NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21243
Docket Number CL-21195

Irwin M. Lieberman, 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-7811) that:

1. Carrier violated the rules of the Clerks' Agreement when it arbitrarily and capriciously refused to assign Mrs. Grace Ann Spencer to the position of No. 483 Key Punch Operator - Clerk, in the office of General Freight Claim Agent, Palestine, Texas (Carrier's File D-280-790).

2. Carrier shall now be required to compensate Mrs. Spencer eight hours' pay at the rate applicable to the position of No. 483 Key Punch Operator - Clerk, beginning Monday, November 26, 1973, and continuing each subsequent work day, Monday through Friday, in addition to any other compensation earned or received, until the violation is corrected by assigning Mrs. Spencer to the aforementioned position. (Claim is to also include any subsequent wage increases).

OPINION OF BOARD: This is a "fitness and ability" dispute. Claimant, with a seniority date of October 2, 1972 had been regularly assigned to the Extra Board at Carrier's Palestine Yard Office in Palestine, Texas. Among the positions she had been assigned to while on the Extra Board was that of Yard Clerk; one of the functions assigned to that position was keypunching. On November 12, 1973 Carrier bulletined the position of Key Punch Operator-Clerk in the General Freight Claim Office (a different seniority district) in Palestine, Texas. The bulletin outlined the duties of the position as follows:

> "10. Major Duties. To punch IBM cards as appropriate to all phases of work of the department, and to operate the machine efficiently and accurately. Maintain daily market report. To perform such other similar or lower rated duties as may be assigned, properly coming within the rate of pay. A key punch machine operation test will be required."

Claimant bid for the position; on November 15, 1973 she was given two key punch tests to indicate her ability to perform in the position. The record indicates that she took 6½ minutes to punch 20 cards with 11 errors (alpha key punch) and 16 minutes to punch 200 cards with 13 errors (numerical key punch). Carrier alleges that the standard for alpha key punch requires the punching of 20 cards within a five minute period with only one error; the standard for numerical key punch requires the punching of 200 cards within a 15 minute period with only two errors. Carrier stated that

Claimant's rate of production for the two tests was approximately 6,000 strokes per hour. On November 16, 1973 Claimant was notified that she was not being assigned to the position since she did not satisfactorily pass the key punch machine operation test. Since Claimant had been the only Carrier employe who bid for the job, a new employe was hired to fill the position.

The most relevant rules of the Agreement provide:

"RULE 4 - PROMOTION BASIS

(a) Employes 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 employes of the same seniority district having adequate fitness and ability for the position or vacancy sought in the exercise of seniority.

NOTE 2: An employe unable to assert seniority due to not having acquired necessary qualifications in given or specialized work and because of this yields to junior employes, will, when necessary qualifications are acquired, notify the employing officer of availability for such service and desire to be thereafter utilized pursuant to Agreement provisions."

"RULE 6 - VACANCIES AND NEW POSITIONS

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(d) Employes filing applications for positions bulletined on other districts or on other rosters will, if they posess sufficient fitness and ability, be given preference over non-employes."

"RULE 7 - FAILURE TO QUALIFY

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(b) Employes who have been awarded bulletined positions, or employes whose exercise of seniority over junior employes has been approved, will be allowed 30 calendar days in which to qualify, except as provided for in Section (d) of this Rule.

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

(f) The provisions of this Rule 7 contemplate that no employe will be permitted to disqualify himself. The provisions of this rule do not apply when employes are denied bulletined positions or refused the right to exercise seniority over junior employes. (See Section (b), Rule 4.)"

Both parties have submitted massive documents and voluminous authorities in support of their positions. Petitioner's arguments may be summarized briefly as follows: 1. Claimant was the senior and only bidder for the position and should have been placed on the job and given full cooperation in her efforts to qualify. Carrier may not deny an employe his seniority rights to a position simply because such an employe does not have full knowledge of all the duties of the position. 2. Carrier acted arbitrarily and capriciously in not honoring Claimant's rights. Fitness and ability does not mean that the applicant is immeditely qualified to step in and assume the duties of a position without guidance and assistance. 3. Many Board awards have supported the thesis that in promotions, preference should be given the qualified senior employe. 4. Carrier has not supported its position by producing the test taken by Claimant. 5. Claimant should have been given an opportunity to qualify and have been accorded cooperation, as specified in Rule 7. There is no requirement that an employe must have full knowledge of skills of all the duties of a given position before being assigned to such position. 6. Petitioner relies particularly on Awards 20561, 13196, 18607, 19485 and 19660 all of which involve essentially the same issue and the same parties.

Certain fundamentals must be examined in order to resolve this dispute. It is apparent that the terms "fitness and ability" and "qualified" are easily confused. It is our judgement that the employes must have a minimum of "fitness and ability" in order to "qualify". For example, an employe may be required to have a minimum skill as a typist and then may need the thirty day period in order to qualify for the particular work of a department; as a corollary, if the employe doesn't have the requisite skill as a typist, the thirty day period is of no avail.

We have dealt with issues closely related to that herein over many years. One aspect of the problem was well stated in Award 16480:

"....In essence we have held in such cases that: (1) the current possession of fitness and ability is an indispensable requisite that must be met before seniority rights become dominant; and (2) 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. See, for example, Award No. 11941, 12461, 13331, 14011, 15164. Also, we have held that for us to set aside a Carrier's judgment the record must contain substantial evidence of probative value that the claimant employe possessed, at the time, sufficient fitness and ability to perform the duties of the position which he sought."

