reasonable probability that the employee would be able to perform all the duties of the position within a reasonable period of time. If the employee is obviously unfit or unqualified, as in a situation where the job in question requires a high degree of skill which can be acquired only after a long period of training and there is no evidence that the employee has these skills or related skills, then Carrier is not required to give him or her a trial period.

Claimant had only worked previously as machine operator and a timekeeper in the Material Bureau, Bill Bureau, AFE Billing, and BNAFI. Yet, Class "A" Accountants, because of their experience, handle major accounts; difficult cases; issue waybill corrections; write letters, and use the telephone to deal with big shippers.

After reviewing Claimant's attendance, punctuality, and general work habits, Carrier determined that Claimant had to obtain at least a score of 70 on a job-related test dealing with Customer Accounting before she would qualify for the trial period.

Claimant did not successfully pass the test, and this was made the determining factor by Carrier that she did not have sufficient fitness and ability.

A determination of how much weight should be given test results, along with other relevant factors, is a matter of judgment. When such judgment is exercised honestly and upon due consideration, it is not arbitrary action even though there may be room for two opinions.

There is nothing in the record which indicates unjust treatment or an arbitrary and or capricious judgment on the part of Carrier. This Board will not set aside Carrier's judgment of fitness and ability unless it is arbitrary or capricious or has been exercised in such a manner as to circumvent the Agreement. We are not permitted to blithely substitute our judgment for that of Carrier in disputes of this type under our limited review authority.

Moreover, we have held that for the Board to set aside a Carrier's judgment the record must contain substantial evidence of probative value that the Claimant possessed, at the time, sufficient fitness and ability to perform the duties of the position which she sought. The record in the instant case is barren of such evidence that would support a finding that Claimant possessed the indispensable fitness and ability. Claimant herself testified that she would need "a small length of time and some help" in order to do the work in the department.

Finally, on the issue of "discriminatory treatment", Claimant argues that since the test was not properly validated in accordance with Title 41, Chapter 60 of the Federal Code, and therefore, also violates Rule 2 on Non-Discrimination.

This Board is not empowered to interpret or enforce federal laws or regulations dealing with test validation. Claimant must apply to the Equal Employment Opportunity Commission for relief under Title VII of the Civil Rights Act in that regard.

As far as Rule 2 is concerned, the record does not show substantial probative evidence necessary to support a contention of discrimination.

The record shows that of the seven (7) or eight (8) employees who took the test, two (2) passed. Five (5) of the employees who took the test were women, and only one (1) of them passed. No minorities took the test.

This test sample is too small for the Board to come to the sweeping generalization that Carrier's test disqualified a "disproportionate" number of women and minorities, and was therefore "discriminatory" within the meaning of Rule 2.

Furthermore, it is worthy of note in regard to the alleged "discrimination" that Claimant herself stated in the record that the test was "very definitely" job related.

In fact, Claimant's suggestion that the test "should be more in regard to general knowledge rather than Customer Accounting knowledge" would leave Carrier more open to a charge of "discrimination", since the test would be less job related.

Accordingly, on the basis of the record considered as a whole, established precedent, and the foregoing findings and conclusions the Board is compelled to deny 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 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:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of June 1976.