To further emphasize the basic position enunciated above, in Award 4687 we said:

> "This Division has uniformly held that determination as to ability and fitness is exclusively a managerial function and will be sustained unless it appears that the decision of the Carrier was capricious or arbitrary; that the burden is on Claimant to establish that such was the case, and that if the decision of the Carrier is supported by substantial evidence it will not be disturbed."

Although the doctrine is well established, as indicated above, it remains for a determination to be made in each instance as to whether or not the Carrier has abused its discretion.

In the instant case Carrier has asserted that by the Organization's own training program standards for key punch operators, a student is required to make 10,000 alpha/numerical strokes per hour as a standard for graduation. Carrier points to the approximate 6,000 strokes per hour as the test result for Claimant to justify its conclusion that she did not have the requisite ability for the job. In the penultimate correspondence on the property, the Organization stated:

> "We disagree with your position entirely that statement in our letter of July 5, 1975 acquiesced with the Carrier's position that the Claimant was not qualified for the position here involved but to the contrary, we hold that she had 'sufficient' qualifications for the position sought if she had been given full cooperation of the department heads as required by the Rules' Agreement. We disagree with your position that the Claimant was 'unqualified' and we have not requested that the claimant be assigned to a position and afforded an opportunity to qualify on the job, we have only requested that required by the Agreement, that the senior employe making application, who has sufficient fitness and ability, be assigned to the position and be given cooperation of officers and department heads in fulfilling the assignment."

The above statement provides no evidence of fitness and ability and in effect begs the question. We cannot quarrel with Petitioner's logic;

all that is lacking is probative evidence that Claimant indeed had the fitness and ability in question, or that Carrier's conclusion as to her skills, or lack of same, was arbitrary and capricious. We find no such evidence in the record of the handling on the property. It is true the Organization has cited Claimant's excellent background and work experience; unfortunately this background has only presumptive future relevance to the question of whether she had the required fitness and ability, at the time of the assignment.

In evaluating the arguments raised by Petitioner, summarized above, we agree with the statement that Carrier may not deny an employe with seniority his rights to a position simply because such an employe does not have full knowledge of all the duties of a position. However, that is not the issue herein: ability to perform the key punch function of the position, not knowledge of all the duties, is the question. We also agree with the thesis that fitness and ability currently, may not be equated with assuming responsibilities without guidance and assistance; the problem herein is the alleged lack of the original fitness and ability. We have no disagreement whatever with the proposition that preference in promotions should be given the qualified senior employe; that is the very factual question involved in this dispute. Petitioner has argued that Carrier has not produced the test taken by Claimant. The record indicates that the Organization acknowledged on the property that the test in question was an accepted screening device for new employes for key punch positions and thus recognized the validity of the instrument. It should also be noted that the question of the qualifications and ability of the new employe who was assigned to the position is not relevant to this dispute. There is no indication that the test given was unfair or inappropriate and Claimant never disagreed with the results of the test on the property - merely with the conclusions reached as a result of the test. See Awards 4371, 4918, 5025 and others.

Perhaps the most important of Petitioner's arguments deals with the question of whether or not Claimant should have been given an opportunity to qualify for the position, for a thirty day period, as specified in Rule 7 supra.

Let us examine some of the principal awards cited by Petitioner involving the same parties. First Award No. 6 of Special Board of Adjustment No. 341 is clearly distinguishable in that Carrier's official in that dispute did not question Claimant's fitness or ability but merely argued that the junior employe was better fitted to fill the position. In Award 13196 Carrier was found to have erred when Claimant was not permitted to demonstrate his fitness and ability to perform the duties of the position sought, significantly different than the case at bar. In Award 18607 the Claimant had successfully performed in an analogous position previously and Carrier failed to produce any evidence of value to support its position that Claimant did not possess sufficient qualifications for the job, clearly arbitrary actions by Carrier representatives as distinct from the instant dispute.

Award 19485 deals only with the lack of cooperation by Carrier officials during the thirty day qualification period, totally unrelated to this dispute. In Award 19660 we found that Carrier failed to show a reasonable basis for disqualifying Claimant; in the instant dispute the test results were clearly an acceptable rationale, unless rebutted. An examination of Award 20561, without regard to the thirty day qualification question, indicates that our decision was based on Carrier's failure to provide evidence to support its conclusion that Claimant did not have the requisite ability. We shall not discuss in depth the question of the relative burden of proof required in disputes of this nature; however, it is well to emphasize, as indicated heretofore, that Claimant has the burden of establishing that she has the required ability to perform in the position in the face of Carrier's assertions and evidence to the contrary.

On the question of the qualification period provided in Rule 7 and emphasized by the Organization, we must refer to the changes made in the Agreement effective March 1, 1973. Rule 7 (f) was added to the previous provisions and its language is determinative of this aspect of the dispute: the qualification period does not apply "when employes are denied bulletined positions or refused the right to exercise seniority over junior employes". Thus, even if Petitioner is correct in its citations of earlier cases, arguendo, the changed language negates the precedents. Since Claimant herein was denied the position as bulletined, she was not entitled to a qualification period. Her fitness and ability, as provided in Rule 6(d) was the first step towards the job; only in the event that she got the job was she entitled to the thirty day period.

Under the rule applied in the long line of precedents such as Awards 4687 and 16480, which rule is hereby reaffirmed, this Division has uniformly held that determination as to ability and fitness is exclusively a managerial function and will be sustained unless it appears that the decision of the Carrier was capricious or arbitrary.

For all the reasons indicated, the Claim must be denied.

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 Employes involved in this dispute are respectively Carrier and Employes 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.

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1976.